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ENEKEN TIKK



FRAMEWORKS

FOR INTERNATIONAL CYBER SECURITY

INTERNATIONAL CASE LAW

2010

PREFACE

The second volume of Frameworks for International Cyber Security (FICS) compiles case law from the European Court of Human Rights and the European Court of Justice. The reader will find judicial insights into concepts such as personal data protection, access to documents, surveillance and others, which shape national approaches to cyber security. The courts' interpretation of the balance of fundamental rights and freedoms, public interests and security will offer arguments for legal analysis, advice, but also legislative drafting and expert discussions.

Growing cyber security challenges introduce new ways of interpreting laws and regulations. This case law compilation is intended to support a systematic and integrated approach to implementing and reshaping the existing legal framework.

For a comprehensive cyber security, skillful co-application of legal areas and concepts that for a long time have been developing in stove-pipes is needed. Understanding the background and limitations of existing information security regulation, one can better foresee and devise the changes and adjustments needed to deter and respond to cyber incidents. These twelve hundred pages of case law are a good starting point for those interested in how information society and telecoms law, criminal law, national security legal framework and the law of armed conflict merge and interact in the cyber domain.

Similarly to FICS 1: International Cyber Security Law and Policy Instruments, this set of case law is a subjective choice of the editor and feedback, comments and references to additional materials are most welcome.

Special thanks go to Yaroslav Shiryayev, Maria Teder and Marbel Vaino who helped gather, systemize, filter, edit, proofread and update this material. Thanks for all the comments, feedback and interest so far!

Tallinn, December 2010

Eneken Tikk

CONTENTS

PREFACE	4
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ECHR CASES

CASE OF DENISOVA AND MOISEYEVA V. RUSSIA	9
CASE OF FATULLAYEV V. AZERBAIJAN	23
CASE OF KENNEDY V. THE UNITED KINGDOM	59
CASE OF K.U. V. FINLAND	99
CASE OF TIMES NEWSPAPERS LTD (NOS. 1 AND 2) V. THE UNITED KINGDOM	111
CASE OF LIBERTY AND OTHERS V. THE UNITED KINGDOM	121
CASE OF S. AND MARPER V. THE UNITED KINGDOM	141
CASE OF MEGADAT.COM SRL V. MOLDOVA	167
CASE OF RAMANAUSKAS V. LITHUANIA	181
CASE OF WIESER AND BICOS BETEILIGUNGEN GMBH V. AUSTRIA	197
CASE OF COPLAND V. THE UNITED KINGDOM	209
CASE OF SMIRNOV V. RUSSIA	219
CASE OF PETRI SALLINEN AND OTHERS V. FINLAND	231
CASE OF MALONE V. THE UNITED KINGDOM	247
CASE OF BYKOV V. RUSSIA	275
CASE OF IORDACHI AND OTHERS V. MOLDOVA	305
CASE OF KVASNICA V. SLOVAKIA	321
CASE OF VOLOKHV V. UKRAINE	335
CASE OF TAYLOR-SABORI V. THE UNITED KINGDOM	347
CASE OF AMANN V. SWITZERLAND	353
CASE OF KOPP V. SWITZERLAND	371
CASE OF LAMBERT V. FRANCE	387
CASE OF VALENZUELA CONTRERAS V. SPAIN	397
CASE OF AUTRONIC AG V. SWITZERLAND	411
CASE OF HUVIG V. FRANCE	429
CASE OF KRUSLIN V. FRANCE	445
CASE OF KLASS AND OTHERS V. GERMANY	461
CASE OF GUJA V. MOLDOVA	483
CASE OF SATIK V. TURKEY (NO2)	503
CASE OF STOLL V. SWITZERLAND	517
CASE OF SEGERSTEDT-WIBERG AND OTHERS V. SWEDEN	553
CASE OF PASKO V. RUSSIA	579
CASE OF DOWSETT V. THE UNITED KINGDOM	599
CASE OF ÖZGÜR GÜNDEM V. TURKEY	613
CASE OF GERGER V. TURKEY	633
CASE OF ZANA V. TURKEY	655
CASE OF A. AND OTHERS V. THE UNITED KINGDOM	673
CASE OF NURAY ŞEN V. TURKEY	733
CASE OF BRANNIGAN AND MCBRIDE V. THE UNITED KINGDOM	741
CASE OF LAWLESS V. IRELAND (NO. 3)	769

CASE OF VAJNAI V. HUNGARY	795
CASE OF ŽDANOKA V. LATVIA	809
INDEX	848

ECJ CASES

CASE 72/83 CAMPUS OIL LIMITED AND OTHERS v MINISTER FOR INDUSTRY AND ENERGY AND OTHERS	851
CASE C-70/94 FRITZ WERNER INDUSTRIE-AUSRÜSTUNGEN GMBH v FEDERAL REPUBLIC OF GERMANY	860
CASE T-174/95 SVENSKA JOURNALISTFÖRBUNDET v COUNCIL OF THE EUROPEAN UNION	866
CASE C-274/99P BERNARD CONNOLLY v COMMISSION	884
CASE C-369/98 THE QUEEN v MINISTER OF AGRICULTURE, FISHERIES AND FOOD, EX PARTE TREVOR ROBERT FISHER AND PENNY FISHER	908
JOINED CASES C-465/00, C-138/01 AND C-139/01 RECHNUNGSHOF v ÖSTERREICHISCHER RUNDFUNK AND OTHERS AND CHRISTA NEUKOMM AND JOSEPH LAUERMAN v ÖSTERREICHISCHER RUNDFUNK	916
CASE C-101/01 CRIMINAL PROCEEDINGS AGAINST BODIL LINDQVIST	932
CASE C-243/01 CRIMINAL PROCEEDINGS AGAINST PIERGIORGIO GAMBELLI AND OTHERS	948
CASE C-71/02 HERBERT KARNER INDUSTRIE-AUKTIONEN GMBH v TROOSTWIJK GMBH	960
CASE T-253/02 CHAFIQ AYADI v COUNCIL OF THE EUROPEAN UNION	968
CASE C-176/03 COMMISSION OF THE EUROPEAN COMMUNITIES v COUNCIL OF THE EUROPEAN UNION	996
CASE C-89/04 MEDIAKABEL BV v COMMISSARIAAT VOOR DE MEDIA	1004
CASE T-99/04 AC-TREUHAND AG v COMMISSION OF THE EUROPEAN COMMUNITIES	1014
CASE T-194/04 THE BAVARIAN LAGER CO. LTD v COMMISSION OF THE EUROPEAN COMMUNITIES	1050
JOINED CASES C-317/04 AND C-318/04	1074
EUROPEAN PARLIAMENT v COUNCIL OF THE EUROPEAN UNION AND COMMISSION OF THE EUROPEAN COMMUNITIES	1074
JUDGMENT OF THE COURT OF FIRST INSTANCE (SECOND CHAMBER), 31 JANUARY 2007	1088
CASE T-362/04 LEONID MININ v COMMISSION OF THE EUROPEAN COMMUNITIES	1088
CASE C-150/05 JEAN LEON VAN STRAATEN v STAAT DER NEDERLANDEN AND REPUBLIEK ITALIÉ	1104
CASE C-306/05 SOCIEDAD GENERAL DE AUTORES Y EDITORES DE ESPAÑA (SGAE) v RAFAEL HOTELES SA	1114
JOINED CASES C-402/05 P AND C-415/05P YASSIN ABDULLAH KADI AND AL BARAKAAT INTERNATIONAL FOUNDATION v COUNCIL OF THE EUROPEAN UNION AND COMMISSION OF THE EUROPEAN COMMUNITIES	1122
CASE C-467/05 CRIMINAL PROCEEDINGS AGAINST GIOVANNI DELL'ORTO	1166
CASE C-244/06 DYNAMIC MEDIEN VERTRIEBS GMBH v AVIDES MEDIA AG	1176
CASE C-275/06 PRODUCTORES DE MÚSICA DE ESPAÑA (PROMUSICAE) v ELEFÓNICA DE ESPAÑA SAU	1184
CASE C-301/06 IRELAND v EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION	1198
JOINED CASES C 399/06 P AND C-403/06 P FARAJ HASSAN v COUNCIL OF THE EUROPEAN UNION AND EUROPEAN COMMISSION (C-399/06 P) AND CHAFIQ AYADI v COUNCIL OF THE EUROPEAN UNION (C-403/06 P)	1210
VAREC SA v BELGIAN STATE	1222
14 FEBRUARY 2008	1222
CASE C-524/06 HEINZ HUBER v BUNDESREPUBLIK DEUTSCHLAND	1230
CASE C-73/07 TIETOSUOJAVALTUUTETTU v SATAKUNNAN MARKKINAPÖRSSI OY AND SATAMEDIA OY	1244
CASE C-421/07 CRIMINAL PROCEEDINGS AGAINST FREDE DAMGAARD	1254
CASE C-553/07 COLLEGE VAN BURGEMEESTER EN WETHOUDERS VAN ROTTERDAM v M.E.E. RIJKEBOER	1260
LSG-GESELLSCHAFT ZUR WAHRNEHMUNG VON LEISTUNGSSCHUTZ-RECHTEN GMBH v TELE2 TELECOMMUNICATION GMBH	1270
INDEX	1278

ECHR CASES

FIRST SECTION

CASE OF DENISOVA AND MOISEYEVA v RUSSIA

(Application no. 16903/03)

JUDGMENT

STRASBOURG

1 April 2010

COMPUTER, ENJOYMENT OF POSSESSIONS, INVESTIGATION, SEIZURE, CONFISCATION, PROPERTY.

IN THE CASE OF DENISOVA AND MOISEYEVA V. RUSSIA,

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

Christos Rozakis, *President*,
Nina Vajić,

Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,

Giorgio Malinverni,
George Nicolaou, *judges*,

and **André Wampach**, *Deputy Section Registrar*,

Having deliberated in private on 11 March 2010,
Delivers the following judgment, which was
adopted on that date:

PROCEDURE

1. The case originated in an application (no. 16903/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Ms Nataliya Mikhaylovna Denisova and Ms Nadezhda Valentinovna Moiseyeva ("the applicants"), on 8 July 2002.
2. The applicants were represented by Ms K. Kostromina, a lawyer with International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.
3. The applicants alleged, in particular, a violation of their right to peaceful enjoyment of possessions.
4. On 9 September 2005 the Court decided to communicate the complaint concerning the alleged violation of the applicants' property rights to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1949 and 1978 respectively and live in Moscow. They are wife and daughter of Mr Valentin Moiseyev, who was also an applicant before the Court (see *Moiseyev v. Russia*, no. 62936/00 62936/00, 9 October 2008).
- #### A. Criminal proceedings against Mr Moiseyev
6. On 3 July 1998 the Investigations Department of the Federal Security Service of the Russian Federation (the FSB) opened criminal proceedings against Mr Moiseyev. At 11.30 p.m. a search was conducted at the applicants' flat. Foreign currency, the keys and registration papers for a VAZ car, and the second applicant's personal computer were seized. Simultaneously a search was carried out at Mr Moiseyev's office. In total, the investigators seized 5,747 US dollars.
 7. On 10 July 1998 the investigator seized from the first applicant the keys to garage no. 178.
 8. On 13 July 1998 Mr Moiseyev was formally charged with high treason, an offence under Article 275 of the Criminal Code.
 9. On 22 July 1998 the investigator ordered a charge to be placed on the VAZ car with a view to "securing possible forfeiture of the defendant's property in accordance with Article 175 of the RSFSR Code of Criminal Procedure".
 10. On 1 September 1998 the investigator informed the director of the SBS-Agro bank of the freezing of Mr Moiseyev's foreign currency and Russian rouble accounts.
 11. On 16 September and 12 November 1998 the investigator issued charging orders in respect of the garage and the computer. On 16 November 1998 the computer was physically removed from the applicants' flat and placed in the material evidence room of the Federal Security Service.
 12. On 29 March 1999 the second applicant asked the investigator to return the computer, which was her personal property. On 12 April 1999 the investigator replied that the computer had been seized with a view to securing possible

forfeiture of Mr Moiseyev's property and that certain files edited by Mr Moiseyev had been discovered on the hard disc. The second applicant was informed that, if necessary, her text files would be copied and handed over to her.

13. On 8 June 1999 the investigator ordered attachment of the seized 5,747 US dollars as a material exhibit. On 15 June 1999 the Finance and Planning Department of the "USSR State Security Committee"¹ issued a receipt for the money.
14. On 14 August 2001 the Moscow City Court convicted Mr Moiseyev of high treason committed between 1992 and 1998, sentenced him to four years and six months' imprisonment and issued a confiscation order in respect of his property. The parts of the judgments relevant to the determination of the property matters read as follows:

"Mr Moiseyev's pre-trial deposition that he had received remuneration for information transmitted to a representative of a foreign state has been confirmed by the search records, noting the discovery of US dollars both in his office and at his place of residence. The witness B. confirmed that the search had uncovered 4,647 US dollars sorted into non-standard envelopes.

Both Mr Moiseyev and his wife Ms Denisova who was interviewed as an additional witness at trial, had been present during the search but raised no objections. Accordingly, the court considers that the decision attaching the 1,100 US dollars seized in Mr Moiseyev's office, the 4,647 US dollars, and seven envelopes as material exhibits was justified...

Having regard to the public dangerousness of the committed crime, the court orders confiscation of Mr Moiseyev's property. The court decides on the destiny of the material exhibits in accordance with Article 86 of the RSFSR Code of Criminal Procedure...

A confiscation order is issued in respect of the property that has been seized: [the VAZ car, foreign currency and Russian rouble bank accounts, garage no. 178, and the computer], as well as the cash funds of 5,747 US dollars which have been criminally acquired."

15. On 3 January 2002 the first applicant asked the Supreme Court to order the return of her spousal property and to remove the garage

from the list because it was rented rather than owned. She did not receive a response to her request.

16. On 9 January 2002 the Supreme Court upheld the conviction.

B. Enforcement of the confiscation order

17. On 4 March 2002 the Moscow City Court sent an excerpt from the judgment of 14 August 2001 to the FSB's Finance and Economic Department for enforcement of the confiscation order in respect of the cash funds. The covering letter read as follows:

"Confiscation order to be executed in respect of Mr Moiseyev's cash funds in the amount of [unreadable] US dollars as having been criminally acquired and stored at the Department [according to] receipt no. 1013 of 15 June 1999."

18. On 18 March 2002 the Moscow City Court issued five writs of execution for enforcement of the confiscation order in respect of Mr Moiseyev's property at his place of residence, the VAZ car, the garage, the bank accounts and the computer.
19. On 27 March 2002 the cash funds in the amount of 5,747 US dollars were received by the Vneshtorgbank from the FSB's Finance and Economic Department and credited to the State.
20. On 25 May 2002 a bailiff discontinued enforcement in respect of Mr Moiseyev's property located in his flat because no chargeable items had been found.
21. By a decision of 20 June 2002, a bailiff ordered the removal and sale of the computer and declared enforcement completed. On 31 July 2002 the computer was evaluated at 2,500 Russian roubles (RUB) and subsequently sold for RUB 1,609.05.
22. On 17 September 2002 a bailiff discontinued enforcement in respect of Mr Moiseyev's foreign currency and Russian rouble bank accounts. He determined that no accounts in his name were listed in the bank's database.
23. On 27 November 2003 a bailiff determined that the garage was in fact a collapsible metal structure located on a rented plot, in respect of which the rent agreement had expired. Accordingly, he held that its removal or sale were impossible.

¹ According to the heading of the document. The State Security Committee ("KGB") is the predecessor of the Federal Security Service.

24. Following the amendments of the Criminal Code (see paragraph 34 below), Mr Moiseyev asked the Moscow City Court to relieve him from the auxiliary penal sanction in the form of the confiscation order. On 14 February 2005 the Moscow City Court found that the enforcement of the confiscation order had been discontinued or terminated in respect of everything but the VAZ car. Since the auxiliary penal sanction of confiscation had been removed from the Criminal Code, the City Court decided to return the car to Mr Moiseyev. On 6 July 2005 the Supreme Court of the Russian Federation upheld that judgment on appeal.

C. Civil proceedings for return of family property

25. On 13 May 2002 the first applicant sued the court bailiffs and the Federal Security Service before the Khoroshevskiy District Court of Moscow, seeking to have the charging orders lifted and to have her right to one half of the marital property, excluding the bank deposits, recognised. She submitted that she had been married to Mr Moiseyev since 1978 and that the Civil and Family Codes provided for equality of spouses' portions of the marital property. Relying on Mr Moiseyev's pay statements, she argued that from 1992 to 1998 he had earned more than five thousand dollars and thus the amount of 5,747 US dollars could not be considered to have been unlawfully acquired. She indicated that the garage had been rented in 1988, and that the computer had been the second applicant's property.
26. On 11 October 2002, 14 and 27 February 2003 the court heard the parties. As the first applicant withheld consent to the substitution of the Federal Property Fund for the FSB and to Mr Moiseyev as co-defendant, Mr Moiseyev joined the proceedings as a third party.
27. On 27 February 2003 the Khoroshevskiy District Court delivered a judgment. The entire reasoning read as follows:

"Having assessed the collected evidence, the court dismisses [the first applicant's] claim because the judgment of the Moscow City Court established that the contested property had been criminally acquired, which makes it impossible to recognise the plaintiff's right to one half of the seized property, and also [because] the FSB is not a proper defendant in this case. Neither [the first applicant] nor Mr Moiseyev have been deprived of an opportunity to appeal against the conviction

in the part concerning the contested property."

28. On 18 June 2003 the Moscow City Court upheld the judgment on appeal, noting that the claimed property had been found to have been criminally acquired by the Moscow City Court's judgment of 14 August 2001.
29. On 20 November 2003 the applicants sued the Federal Property Fund of the Russian Federation, seeking the lifting of the charging orders and recognition of the first applicant's right to one half of the spousal property and the second applicant's ownership of the computer.
30. On 9 August 2005 the Khoroshevskiy District Court of Moscow dismissed their claim, finding as follows:

"It follows from the judgment of 14 August 2001 that the cash funds in the amount of 5,747 US dollars had been criminally acquired... On 19 March 2002 they were deposited with the Vneshtorgbank bank with a view to confiscation and credit to the State... Accordingly, the court cannot agree with Ms Denisova's claim to one half of the spousal part of the said cash funds. No other judicial documents relating to the origin of the contested cash funds have been produced before the court, whereas, pursuant to Article 61 § 2 of the Code of Civil Procedure, the facts established by a final judicial decision in an earlier case bind the court.

As to Ms Moiseyeva's claims for recognition of her ownership of the computer and peripherals, it cannot likewise be satisfied because they have not been corroborated during the examination of the merits of the case. At present the said property has been confiscated and sold, which is confirmed by the bailiffs' information about the enforcement of the confiscation order in that respect."

31. On 13 October 2005 the Moscow City Court upheld, in a summary fashion, the City Court's judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Spousal and donated property

32. Property acquired by spouses in marriage is presumed to be jointly owned (Article 256 § 1 of the Civil Code, Article 34 § 1 of the Family Code). A child owns property which he or

she has received as a gift (Article 60 § 1 of the Family Code). Giving does not require a written agreement, handover of the gift being sufficient (Article 574 § 1 of the Civil Code).

B. Criminal law and procedure

33. The Criminal Code provides that “penalty shall be imposed on a person found guilty of commission of a crime” (Article 44). Confiscation of property is a form of penal sanction which is auxiliary to the main sanction and defined as “compulsory withdrawal, in whole or in part, without compensation, of the property owned by the convicted person” (Article 52). On 8 December 2003, Article 52 was removed from the Criminal Code.
34. As worded at the time of Mr Moiseyev’s conviction, Article 275 of the Criminal Code provided that high treason carried a punishment of up to twenty years’ imprisonment that may or may not be accompanied by a confiscation order in respect of the convict’s property. On 8 December 2003 the reference to the possibility of issuing a confiscation order was deleted.
35. The RSFSR Code of Criminal Procedure, as worded at the time of Mr Moiseyev’s conviction, provided as follows:

Article 86. Measures taken in respect of the exhibits in criminal proceedings

“The judgment... must decide on the destiny of the exhibits, and:

(1) instruments of crime which belong to the accused shall be confiscated and passed on to a competent agency or destroyed;

...

(4) criminally acquired money and other assets shall be confiscated to the profit of the State; other items shall be returned to their lawful owners, or, if the owners cannot be established, shall become the State’s property. In case of a dispute over the ownership of such items, the dispute shall be resolved in civil proceedings...”

Article 175. Charging of property

“With a view to securing a civil claim or a possible confiscation order, the investigator must charge the property of the suspect, defendant... or of the other persons who keep criminally acquired property... If necessary, the

charged property may be impounded...”

C. Rules of civil procedure

36. Article 442 § 2 of the Code of Civil Procedure provides:

“A dispute over the ownership of the charged property initiated by persons who were not parties to the case shall be examined as a civil claim.

A claim for having the charging order lifted shall be made against the debtor and creditor. If the property has been charged or seized in connection with a confiscation order, the person whose property is to be confiscated, and the competent State authority shall be co-defendants...”

37. Resolution no. 7 of the Plenary Supreme Court of the USSR “On the case-law concerning confiscation of property” (of 29 September 1953, as amended on 29 August 1980) provided:

“4. ...The court should bear in mind that in case of confiscation of the convict’s property in its entirety, the confiscation order should only apply to his or her personal property and to his or her part of the jointly owned property, it may not extend to the part of other persons who own that property jointly with the convict. Rights and lawful interests of the convict’s family members living with him, must be respected...”

9. The courts should bear in mind that even if the criminal judgment contained a list of specific property items liable to confiscation, third parties still may claim their title to that property in civil proceedings... The courts must consider such claims and the criminal judgment does not bind the civil court in its determination of the dispute over the contested property.

However, if the criminal judgment established that the listed property items had been criminally acquired or paid for with criminally acquired assets, but registered in other persons’ names with a view to concealing them from confiscation... then the claim for lifting of the charging order shall be dismissed.”

38. Resolution no. 4 of the Plenary Supreme Court of the USSR “On legal requirements for examination of claims for lifting of charging orders” (of 31 March 1978, as amended on 30 November 1990) provided:

“9. When considering a spouse’s claim for lifting the charging order in respect of his

or her part in the joint marital property, the court must bear in mind that... the property acquired in marriage is jointly owned by the spouses and in case of division their parts are presumed equal...

The court must determine the actual size of the spouse's portion of the marital property and the specific items allocated to him or her, having regard to the entirety of the jointly acquired property, including the property that is not – by operation of law or otherwise – liable to confiscation. Each spouse's portion shall include both the property liable to confiscation and that not liable to confiscation..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

39. The applicants complained under Article 1 of Protocol No. 1 that their property rights had been violated as regards the domestic courts' refusal to lift the charging order in respect of the spousal portion of the first applicant and of the computer owned by the second applicant. Article 1 of Protocol No. 1 provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

40. The parties did not comment on the admissibility of the complaint.
41. 41. The Court notes that the this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admis-

sible.

B. Merits

1. *Submissions by the parties*

(a) The applicants

42. The applicants submitted that the finding of the criminal origin in the judgment of 14 August 2001 had related solely to the cash funds rather than to all the other property objects mentioned in the text. This was evident from the use of the plural form in the text ("cash funds... which *have* been criminally acquired"); otherwise, the sentence should have been in the singular ("property... which *has* been criminally acquired") (see paragraph 14 above). Furthermore, the writs of execution issued by the Moscow City Court had not mentioned that the property items – as opposed to the cash funds – had been criminally acquired. Finally, the applicants pointed out that the garage had been rented in 1988, that is before the beginning of Mr Moiseyev's alleged criminal activities, and that his accounts at the Sbs-Agro bank had only been used to withdraw the salary paid by the Ministry of Foreign Affairs.

43. The applicants pointed out that the Khoroshevskiy District Court had not given them an effective opportunity to vindicate their property rights because it had merely referred back to the criminal judgment, without carrying out an independent assessment of the facts. The District Court had failed to indicate which authority – the Federal Security Service or the Federal Property Fund – had been the proper defendant.

44. The applicants disputed the legal basis for the domestic courts' decisions and emphasised that Resolution no. 7 of the Plenary Supreme Court of the USSR required the courts to confine the scope of confiscation measures to the convict's personal property and to take into account the lawful interests of the convict's family members. However, the Russian courts had refused to exempt the first applicant's spousal portion and the second applicant's personal property from confiscation.

(b) The Government

45. The Government claimed that, according to the operative part of judgment of 14 August 2001, all of Mr Moiseyev's property, including the cash funds, car, garage, and computer had been criminally acquired. In support of their claim they referred to the last paragraph of the

judgment cited in paragraph 14 above. The Government maintained that the value of the cash funds and computer as the items which had actually been confiscated had not exceeded the amount of 14,000 US dollars, which Mr Moiseyev had received in remuneration for his spying activities.

46. The Government submitted that there had been no violation of the applicants' property rights. The confiscation order had been issued in strict compliance with the domestic law provisions. In case of mercenary crimes there existed the presumption of the criminal origin of the defendant's property and a confiscation order could be issued without examination of further evidence of its criminal origin. As the property had been criminally acquired, the Khoroshevskiy District Court had correctly refused the first applicant's claim for recognition of her spousal portion.

2. The Court's assessment

(a) Whether the applicants had a legitimate claim to property

47. The Court reiterates that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right or a proprietary interest (see *Öneriyildiz v. Turkey* [GC], no. 48939/99 48939/99, § 124, ECHR 2004-XII, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII). Where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (see *Kopecký v. Slovakia* [GC], no. 44912/98 44912/98, § 52, ECHR 2004-IX; *Draon v. France* [GC], no. 1513/03, § 68, 6 October 2005; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01 73049/01, § 65, 11 January 2007).
48. On the facts, it is noted that in the course of criminal proceedings against Mr Moiseyev a large number of household items, including cash currency, keys and registration papers of a passenger car, keys to the garage and a computer, were seized by the investigation and subsequently confiscated pursuant to the confiscation order issued by the Moscow City Court on 14 August 2001 (see paragraph 14 above). Enforcement of the order proved to be impossible in respect of the garage (see paragraph 23 above) or was discontinued, owing to legislative changes, in respect of the car (see paragraph 24 above). The confiscation measure was eventually carried out in respect of the cash funds and the computer which had been sold by the bailiffs.
49. As regards the cash funds, it transpires from the Moscow City Court's judgment that the amount of 1,100 US dollars was seized in Mr Moiseyev's office and the remaining amount of 4,467 US dollars in the Moiseyevs family's home. The computer had been removed from the second applicant's room and the parties did not dispute that she had been its primary user.
50. The first applicant argued that she had been entitled to the spousal portion of the confiscated money and the second applicant asserted her ownership of the computer. The crux of the applicants' complaint was that the domestic courts had not provided them with an effective opportunity to claim their ownership to that property. Accordingly, in determining the existence of an interference with the right guaranteed by Article 1 of Protocol No. 1, the Court is called upon to verify in the light of the above-cited case-law whether the applicants had at least a reasonable and legitimate expectation to regain possession of the confiscated property.
51. The Court observes, firstly, that the Russian Civil and Family Codes stipulated joint ownership of property acquired by spouses in marriage. In the absence of evidence of any other arrangement between the first applicant and her husband in relation to the marital property, this default legal regulation was applicable in their case. Furthermore, by virtue of the relevant provisions of the Family and Civil Codes, children were legitimate owners of the objects which they had received from their parents as gifts. The change of ownership occurred at the moment of handing over the gift and there was no requirement of a written form (see paragraph 32 above). Thus, the first applicant could legitimately assert her entitlement to a portion of the family property equal to that of her husband and the second applicant to the computer which had been given to her by her parents.

52. The domestic case-law, as codified in the binding resolutions of the Supreme Court, indicated that confiscation orders could not “extend to the part of other persons who own [the] property jointly with the convict” and required the courts of general jurisdiction to respect the “rights and lawful interests of the convict’s family members living with him”. Only if it was found in subsequent civil proceedings – irrespective of the findings made in the criminal proceedings – that the property was criminally acquired but registered in other persons’ names with a view to concealing it from confiscation, the claim was to be rejected (see paragraph 37 above). In the instant case the intention to mislead the courts as to the actual ownership of the property for the purpose of avoiding its confiscation was not established in any proceedings.
53. A further resolution by the Supreme Court required the civil courts to have regard to the entirety of the marital property and, taking account of the presumption of equality of spouses’ portion, determine the actual size of each spouse’s portion which was to include both items liable to confiscation and those not liable to confiscation (see paragraph 38 above). It therefore appears that the first applicant could legitimately rely on those provisions to claim an equal share of the marital property.
54. In the light of the above considerations, the Court finds that the first applicant’s claim to the spousal portion and the second applicant’s claim to the computer had a basis in the statutory law, such as provisions of the Russian Civil and Family Codes, and the case-law codified by the Supreme Court. They could reasonably and legitimately argue that the confiscation order of 14 August 2001 amounted to an interference with their right to peaceful enjoyment of possessions and the Court is called upon to determine whether their claim was examined by the domestic courts in compliance with the requirements of Article 1 of Protocol No. 1.
- (b) Whether the applicants’ claim was examined in accordance with the requirements of Article 1 of Protocol No. 1**
55. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest (see, as a recent authority, *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V). The parties did not take a clear stance on the question of the rule of Article 1 of Protocol No. 1 under which the case should be examined. The Court considers that there is no need to resolve this issue because the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance.
56. The Court emphasises that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be “lawful”: the second paragraph recognises that the States have the right to control the use of property by enforcing “laws”. Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. The issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights only becomes relevant once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (see, among other authorities, *Baklanov v. Russia*, no. 68443/01 68443/01, § 39, 9 June 2005, and *Frizen v. Russia*, no. 58254/00, § 33, 24 March 2005).
57. The Court notes that the specific legal provisions for the confiscation measure were not mentioned in the Moscow City Court’s judgment of 14 January 2001 or in any other domestic decisions. This omission requires it to conjecture as to the legal basis for the interference. However, even though the decision itself did not refer explicitly to the provisions that formed its basis, it may be understood that the confiscation order was imposed as an auxiliary penal sanction on the basis of Articles 52 and 275 of the Criminal Code, read in conjunction with Article 86 § 4 of the RSFSR Code of Criminal Procedure (see paragraphs 33, 34 and 35 above). The interference at issue may therefore be regarded as “lawful”.
58. The Court considers that the confiscation mea-

- asures in criminal proceedings pursue a general interest of the community because the forfeiture of money or assets obtained through illegal activities or paid for with the proceeds from crime is a necessary and effective means of combating criminal activities (see *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, p. 17, § 30). Such confiscation measures are in keeping with the goals of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which requires State Parties to introduce confiscation of instrumentalities and proceeds from crime in respect of serious offences (Article 3 § 3). Thus, the making of a confiscation order in respect of criminally acquired property operates in the general interest as a deterrent to those considering engaging in criminal activities and also guarantees that crime does not pay (compare *Phillips v. the United Kingdom*, no. 41087/98, § 52, ECHR 2001-VII, and *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007).
59. The Court further reiterates that, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been its constant requirement that the domestic proceedings afford the aggrieved individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV, and *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 55).
60. In the instant case the seizure and subsequent confiscation were ordered and carried out in the framework of criminal proceedings against Mr Moiseyev. The applicants were not party to those proceedings and had no standing to lodge requests or make any submissions in them. When issuing the confiscation order, the sentencing court did not examine whether any property objects affected by the seizure order could have belonged to the first and/or second applicant. The first applicant made representation to the appeal court for removal of her spousal portion and the garage from the confiscation order but she did not receive any reply or an opportunity to take part in the appeal proceedings (see paragraph 15 above).
- The Khoroshevskiy District Court's judgment of 27 February 2003 indicated that the first applicant had had an opportunity to appeal against the criminal judgment in the part concerning the contested property, but it did not refer to any legal provisions which would have allowed a person who had no standing in criminal proceedings to lodge such an appeal. The Government, for their part, did not indicate any provisions of the Russian law that would have enabled the spouse or daughter of the convicted person to make submissions to the trial or appeal court.
61. In a situation where the ownership of property subject to a confiscation order was contested by persons who were not parties to the criminal proceedings, Article 442 of the Code of Civil Procedure allowed such persons to vindicate their property rights in civil proceedings. The applicants availed themselves of that remedy by introducing two civil claims, firstly against the bailiffs' service and the Federal Security Service, the latter having been the prosecuting authority in Mr Moiseyev's case, and subsequently against the Federal Property Fund. In examining their claims, the courts should have directed their attention to the possibility that the confiscated property items could have belonged to family members rather than to Mr Moiseyev himself and should have examined whether the applicants could have been their owners. However, the civil courts refused to take cognisance of the merits of the vindication claims or make any independent findings of fact, and they merely referred back to the judgment in Mr Moiseyev's criminal case. Thus, on 27 February 2003 the Khoroshevskiy District Court dismissed the first applicant's claim on the ground that the Moscow City Court had already established that "the contested property had been criminally acquired" (see paragraph 27 above). On 9 August 2005 the same District Court dismissed her renewed claim, by holding that the "facts established by a final judicial decision in an earlier case bind the court", and rejected the second applicant's claim because the computer had already been "confiscated and sold" (see paragraph 30 above).
62. The Khoroshevskiy District and the Moscow City Courts' persistent failure to take cognisance of the merits of the applicants' claim for vindication of their property was at variance with the requirements of the Russian law. In a series of binding rulings the Plenary Supreme Court consistently reminded the courts of general jurisdiction that a confiscation order

may only apply to the convict's portion of the jointly owned property and may not affect the property rights of cohabiting family members, unless it has been established that the property was criminally acquired and registered in family members' names with a view to avoiding confiscation. To achieve the proper balance of interests, the courts examining claims for release of the spousal portion from confiscation were required to determine the portion of each spouse by reference to the family property in its entirety, so that each spouse's portion comprises both confiscated and non-confiscated property items (see paragraphs 37 and 38 above). The first applicant supported her claim to one half of the spousal property with evidence capable of showing the legitimate origin of at least a part of the family property, such as Mr Moiseyev's pay statements from the Ministry of Foreign Affairs and the rental agreement in respect of the car garage. Although the domestic courts did not declare that evidence inadmissible, it was not mentioned in their judgments, which moreover did not contain any analysis of the composition of the family property. It follows that the domestic courts did not carry out a global assessment of the family property and the balancing exercise of the rights of family members, which were both required under the applicable domestic law provisions.

63. After Mr Moiseyev had regained possession of the car following a legislative amendment of Russian criminal law and after the bailiffs had determined that confiscation of bank assets, personal property and the garage was not physically possible, the first applicant reintroduced her claim for the spousal portion of the contested cash funds and the second applicant sought to vindicate her right to the computer. However, the second civil claim was likewise dealt with in a summary fashion. The domestic courts did not give heed to the evidence and submissions by the applicants or make a global assessment of the family property with a view to determining the spousal portions. As to the second applicant's claim to the computer, it was likewise dismissed without any explanation why her submission that the computer had been given to her by her parents as a gift appeared implausible. The Khoroshevskiy District and Moscow City Courts did not mention or refer in their judgments to any provisions of the Civil or Family Code.
64. In the light of the foregoing considerations, the Court finds that the applicants "bore an indi-

vidual and excessive burden" which could have been rendered legitimate only if they had had the opportunity to challenge effectively the confiscation measure imposed in the criminal proceedings to which they were not parties; however, that opportunity was denied them in the subsequent civil proceedings and therefore the "fair balance which should be struck between the protection of the right of property and the requirements of the general interest" was upset (compare *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, § 49).

65. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The first applicant further complained under Article 8 of the Convention about the night search of their flat on 3 July 1998. The applicants also complained under Article 6 § 1 of the Convention that the proceedings that lasted from 3 July 1998 to 18 June 2003 had exceeded a "reasonable time".
67. The Court reiterates that it has already dismissed the complaint about the search at Mr Moiseyev's flat on 3 July 1998 for non-exhaustion of domestic remedies (see *Moiseyev v. Russia* (dec.), no. 62936/00 62936/00, 9 December 2004). It finds no reason to depart from that conclusion in the present case.
68. The Court further observes that there was no continuous set of proceedings that lasted from 3 July 1998 to 18 June 2003. The applicants were not parties to the criminal proceedings against Mr Moiseyev and the first applicant introduced her first civil claim only on 13 May 2002. That claim was finally dismissed on 18 June 2003, that is one year and one month later. That period was short and there was no appearance of a violation of the "reasonable time" requirement.
69. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

71. The first applicant claimed the following amounts in respect of pecuniary damage:
 - 6,657.50 euros (EUR) for the loss of rental income from the car garage and the land tax she was liable to pay on it;
 - EUR 2,712.60 for one half of the depreciation cost of the VAZ car and the transport tax she was liable to pay on it; and
 - EUR 3,537.80 for one half of the cash funds plus interest at the statutory lending rate.
72. The second applicant claimed EUR 800, representing the approximate value of a computer similar to hers.
73. The applicants further claimed EUR 30,000 and EUR 20,000 respectively in respect of non-pecuniary damage. Finally, they claimed jointly EUR 374.60 for legal fees in the domestic proceedings, EUR 122.20 for court fees and EUR 3,000 for their representation before the Court.
74. The Government pointed out that the obligation to pay taxes, such as land and transport tax, was a corollary of the right of ownership. Neither Mr Moiseyev's nor the first applicant's right of ownership to the car garage and the car itself had ever been disputed and they had been therefore liable to tax imposition. The claim for rental income was speculative and the depreciation cost of the car was not supported with any documents. The second applicant's claim for the computer value was excessive, in view of the small amount which the sale of the computer fetched. Finally, the Government considered that the claim in respect of non-pecuniary damage was unreasonable as to quantum and that the applicants had not submitted appropriate documents in support of their claims for costs and expenses.
75. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicants (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Declares unanimously the complaint concerning an alleged violation of the applicants' property rights admissible and the remainder of the application inadmissible;
2. Holds, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1;
3. Holds, by six votes to one, that the question of the application of Article 41 is not ready for decision and accordingly:
 - (a) reserves the said question;
 - (b) invites the Government and the applicants to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 1 April 2010, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

André Wampach, Deputy Registrar
Christos Rozakis, President

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

DISSENTING OPINION OF JUDGE VAJIĆ

I am unable to find that there has been a violation of the applicants' property rights under Article 1 of Protocol No. 1 to the Convention in the present case.

According to national law a criminal court in Russia has the power to confiscate criminally acquired property; the finding as to its criminal origin is of a factual nature. In the present case that question was examined in the criminal proceedings, which determined the matter (see paragraphs 14-16 of the judgment) and simply precluded any further claims. In this regard, Resolution no. 7 of the Plenary Supreme Court of the USSR states as follows: "However, if the criminal judgment established that the listed property items had been criminally acquired or paid for with criminally acquired assets, but registered in other persons' names with a view to concealing them from confiscation ... then the claim for lifting of the charging order shall be dismissed" (see paragraph 37 of the judgment). (emphasis added)

As in most countries, Russian civil law basically denies any legal protection to criminally acquired property.

It follows that in the given circumstances the applicants could not and had not become the owners of the property in question and thus could not claim their share of the property, as their claim had no basis in domestic law (contrary to the assertion in paragraph 52 of the judgment). This was also stated by the national courts (see paragraphs 27-28 and 30 of the judgment). Therefore, in view of the Court's case-law, the applicants – contrary to the majority's view (see paragraphs 51-54 of the judgment) – did not have a sufficiently established claim to qualify as an asset protected by Article 1 of Protocol No. 1.

For the above-mentioned reasons it is my opinion that the applicants did not have a right or a legitimate expectation that was protected by the Convention and I do not agree with the majority that there has been a violation of Article 1 of Protocol No. 1.

ECHR

ECJ

FIRST SECTION

CASE OF FATULLAYEV v AZERBAIJAN

(Application no. 40984/07)

JUDGMENT

STRASBOURG

22 April 2010

INTERNET, FORUM, POSTING, FREEDOM OF EXPRESSION, NAGORNO-KARABAKH, HOLOCAUST DENIAL.

IN THE CASE OF FATULLAYEV V. AZERBAIJAN,

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

Christos Rozakis, *President*,

Nina Vajić,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judge*,

Lətif Hüseynov, *ad hoc judge*,

and **Søren Nielsen**, *Section Registrar*,

Having deliberated in private on 25 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 40984/07) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Mr Eynulla Emin oğlu Fatullayev (*Eynulla Emin oğlu Fatullayev* – "the applicant"), on 10 September 2007.
2. The applicant was represented by Mr I. Ashurov, a lawyer practising in Baku. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.
3. The applicant alleged, in particular, that his criminal convictions for statements made in newspaper articles authored by him had constituted a violation of his freedom of expression, that he had not been heard by an independent and impartial tribunal established by law, and that his right to the presumption of innocence had not been respected.
4. On 3 September 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of

the Convention).

5. Mr K. Hajiyev, the judge elected in respect of Azerbaijan, withdrew from sitting in the Chamber (Rule 28 of the Rules of Court). The Government accordingly appointed Mr L. Hüseynov to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976 and lives in Baku.
7. The applicant was the founder and chief editor of the newspapers *Gündəlik Azərbaycan*, published in the Azerbaijani language, and *Realny Azerbaijan* ("*Реальный Азербайджан*"), published in the Russian language. The newspapers were widely known for often publishing articles harshly criticising the Government and various public officials.
8. Prior to the events complained of in this application, the applicant had been sued for defamation in a number of sets of civil and criminal proceedings instituted following complaints by various high-ranking government officials, including cabinet ministers and members of parliament. In the most recent set of proceedings, on 26 September 2006 the applicant was convicted of defamation of a cabinet minister and conditionally sentenced to two years' imprisonment. Moreover, according to the applicant, at various times he and his staff had received numerous threatening phone calls demanding him to stop writing critical articles about high-ranking officials or even to completely cease the publication of his newspapers.
9. In 2007 two sets of criminal proceedings were brought against the applicant in connection with, *inter alia*, two articles published by him in *Realny Azerbaijan*.

A. First set of proceedings

1. *Statements made by the applicant*
10. In 2005 the applicant visited, as a journalist, the area of Nagorno-Karabakh and other territories controlled by the Armenian military

forces. This was one of a few exceptionally allowed and organised visits by Azerbaijani nationals to those territories and to Armenia in the years following the Nagorno-Karabakh war, as movement across the front line in Nagorno-Karabakh and across the Armenian-Azerbaijani border remains severely restricted to this day from both sides. During his visit he met, among others, some officials of the self-proclaimed, unrecognised “Nagorno-Karabakh Republic” and some ordinary people. In the aftermath of this visit, in April 2005 the applicant published an article called “The Karabakh Diary” (Russian: “Карабахск ий дневник”) in *Realny Azerbaijan*.

11. In the article, styled as a diary, the applicant described his visits to several towns, including Lachin, Shusha, Agdam and Khojaly, which had formerly been inhabited primarily by ethnic Azerbaijanis who had been forced to flee their homes during the war. He described both the ruins of war and the new construction sites that he had seen in those towns, as well as his casual conversations with a number of local Armenians he had met during his visit.
12. One of the topics discussed in “The Karabakh Diary” concerned the Khojaly massacre of 26 February 1992. Discussing this topic, the applicant made certain statements which could be construed as differing from the commonly accepted version of the Khojaly events according to which hundreds of Azerbaijani civilians had been killed by the Armenian armed forces, with the reported assistance of the Russian (formerly Soviet) 366th Motorised Rifle Regiment, during their assault on the town of Khojaly in the course of the war in Nagorno-Karabakh. Specifically, the article contained the following passages:

“Having seen Khojaly, I could not hide my astonishment. This Azerbaijani town, which had been razed to the ground, has been completely reconstructed and converted into a town called Ivanovka, named after an Armenian general who had actively participated in the occupation of Khojaly. The Khojaly tragedy and the deep wounds inflicted on our soul by the Armenian expansionism on this long-suffering Azerbaijani land permeated all my meetings in Askeran [a town in Nagorno-Karabakh close to Khojaly]. How so? Can it be true that nothing human is left in these people? However, for the sake of fairness I will admit that several years ago I met some refugees from Khojaly, temporarily settled in Naftalan, who openly confessed to me that, on the eve of the large-scale offensive of the

Russian and Armenian troops on Khojaly, the town had been encircled [by those troops]. And even several days prior to the attack, the Armenians had been continuously warning the population about the planned operation through loudspeakers and suggesting that the civilians abandon the town and escape from the encirclement through a humanitarian corridor along the Kar-Kar River. According to the Khojaly refugees’ own words, they had used this corridor and, indeed, the Armenian soldiers positioned behind the corridor had not opened fire on them. Some soldiers from the battalions of the NFA [the National Front of Azerbaijan, a political party], for some reason, had led part of the [refugees] in the direction of the village of Nakhichevanik, which during that period had been under the control of the Armenians’ Askeran battalion. The other group of refugees were hit by artillery volleys [while they were reaching] the Agdam Region.

When I was in Askeran, I spoke to the deputy head of the administration of Askeran, Slavik Arushanyan, and compared his recollection of the events with that of the Khojaly inhabitants who came under fire from the Azerbaijani side.

I asked S. Arushanyan to show me the corridor which the Khojaly inhabitants had used [to abandon the town]. Having familiarised myself with the geographical area, I can say, fully convinced, that the conjectures that there had been no Armenian corridor are groundless. The corridor did indeed exist, otherwise the Khojaly inhabitants, fully surrounded [by the enemy troops] and isolated from the outside world, would not have been able to force their way out and escape the encirclement. However, having crossed the area behind the Kar-Kar River, the row of refugees was separated and, for some reason, a group of [them] headed in the direction of Nakhichevanik. It appears that the NFA battalions were striving not for the liberation of the Khojaly civilians but for more bloodshed on their way to overthrow A. Murtalibov [the first President of Azerbaijan] ...”

13. More than a year after the publication of the above article, during the period from December 2006 to January 2007, a person registered under the username “Eynulla Fatullayev”, identifying himself as the applicant, made a number of postings on the publicly accessible Internet forum of a website called AzeriTriColor. The postings were made in a specific forum thread dedicated to other forum members’ questions to the forum member named “Eynulla Fatullayev” about the contents of “The Karabakh Diary”. In his various answers to those questions, the person posting under the username “Ey-

nulla Fatullayev" made, *inter alia*, the following statements:

"I have visited this town [Naftalan] where I have spoken to hundreds (I repeat, hundreds) of refugees who insisted that there had been a corridor and that they had remained alive owing to this corridor ...

You see, it was wartime and there was a front line... Of course, Armenians were killing [the civilians], but part of the Khojaly inhabitants had been fired upon by our own [troops]... Whether it was done intentionally or not is to be determined by investigators. ...

[They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions ... [The corpses] had been mutilated by our own ..."

2. Civil action against the applicant

14. On 23 February 2007 Ms T. Chaladze, the Head of the Centre for Protection of Refugees and Displaced Persons, brought a civil action against the applicant in the Yasamal District Court. She claimed that the applicant had "for a long period of time insulted the honour and dignity of the victims of the Khojaly Tragedy, persons killed during those tragic events and their relatives, as well as veterans of the Karabakh War, soldiers of the Azerbaijani National Army and the entire Azerbaijani people". She alleged that the applicant had done so by making the above-mentioned statements in his article "The Karabakh Diary" as well as by making similar insulting statements on the forum of the AzeriTriColor website. Ms Chaladze attributed the authorship of the Internet forum postings made from the forum account with the username "Eynulla Fatullayev" to the applicant.
15. In his submissions to the court, the applicant argued that the forum postings at the AzeriTriColor website had not been written by him and denied making these statements. He also argued that, in "The Karabakh Diary", he had merely reported the information given to him by persons whom he had interviewed.
16. The Yasamal District Court, sitting as a single-judge formation composed of Judge I. Ismayilov, heard evidence from a number of refugees from Khojaly, all of whom testified about their escape from the town and noted that they had not been fired upon by Azerbaijani soldiers and that the applicant's assertions concerning this were false. Furthermore, having examined electronic evidence and witness statements,

the court established that the postings on the AzeriTriColor forum had indeed been made by the applicant himself and that they had been posted in response to various questions by readers of *Realny Azerbaijan*. The court found that the applicant and the newspaper had disseminated false and unproven statements tarnishing the honour and dignity of the survivors of the Khojaly events.

17. In view of the above findings, on 6 April 2007 the Yasamal District Court upheld Ms Chaladze's claim and ordered the applicant to publish, in *Realny Azerbaijan* and on related websites, a retraction of his statements and an apology to the refugees from Khojaly and the newspaper's readers. The court also ordered the applicant and *Realny Azerbaijan* to pay 10,000 New Azerbaijani manats (AZN – approximately 8,500 euros) each in respect of non-pecuniary damage. This total award of AZN 20,000 was to be spent on upgrading the living conditions of the refugees from Khojaly temporarily residing in Naftalan.

3. Criminal conviction

18. Thereafter, on an unspecified date, a group of four Khojaly survivors and two former soldiers who had been involved in the Khojaly battle, represented by Ms Chaladze, lodged a criminal complaint against the applicant with the Yasamal District Court, under the private prosecution procedure. They asked that the applicant be convicted of defamation and of falsely accusing Azerbaijani soldiers of having committed an especially grave crime.
19. At a preliminary hearing held on 9 April 2007 the applicant filed an objection against the entire judicial composition of the Yasamal District Court. He claimed that all of the judges of that court had been appointed to their positions in September 2000 for a fixed five-year term and that their term of office had expired in 2005. He therefore argued that the composition of the court meant that it could not be regarded as a "tribunal established by law". This objection was dismissed.
20. The hearing of the criminal case took place on 20 April 2007 and was presided over by Judge I. Ismayilov, sitting as a single judge.
21. In his oral submissions to the court, the applicant pleaded his innocence. In particular, he denied making the statements on the forum of the AzeriTriColor website and maintained that those statements had been made by some un-

known impostor who had used his name for this purpose.

22. The court heard a linguistic expert who gave an opinion on the applicant's statements. The expert testified, *inter alia*, that, owing to the specific style in which "The Karabakh Diary" had been written, it was difficult to differentiate whether the specific statements and conclusions made concerning the Khojaly events could be attributable to the applicant personally or to those persons whom he had allegedly interviewed in Nagorno-Karabakh. He also noted that it was difficult to analyse separately the specific phrases taken out of the context of the article as a whole, and that it appeared from the context that the author had attempted to convey the positions of both sides to the conflict. The court also heard several witnesses who testified about the Khojaly events and stated that there had been no escape corridor for the civilians and that the civilians had been shot at from the enemy's positions. The court further found that the Internet forum of the AzeriTriColor website, in essence, had replaced the Internet forum of the *Realny Azerbaijan* website, which had become defunct in 2006, and that the statements posted on that forum under the username "Eynulla Fatullayev" had indeed been made by the applicant himself. Lastly, the court found that, through his statements made in "The Karabakh Diary" and his Internet forum postings, the applicant had given a heavily distorted account of the historical events in Khojaly and had deliberately disseminated false information which had damaged the reputation of the plaintiffs and had accused the soldiers of the Azerbaijani Army (specifically, the two plaintiffs who had fought in Khojaly) of committing grave crimes which they had not committed. The court convicted the applicant under Articles 147.1 (defamation) and 147.2 (defamation by accusing a person of having committed a grave crime) of the Criminal Code and sentenced him to two years and six months' imprisonment.
23. The applicant was arrested in the courtroom and taken to Detention Facility No. 1 on the same day (20 April 2007).
24. On 6 June 2007 the Court of Appeal upheld the Yasamal District Court's judgment of 20 April 2007.
25. On 21 August 2007 the Supreme Court dismissed a cassation appeal by the applicant and

upheld the lower courts' judgments.

B. Second set of proceedings

1. "*The Aliyevs Go to War*"
26. In the meantime, on 30 March 2007, *Realny Azerbaijan* had published an article entitled "The Aliyevs Go to War" (Russian: "*Алиевы идут на войну*"). The article was written by the applicant but published under the pseudonym "Rovshan Bagirov".
27. This analytical article was devoted to the possible consequences of Azerbaijan's support for a recent "anti-Iranian" resolution of the United Nations (UN) Security Council, which had called for economic sanctions against that country. The article referred to the current Azerbaijani government as "the Aliyev clan" and "the governing Family" and expressed the view that the government had sought United States (US) support for President Ilham Aliyev's "remaining in power" in Azerbaijan in exchange for Azerbaijan's support for the US "aggression" against Iran.
28. The article continued as follows:

"It is also known that, immediately after the UN [Security Council] had voted for this resolution, [the authorities] in Tehran began to seriously prepare for the beginning of the 'anti-Iranian operation'. For several years, the military headquarters of the Islamic regime had been developing plans for repulsing the American aggression and counter-attacking the US and their allies in the region. After 24 March 2007 Azerbaijan, having openly supported the anti-Iranian operation, must prepare for a lengthy and dreadful war which will result in large-scale destruction and loss of human life. According to information from sources close to official Paris, the Iranian General Staff has already developed its military plans concerning Azerbaijan in the event that Baku takes part in the aggression against Iran. Thus, the Iranian long-range military air force, thousands of insane kamikaze terrorists from the IRGC [the Islamic Revolution's Guardian Corps] and hundreds of Shahab-2 and Shahab-3 missiles will strike the following main targets on the territory of Azerbaijan ..."
29. The article continued with a long and detailed list of such targets, which included, *inter alia*, active petroleum platforms on the shelf of the Caspian Sea, the Sangachal Oil Terminal and other petroleum plants and terminals, the Baku-Tbilisi-Ceyhan petroleum pipeline and the Baku-Tbilisi-Erzurum gas pipeline, the building

of the Presidential Administration, the building of the US Embassy in Azerbaijan, buildings of various ministries, the Baku seaport and airport, and a number of large business centres housing the offices of major foreign companies doing business in Azerbaijan.

30. Further, it was noted in the article that the Azerbaijani Government should have maintained neutrality in its relations with both the US and Iran, and that its support of the US position could lead, in the event of a war between those two States, to such grave consequences as loss of human life among Azeris in both Azerbaijan and Iran. In this connection, the author noted that the US military forces were already operating four airbases on the territory of Azerbaijan and had expressed an interest in operating the Gabala Radar Station, which was then operated by Russia.
31. The article also discussed the issue of possible unrest, in the event of a conflict with Iran, in the southern regions of Azerbaijan populated by the Talysh ethnic minority, who are ethnically and linguistically close to the Persians. Among other things, the article appeared to imply that the current ruling elite, a large number of whom allegedly came from the region of Nakhchivan, was engaging in regional nepotism by appointing people from Nakhchivan to government posts in southern areas of the country, including the Lenkoran region. In particular, the article stated:

"Thus, the Talysh have long been expressing their discontent with the fact that [the central authorities] always appoint to administrative positions in Lenkoran persons hailing from Nakhchivan who are alien to the mentality and problems of the region. ... The level of unemployment in the region is terribly high, drug abuse is flourishing, every morning hundreds of unemployed Talysh cluster together at the 'slave' [that is, cheap labour] market in Baku. Is this not a powder keg?"

But the authorities, seemingly unaware of the danger of the developing situation, are giving preference to their standard methods – repressive measures and paying off the Talysh elite. It seems as if the authorities are deliberately pushing the Talysh into the embrace of Iranian radicals."

32. The article noted that certain high-ranking Iranian officials and ayatollahs were of Talysh ethnicity, and that there were "several million" Talysh living across the Iranian border who could "support their kin" living in Azerbaijan in

the event of a war. Lastly, the article concluded that the Azerbaijani authorities did not realise all the dangerous consequences of the geopolitical game they were playing.

2. Criminal conviction

33. On 16 May 2007 the investigation department of the Ministry of National Security ("the MNS") commenced a criminal investigation in connection with the publication of the article under Article 214.1 of the Criminal Code (terrorism or threat of terrorism).
34. On 22 May 2007 the investigation authorities conducted searches in the applicant's flat and in the office of the *Realny Azerbaijan* and *Gündəlik Azərbaycan* newspapers. They found and seized certain photographs and computer disks from the applicant's flat and twenty computer hard drives from the newspaper's office.
35. On 29 May 2007 the applicant was transferred to the MNS detention facility.
36. On 31 May 2007 the Prosecutor General made a statement to the press, noting that the article published in *Realny Azerbaijan* contained information which constituted a threat of terrorism and that a criminal investigation had been instituted in this connection by the MNS. This statement was reported on Media Forum, an Internet news portal, as follows:

"Today, the Prosecutor General ... provided an explanation concerning the criminal case instituted by the Ministry of National Security in respect of Eynulla Fatullayev, the editor-in-chief of *Gündəlik Azərbaycan* and *Realny Azerbaijan* newspapers, and stated that the Internet site [of the newspapers] had indeed contained information threatening acts of terrorism. According to Azadliq Radio, the Prosecutor General stated: 'The site mentions specific State facilities and addresses which would allegedly be bombed by the Islamic Republic of Iran. This information constitutes a threat of terrorism.' [He] noted that, in connection with this, the MNS had instituted criminal proceedings under Article 214.1 of the Criminal Code. The Prosecutor General stated that the MNS would shortly make a statement concerning the results of the investigation."

37. Another Internet news portal, Day.Az, reported as follows:

"The Internet site of *Realny Azerbaijan*, founded by Eynulla Fatullayev, indeed contains a threat of terrorism. The Prosecutor General ... made this statement. According to him,

the Internet site of *Realny Azerbaijan* mentions specific addresses of certain State facilities and asserts that, according to available information, they will be bombed by the Islamic Republic of Iran. 'This information constitutes a threat of terrorism. Therefore, the Ministry of National Security (the MNS) has instituted criminal proceedings under Article 214.1 of the Criminal Code and is taking investigative measures.' [The Prosecutor General] noted that the MNS would keep the public informed about the progress in the case.."

38. On 3 July 2007, by a decision of an MNS investigator, the applicant was formally charged with the criminal offences of threat of terrorism (Article 214.1 of the Criminal Code) and inciting ethnic hostility (Article 283.2.2 of the Criminal Code).
39. On the same day, 3 July 2007, pursuant to a request by the Prosecutor General's Office, the Sabail District Court remanded the applicant in custody for a period of three months in connection with this criminal case. The applicant appealed. On 11 July 2007 the Court of Appeal upheld the Sabail District Court's decision.
40. On 4 September 2007 the applicant was also charged with tax evasion under Article 213.2 of the Criminal Code on account of his alleged failure to duly declare taxes on his personal earnings as a newspaper editor.
41. During the trial, among other evidence, the prosecution produced evidence showing that in May 2007 the full electronic version of "The Aliyevs Go to War" had been forwarded by e-mail to the offices of a number of foreign and local companies in Baku. A total of eight employees of these companies testified during the trial that, after reading the article, they had felt disturbed, anxious and frightened. The court found that the publication of this article had pursued the aim of creating panic among the population. The court further found that, in the article, the applicant had threatened the Government with destruction of public property and acts endangering human life, with the aim of exerting influence on the Government to refrain from taking political decisions required by national interests.
42. On 30 October 2007 the Assize Court found the applicant guilty on all charges and convicted him of threat of terrorism (eight years' imprisonment), incitement to ethnic hostility (three years' imprisonment) and tax evasion (four months' imprisonment). The partial merger of these sentences resulted in a sentence of eight years and four months' imprisonment. Lastly, the court partially merged this sentence with the sentence of two years and six months' imprisonment imposed on the applicant in the previous criminal case, which resulted in a total sentence of eight years and six months' imprisonment. In imposing this final sentence, the court found that, on account of his previous convictions, the applicant was a repeat offender and assessed this as an aggravating circumstance. The court also ordered that 23 computers and several compact discs, previously seized as material evidence from the newspapers' offices, be confiscated in favour of the State. Lastly, the court ordered that AZN 242,522 (for unpaid taxes) and AZN 17,800 (for unpaid social security contributions) be withheld from the applicant.
43. On 16 January 2008 the Court of Appeal upheld the Assize Court's judgment of 30 October 2007.
44. On 3 June 2008 the Supreme Court upheld the lower courts' judgments.
45. In his defence speech at the trial and in his appeals to the higher courts, the applicant had complained, *inter alia*, of a breach of his presumption of innocence on account of the Prosecutor General's statement to the press, relying directly on Article 6 § 2 of the Convention. His arguments under the Convention in this respect had been summarily rejected.
46. It appears that, on an unspecified date during the period when the above-mentioned criminal proceedings were taking place, the publication and distribution of *Gündəlik Azərbaycan* and *Realny Azerbaijan* were halted, in circumstances which are not entirely clear from the material available in the case file.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of 2000

47. Article 147 of the Criminal Code, in force at the relevant time, provided as follows:

"147.1. Defamation, that is, dissemination, in a public statement, publicly exhibited work of art or through the mass media, of knowingly false information discrediting the honour and dignity of a person or damaging his or her reputation,

shall be punishable by a fine in the amount of one hundred to five hundred conditional

financial units, or by community service for a term of up to two hundred and forty hours, or by corrective labour for a term of up to one year, or by imprisonment for a term of up to six months.

147.2. Defamation by accusing [a person] of having committed a serious or especially serious crime

shall be punishable by corrective labour for a term of up to two years, or by restriction of liberty for a term of up to two years, or by imprisonment for a term of up to three years."

48. Article 214.1 of the Criminal Code provided as follows:

"Terrorism, that is, perpetration of an explosion, arson or other acts creating a danger to human life or significant material damage or other grave consequences, if such acts are carried out for the purpose of undermining public security, frightening the population or exerting influence on the State authorities or international organisations to take certain decisions, as well as the threat to carry out the above-mentioned acts with the same purposes,

shall be punishable by deprivation of liberty for a term of eight to twelve years together with confiscation of property."

49. Article 283 of the Criminal Code provided as follows:

"283.1. Acts aimed at incitement to ethnic, racial or religious hostility or humiliation of ethnic dignity, as well as acts aimed at restricting citizens' rights or establishing citizens' superiority on the basis of their ethnic or racial origin, if committed openly or by means of the mass media,

shall be punishable by a fine in the amount of one thousand to two thousand conditional financial units, or by restriction of liberty for a term of up to three years, or by imprisonment for a term of two to four years.

283.2. The same acts, if committed:

283.2.1. with the use of violence or the threat of use of violence;

283.2.2. by a person using his official position;

283.2.3. by an organised group;

shall be punishable by imprisonment for a

term of three to five years."

B. Code of Criminal Procedure of 2000

50. Under Article 449 of the Code of Criminal Procedure ("the CCRP"), an accused or suspected person can lodge a complaint against procedural steps or decisions of the prosecuting authorities (preliminary investigator, investigator, supervising prosecutor, etc.) with the court supervising the pre-trial investigation. Article 449.3 of the CCRP provides that such a complaint may be lodged, *inter alia*, in the event of a violation of a detainee's rights.
51. Articles 450 and 451 of the CCRP provide for the procedure for examining such complaints and outline the supervising court's competence. In particular, under Article 451.1 of the CCRP, the supervising court may take one of the following two decisions in respect of a complaint under Article 449 of the CCRP: (a) declaring the impugned procedural step or decision lawful; or (b) declaring the impugned procedural step or decision unlawful and quashing it. Article 451.3 of the CCRP provides that in the event of a finding that the impugned step or decision is unlawful, the prosecutor supervising the investigation or a superior prosecutor is to take immediate measures aimed at stopping the violations of the complainant's rights.

C. Code of Civil Procedure of 2000

52. Chapter 27 of the Code of Civil Procedure ("the CCP"), consisting of Articles 296-300, provides for the procedure for examining civil lawsuits concerning decisions and acts (or omissions) of "the relevant executive authorities, local self-administration authorities, other authorities and organisations and their officials". In particular, in accordance with Article 297.1 of the CCP, decisions and acts (or omissions) covered by this procedure include those which violate a person's rights or freedoms, impede a person's exercise of his or her rights or freedoms, or impose an unlawful obligation or liability upon a person.

D. Appointment and tenure of judges

53. The relevant provisions of the Law on Courts and Judges of 10 June 1997, in force before the amendments adopted on 28 December 2004, and the relevant domestic law concerning the status and composition of the Judicial Legal Council, in force prior to the enactment of the Law on the Judicial Legal Council of 28 December 2004, are summarised in *Asadov*

and Others v. Azerbaijan ((dec.), no. 138/03, 12 January 2006).

54. Law No. 817-IIQD on Additions and Amendments to the Law on Courts and Judges, of 28 December 2004 ("Law No. 817-IIQD"), in force from 30 January 2005, introduced a number of amendments concerning, *inter alia*, the process for the selection and appointment of candidates for judicial office, terms of office of judges, the code of judicial ethics, disciplinary procedures in respect of judges and the immunity of judges. Specifically, Articles 93-1 to 93-4 of the Law on Courts and Judges, as amended by Law No. 817-IIQD, provide that candidates for judicial office are selected by the Judge Selection Committee, established by the Judicial Legal Council, according to a procedure involving written and oral examinations and long-term training courses where each candidate's performance is subsequently graded by the Judge Selection Committee. In accordance with Article 96 of the Law on Courts and Judges, as amended by Law No. 817-IIQD, judges are initially appointed for a five-year term and, during this term, must attend a judicial training course at least once. If following the initial five-year term no professional shortcomings are detected in the judge's work, he or she is reappointed to an indefinite term of office (expiring at the age of 65 or, in exceptional cases, 70) pursuant to a recommendation by the Judicial Legal Council. Prior to the latter amendment, judges were appointed for fixed terms of five or ten years, depending on the court in which they served.
55. Clause 1 of the Transitional Provisions of Law No. 817-IIQD provided as follows:
- "The terms of office of judges of the courts of the Republic of Azerbaijan who were appointed before 1 January 2005 shall expire on the date of the appointment of new judges to those courts ..."
56. The Law on the Judicial Legal Council of 28 December 2004 provides that the Judicial Legal Council has 15 members (including representatives of the executive and legislative authorities, judges of various courts, and representatives of the prosecution authorities and the Bar Association) and is a body competent to organise the process of selecting candidates for judicial office and submitting recommendations to the President on judicial appointments, and to perform other tasks including organising training courses for judges, providing logistical support to the courts and taking

disciplinary measures against judges.

III. COUNCIL OF EUROPE DOCUMENTS

57. The following are extracts from Resolution 1614 (2008) of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Azerbaijan:

"19. As regards freedom of expression, the Azerbaijani authorities should:

19.1. initiate the legal reform aimed at decriminalising defamation and revise the relevant civil law provisions to ensure respect for the principle of proportionality, as recommended in Resolution 1545 (2007); in the meantime, a political moratorium should be reintroduced so as to put an end to the use of defamation lawsuits as a means of intimidating journalists ..."

58. The following are extracts from the report by the Council of Europe Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Azerbaijan, from 3 to 7 September 2007 (CommDH(2008)2, 20 February 2008):

"B. A matter of urgency: the decriminalisation of defamation

69. At the time of the Commissioner's visit, it was reported that there were seven journalists in prison, out of whom four were for libel or defamation under Articles 147 and 148 of the Criminal Code. Both international monitoring bodies and local NGOs claimed that charging individuals for defamation was used as a means to avoid the dissemination of news that could be detrimental to high-ranking officials or to other influential people. According to the parliamentary assembly of the Council of Europe rapporteurs, the number of charges has grown in the last few years. Out of fear of imprisonment journalists are compelled to resort to self-censorship. In 2005, the President, Mr Ilham Aliyev had called for abandoning the use of criminal provisions in matters of defamation, but this was not respected. Some cases, which the Commissioner was informed about point to abusive or unfair imprisonment of journalists.

70. ... Indeed, many journalists remain incarcerated. Mr Eynulla Fatullayev, who was held at the pre-trial detention centres on the premises of the Ministry for National Security is still incarcerated. This journalist had criticised the authorities' and armed forces' conduct during the siege of Khojaly. His critical analysis of

the handling of the crisis cost him a two and half year sentence for libel. Furthermore, in a concerning stacking of incriminations, he was sentenced on 30 October 2007 to an additional eight and a half years, this time on charges of terrorism and incitement to racial hatred. When this journalist met the Commissioner, he said that the fact that he had been jailed was evidence of political pressure on him as a journalist. After the decision on this second sentence, he reiterated this comment. The Commissioner mentioned his imprisonment for libel to the authorities and called for his immediate release. The Commissioner once again urges the authorities to release Mr Eynulla Fatullayev.

71. The authorities' response to questions regarding this issue is that actions against journalists are caused by their lack of professionalism, which leads them to writing in a non-responsible manner and ignoring their legal and ethical duties. There should indeed be proper training and education of journalists, who have a responsibility in the exercise of their profession and should follow a code of ethics in line with European standards. At the same time, officials should allow easy access to information and accept criticism inherent to their position of accountability in society.

72. Nevertheless, the fundamental issue here is whether people, in particular but not only journalists, should be deprived of liberty and other criminal law consequences on account of views expressed. The supplementary issue, as already dealt with, is whether, where it still exists as an offence under criminal law, as it is the case in Azerbaijan, the prosecution of defamation does not in fact lead to instances of abusive prosecution and/or excessive sentences. There is clearly a general trend to move towards a decriminalisation of defamation in Europe today. International standards allow the penalisation of defamation through criminal law but only in cases of hate speech directly intended at inciting violence. To corroborate the requirement of intention, there has to be a direct link between the intention and the likeliness of the violence. ... In most countries, the criminal route is not used: there is a moratorium on such laws. The criminalisation of defamation has a chilling effect on freedom of expression. The legal framework in Azerbaijan provides for a wide range of possibilities for criminalisation, notably for 'damage to honour and reputation'. Work on a draft law on defamation has been going on for more than a year, involving a working group of parliamentarians and media experts, with the support of the OSCE. Emphasis would be shifted from criminal law to civil law.

73. The Commissioner was encouraged by talks he had on this issue with the Minister of Justice. He recommends the launching of an open public debate that would help define a rights-based approach that would remove defamation from the criminal books and offer alternative protection to other rights and interests. Council of Europe experts could provide assistance in that respect. In order to support the holding of that debate, the President could reiterate his 2005 declaration on a moratorium on the use of the criminal provision. The Commissioner recommends, as a first step, the release of all those, who have been criminally prosecuted under the relevant provisions of the criminal code."

IV. INFORMATION NOTE ON THE KHOJALY EVENTS

59. Most of the facts of the reported massacre of Azerbaijani civilians in Khojaly are contested by the Azerbaijani and Armenian sides. As for third-party sources, the following are extracts from reports of international organisations and human-rights NGOs concerning these events.

60. The background paper prepared by the Directorate General of Political Affairs of the Council of Europe, appended to the report by the Parliamentary Assembly's Political Affairs Committee on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference (rapporteur Mr D. Atkinson, 29 November 2004, Doc. 10364), states:

"In February 1992, almost day-to-day four years after the Sumgait events, the ethnic Armenian forces attacked the only airport in [Nagorno-Karabakh], in *Khojali*, to the North of the local capital. At the time, the population of Khojali was 7000. The Azerbaijani view is that the taking of Khojali, which left some 150 defenders of the airport dead, was followed by unprecedented brutalities against the civilian population. In one day, reportedly 613 unarmed people were massacred and close to 1300 were captured – many of them while trying to flee through an alleged humanitarian corridor. The Armenian side contests this view and the number of casualties.

The Khojali massacre sparked an exodus of Azerbaijanis and precipitated a political crisis in Baku. Five years later, in 1997, President Aliyev issued a Decree referring to the tragedy as the 'Khojali genocide'."

61. The following are extracts from the Human Rights Watch World Report 1993 on the former

Soviet Union:

“During the winter of 1992, Armenian forces went on the offensive, forcing almost the entire Azerbaijani population of the enclave to flee, and committing unconscionable acts of violence against civilians as they fled. The most notorious of these attacks occurred on February 25 in the village of Khojaly. A large column of residents, accompanied by a few dozen retreating fighters, fled the city as it fell to Armenian forces. As they approached the border with Azerbaijan, they came across an Armenian military post and were cruelly fired upon. At least 161 civilians are known to have been murdered in this incident, although Azerbaijani officials estimate that about 800 perished. Armenian forces killed unarmed civilians and soldiers who were *hors de combat*, and looted and sometimes burned homes.”

62. The Memorial Human Rights Centre, based in Moscow, dispatched its observers to Nagorno-Karabakh during the war. The following are extracts from the report by the Memorial Human Rights Centre “On Mass Violations of Human Rights in Connection with the Armed Capture of the Town of Khojaly on the Night of 25 to 26 February 1992” (translated from Russian):

“As practically all refugees from Khojaly claimed, military personnel from the 366th Regiment took part in the assault on the town. According to the information received from the Armenian side, combat vehicles of the 366th Regiment which took part in the assault on the town shelled Khojaly but did not actually enter the town. As the Armenian side asserts, the participation of the military personnel [from the 366th Regiment] was not sanctioned by a written order from the Regiment’s command. ...

Part of the population started to leave Khojaly soon after the assault began, trying to flee in the direction of Agdam. There were armed people from the town’s garrison among some of the fleeing groups. People left in two directions: (1) from the eastern side of the town in the north-east direction along the river, passing Askeran to their left (this specific route, according to Armenian officials, was provided as a ‘free corridor’); (2) from the northern side of the town in the north-east direction, passing Askeran to their right (it appears that a smaller number of refugees fled using this route). Thus, the majority of civilians left Khojaly, while around 200-300 people stayed in Khojaly, hiding in their houses and basements. As a result of the shelling of the town, an un-

ascertained number of civilians were killed on the territory of Khojaly during the assault. The Armenian side practically refused to provide information about the number of people who so perished. ...

According to the officials of the NKR [the self-proclaimed ‘Nagorno-Karabakh Republic’], a ‘free corridor’ was provided for fleeing civilians..., which began at the eastern side of the town, passed along the river and continued to the north-east, leading to Agdam and passing Askeran to its left. ... According to the officials of the NKR and those taking part in the assault, the Khojaly population was informed about the existence of this ‘corridor’ through loudspeakers mounted on armoured personnel carriers. ... NKR officials also noted that, several days prior to the assault, leaflets had been dropped on Khojaly from helicopters, urging the Khojaly population to use the ‘free corridor’. However, not a single copy of such a leaflet has been provided to Memorial’s observers in support of this assertion. Likewise, no traces of such leaflets have been found by Memorial’s observers in Khojaly. When interviewed, Khojaly refugees said that they had not heard about such leaflets. In Agdam and Baku, Memorial’s observers have interviewed 60 persons who had fled Khojaly during the assault on the town. Only one person out of those interviewed said that he had known about the existence of the ‘free corridor’ (he had been told about it by a ‘military man’ from the Khojaly garrison). ... Several days prior to the assault, the representatives of the Armenian side had, on repeated occasions, informed the Khojaly authorities by radio about the upcoming assault and urged them to immediately evacuate the population from the town. The fact that this information had been received by the Azerbaijani side and transferred to Baku is confirmed by Baku newspapers (*Bakinskiy Rabochiy*). ...

A large column of inhabitants [of Khojaly] rushed out of town along the river (route 1 – [see above]). There were armed people from the town garrison in some of the groups of refugees. These refugees, who walked along the ‘free corridor’..., were fired upon, as a result of which many people were killed. Those who remained alive dispersed. Running [refugees] came across Armenian military posts and were fired upon. Some refugees managed to escape to Agdam, some, mainly women and children (the exact number is impossible to determine), froze to death while wandering around in mountains, some ... were captured ... The site of the mass killing of refugees, as well as their corpses, was filmed on videotape when the

Azerbaijani units carried out an operation to evacuate the corpses to Agdam by helicopter. ... Among the corpses filmed on the videotape, the majority were those of women and elderly people; there were also children among those killed. At the same time, there were also people in uniform among those killed. ... Within four days, about 200 corpses were evacuated to Agdam. A few score of corpses bore signs of mutilation. ...

Official representatives of the NKR and members of the Armenian armed forces explained the death of civilians in the zone of the 'free corridor' by the fact that there were armed people fleeing together with the refugees, who were firing at Armenian outposts, thus drawing return fire, as well as by an attempted breakthrough by the main Azerbaijani forces. According to members of the Armenian armed forces, the Azerbaijani forces attempted to battle through from Agdam in the direction of the 'free corridor'. At the moment when the Armenian outposts were fighting off this attack, the first groups of Khojaly refugees approached them from the rear. The armed people who were among the refugees began firing at the Armenian outposts. During the battle, one outpost was destroyed ..., but the fighters from another outpost, of whose existence the Azerbaijanis were unaware, opened fire from a close distance at the people coming from Khojaly. According to testimonies of Khojaly refugees (including those published in the press), the armed people inside the refugee column did exchange gunfire with Armenian outposts, but on each occasion the fire was opened first from the Armenian side. ..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 10 OF THE CONVENTION

63. The applicant complained under Articles 6, 10 and 13 of the Convention that each of his criminal convictions for the statements he had made in the newspaper articles and Internet forums had amounted to an unjustified interference with his right to freedom of expression and that, in this connection, his rights to a fair trial and an effective remedy had also been infringed in the relevant criminal proceedings. Having regard to the circumstances of the case, the Court considers that these complaints fall to be examined solely under Article 10 of the Convention, which reads as follows:
- "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
- A. Admissibility**
64. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.
- B. Merits**
65. The Court notes that the applicant was convicted and sentenced to prison terms in two unrelated sets of criminal proceedings concerning two separate sets of statements made in different publications. Therefore, the Court will examine separately whether there has been a violation of Article 10 in respect of each of the convictions.
1. *First criminal conviction*
- (a) The parties' submissions**
66. The Government submitted that the applicant's conviction in the first set of criminal proceedings had been prescribed by law and had been aimed at protecting the reputation and rights of the plaintiffs.
67. As to the necessity of the interference, the Government submitted that the applicant's conviction had been justified on account of the nature of his statements concerning the Khojaly events, a very sensitive issue for the Azerbaijani people as a whole, and in particular for those who lived and fought in that region. During the events in question, at least 339 inhabitants of

Khojaly, including 43 children and 109 women, had been killed, 371 persons had been taken hostage, 200 had disappeared and 421 had been wounded. The applicant's publications asserted that some of those who had perished had been killed by Azerbaijani fighters and that, moreover, the corpses of the victims had been mutilated by the Azerbaijanis. These statements ran counter to the overwhelming evidence indicating that those acts had been committed by Armenian fighters who had been assisted by the soldiers of the former Soviet 366th Motorised Rifle Regiment stationed in Nagorno-Karabakh. As such, the applicant's statements damaged the reputation of those plaintiffs who were former Khojaly inhabitants and also accused those plaintiffs who had fought in the battle of having committed serious crimes against humanity. The Government maintained that, in making those statements, the applicant had not acted in good faith and had breached the ethics of journalism.

68. In the Government's submission, the applicant's conviction served the purpose of protecting the right to respect for private life of the plaintiffs, which was guaranteed by Article 8 of the Convention. Article 17 of the Convention prevented a person from relying on his or her Convention rights (in the present case, on Article 10) in order to engage in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In that connection, the Government referred to the case of *D.I. v. Germany* (no. 26551/95, Commission decision of 26 June 1996), in which the interference with the applicant's freedom of expression had been found to be compatible with the Convention owing to the nature of his remarks, in which he had denied the existence of gas chambers at Auschwitz. In view of the above, the Government concluded that, similarly, the decisions of the domestic courts in the present case had been based on the striking of a balance between a right protected under Article 8 of the Convention and a right protected under Article 10 of the Convention, and that they had correctly found that the reputation of the survivors of the Khojaly events outweighed the applicant's freedom to impart information of a revisionist nature.
69. The applicant maintained that the domestic courts had failed to provide any reasonable justification for the interference with his freedom of expression.
70. The applicant agreed with the Government
- that the topic of the Khojaly massacre was indeed a very sensitive issue. However, the applicant noted that certain issues concerning the events in question had not been fully investigated. For example, he pointed out that the figures produced by the Government in the present case as to the total number of Khojaly victims were inconsistent with other official government sources, which estimated the number of people killed at 613, including 106 women and 23 children, and the number of people wounded and missing at 487 and 1,257. Some private publications provided different estimates. The applicant also noted that former President Mutalibov, who himself had been accused of failure to defend Khojaly, had implied that some Azerbaijani military units might have been responsible for failing to prevent the high number of civilian casualties. Some Azerbaijani military commanders, including the former Commander of Internal Troops F. Hajiyev, had been either accused or even convicted of failing to organise the proper defence of Khojaly and, thus, to prevent or reduce losses among the civilian population. According to the applicant, the main reason why different sources provided divergent information concerning the exact number of victims and the exact course of events during the fall of Khojaly was that a thorough and conclusive investigation of the events in question from the factual and historical point of view had not yet been completed. Accordingly, the applicant contended that, precisely because the issue was very sensitive and important, a public debate about these events was necessary in order to establish the complete truth and the responsibility of all the culprits of this massacre. Likewise, in connection with these events, there was also a need for a public debate in the context of internal politics in Azerbaijan, as the topic of the Khojaly massacre had been used by former President Mutalibov, the National Front Party and other political forces in their political struggle for power.
71. The applicant noted that "The Karabakh Diary" was an article written in the style of a reportage, in which he had merely conveyed what he had seen himself and what he had heard from the people whom he had met during his visit, and which contained only very brief conclusions of his own on the basis of what he had seen and heard from others. The applicant argued that, in the article, he had merely conveyed the statements of Slavik Arushanyan, who had told the applicant his version of the

events during the interview. The article did not directly accuse any of the plaintiffs or any other specific Azerbaijani national of committing any crime. Likewise, it did not contain any slanderous or humiliating remarks in respect of any specific person and in respect of the people of Khojaly in general.

72. The applicant noted that, in his article, there was no statement asserting that any of the Khojaly victims had been killed or mutilated by Azerbaijani fighters. These specific statements had been made by an unidentified person on the Internet forums of the AzeriTriColor website. The applicant insisted that these statements had not been made by him and that, despite his submissions to this effect before the domestic courts, he had been convicted mainly on the basis of these statements, which had been made by someone else. In any event, the statements did not deny the fact of the "Khojaly tragedy"; they simply made assumptions as to what could possibly have caused it. Even though these assumptions might have been made in the absence of sufficient factual basis, they should have been regarded as recourse to a degree of exaggeration allowed by the freedom of expression.
73. The applicant stressed that, while he had been found to have provided a distorted historical account of the Khojaly events, there was no provision in Azerbaijani law defining any type of liability for having suspicions about the Khojaly massacre or even denying it. Therefore, he could not be held liable on that account. Instead, it had been found that his statements had allegedly defamed the six plaintiffs in his criminal case, even though neither "The Karabakh Diary" nor the Internet forum postings had specifically mentioned any of those persons by name or otherwise.
74. The applicant argued that it was inappropriate and unethical to draw analogies between the present case and *D.I. v. Germany* (cited above). He contended that, since the Khojaly events had not yet received a conclusive legal assessment, it was incorrect to equate them to the Holocaust. There was a difference between a State policy on deliberate murders of prisoners in death camps and the loss of civilians who had fallen victim to military operations during a single battle. In the latter case, it could be argued that the Azerbaijani authorities shared a part of the responsibility for casualties among civilians, as they had not been able to prevent the massacre by the Armenian troops. The ap-

plicant stressed that, in "The Karabakh Diary", he had been far from denying the fact of the massacre and had not attempted to exonerate those responsible. He had simply attempted to convey to the Azerbaijani readers the views of the Armenian population of Nagorno-Karabakh on this subject. The article itself was motivated by good will and constituted an attempt at thawing the relations between the conflicting parties.

75. Lastly, the applicant submitted that his criminal convictions should be viewed in the context of the Government's "aggressive policy" aimed at suppressing the freedom of speech. He noted that the situation in respect of the freedom of expression had seriously deteriorated in recent years and that an increasing number of journalists were being attacked, arrested or convicted. This had been reflected in a number of reports by various international organisations. These persecutions had resulted in self-censorship among a number of critics of the Government. The applicant further claimed that, in his case, by convicting him, the authorities had been primarily driven by the desire to suppress his journalistic activity in general, as his writings constantly criticised the Government's policies and exposed public officials' involvement in corruption and violations of civil and political rights. His ongoing journalistic investigation into the case of E. Huseynov (a journalist assassinated in 2005) had implicated certain high-ranking State officials, and as a result, prior to the events of the present case, he had received threats of arrest and conviction.

(b) The Court's preliminary remarks

76. The discussion in the present judgment of the applicant's statements on the Khojaly events is intended solely for the purposes of the present case, and is made in the context of the Court's review of restrictions on debates of general interest, in so far as relevant for determining whether the national courts of the respondent State overstepped their margin of appreciation in interfering with the applicant's freedom of expression. This judgment is not to be understood as containing any factual or legal assessment of the Khojaly events or any arbitration of historical claims relating to those events.
77. Furthermore, the Court observes that, in connection with his statements in "The Karabakh Diary" and the related statements made in the Internet forum postings, the applicant was held liable in the civil proceedings and was

subsequently convicted on the basis of the same statements in the criminal proceedings. The Court notes, however, that the applicant did not specifically complain under Article 10 about the civil action against him. Therefore, the Court will examine solely the compatibility with Article 10 of the applicant's criminal conviction; however, for the purposes of such examination, it will, where necessary, have regard to the entirety of the factual circumstances surrounding the alleged interference with the applicant's rights.

(c) The Court's assessment

78. The Court considers, and it was not disputed by the Government, that the applicant's conviction by the national courts amounted to an "interference" with his right to freedom of expression. Such interference will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.
79. The applicant's conviction was indisputably based on Articles 147.1 and 147.2 of the Criminal Code and was designed to protect "the reputation or rights of others", namely the group of soldiers and civilian survivors of the Khojaly events who had lodged the criminal complaint against the applicant. Accordingly, the Court accepts that the interference was "prescribed by law" and had a legitimate aim under Article 10 § 2 of the Convention.
80. Consequently, the Court's remaining task is to determine whether the interference was "necessary in a democratic society".
81. At the outset, the Court notes that it cannot accept the Government's reliance on Article 17 of the Convention or their argument that the present case is somehow similar to *D.I. v. Germany* (cited above). The situation in the present case is not the same as situations where the protection of Article 10 is removed by virtue of Article 17 owing to the negation or revision of clearly established historical facts such as the Holocaust (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, 23 September 1998, § 47, *Reports of Judgments and Decisions* 1998-VII). In the present case, the specific issues discussed in "The Karabakh Diary" were the subject of an ongoing debate (see paragraph 87 below). As the Court will discuss further below, it does not appear that the applicant attempted to deny the fact that the mass killings of the Khojaly civilians had taken place or that he expressed contempt for the victims of these events. Rather, the applicant was supporting one of the conflicting opinions in the debate concerning the existence of an escape corridor for the refugees and, based on that, expressing the view that some Azerbaijani fighters might have also borne a share of the responsibility for the massacre. By doing so, however, he did not seek to exonerate those who were commonly accepted to be the culprits of this massacre, to mitigate their respective responsibility or to otherwise approve of their actions. The Court considers that the statements that gave rise to the applicant's conviction did not amount to any activity infringing the essence of the values underlying the Convention or calculated to destroy or restrict the rights and freedoms guaranteed by it. It follows that, in the present case, the applicant's freedom of expression cannot be removed from the protection of Article 10 by virtue of Article 17 of the Convention.
82. The Court reiterates that, as a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of the democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).
83. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicant and the context in which he or she made

them (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 89, ECHR 2004-XI).

84. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient” and whether the measure taken was “proportionate to the legitimate aims pursued”. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI).
85. In the present case, the statements held against the applicant concerned the Khojaly massacre which took place in the course of the war in Nagorno-Karabakh. More specifically, he was found to have baselessly accused Azerbaijani fighters of killing some of the Khojaly victims and mutilating their corpses and, by doing so, to have damaged the reputation of the specific individuals who had lodged a criminal complaint against him.
86. Owing to the fact that the Nagorno-Karabakh war was a fairly recent historical event which resulted in significant loss of human life and created considerable tension in the region and that, despite the ceasefire, the conflict is still ongoing, the Court is aware of the very sensitive nature of the issues discussed in the applicant’s article. The Court is aware that, especially, the memory of the Khojaly victims is cherished in Azerbaijani society and that the loss of hundreds of innocent civilian lives during the Khojaly events is a source of deep national grief and is generally considered within that society to be one of the most tragic moments in the history of the nation. In such circumstances, it is understandable that the statements made by the applicant may have been considered shocking or disturbing by the public. However, the Court reiterates that, subject to paragraph 2 of Article 10, the freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society” (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).
87. Moreover, the Court notes that it is an integral part of freedom of expression to seek historical truth. At the same time, it is not the Court’s role to arbitrate the underlying historical issues which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation (see *Chauvy and Others*, cited above, § 69). The Court accordingly considers that it is not its task to settle the differences in opinions about the historical facts relating to the Khojaly events. Therefore, without aiming to draw any definitive conclusions in that respect, the Court will limit itself to making the following observations, for the purposes of its analysis in the present case. It appears that the reports available from independent sources indicate that at the time of the capture of Khojaly on the night of 25 to 26 February 1992 hundreds of civilians of Azerbaijani ethnic origin were reportedly killed, wounded or taken hostage, during their attempt to flee the captured town, by Armenian fighters attacking the town, who were reportedly assisted by the 366th Motorised Rifle Regiment (see paragraphs 60-62 above). However, apart from this aspect, there appears to be a lack of either clarity or unanimity in respect of certain other aspects and details relating to the Khojaly events. For example, there are conflicting views as to whether a safe escape corridor was provided to the civilians fleeing their town (see, for example, the extracts from the Memorial report in paragraph 62 above). Likewise, there exist various opinions about the role and responsibility of the Azerbaijani authorities and military forces in these events, with some reports suggesting they could have done more to protect the civilians or that their actions could have somehow contributed to the gravity of the situation. Questions have arisen whether the proper defence of the town had been organised and, if not, whether this was the result of a domestic political struggle in Azerbaijan. Having regard to the above, the Court considers that various matters related to the Khojaly events still appear to be open to ongoing debate among historians, and as such should be a matter of general interest in modern Azerbaijani society. In this connection, the Court also reiterates that it is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely (see, *mutatis mutandis*, *Lehideux and Isorni*, cited above, § § 54-55).

88. Another factor of particular importance for the Court's determination of the present case is the vital role of "public watchdog" which the press performs in a democratic society (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II). Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on political issues and on other matters of general interest (see, among many other authorities, *De Haes and Gijssels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I, and *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V).
89. The Court will first assess the statements made by the applicant in "The Karabakh Diary", and thereafter proceed to assess the Internet forum postings attributed to the applicant. As to "The Karabakh Diary", it is necessary to first have regard to the general context and aim of this newspaper article. Having examined the article, the Court considers that it was written in a generally descriptive style and had the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. This, in itself, constituted a matter of general interest, as there was not much information of this type available to average members of the public in the circumstances of the ongoing conflict and the public were entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. It also appears that the author attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides of the conflict. It was in this context that the statements which were ultimately held against the applicant were made.
90. Having regard to the passages containing the statements held against the applicant (see paragraph 12 above), it is generally not very easy to differentiate the reported speech attributable to other persons from the remarks directly constituting the author's own point of view. Specifically, the applicant stated that the forces attacking Khojaly had left a corridor for the civilians to escape. He further noted that, while they had been using this corridor for this purpose, some of them had been led by Azerbaijani soldiers in another direction where other Armenian units were located. He also stated that the remainder of the escaping refugees were hit by artillery fire from the Azerbaijani side. It appears that these were not the applicant's own views, but that he was reporting what he had heard from other persons (some unnamed Khojaly refugees whom he had allegedly met earlier, and a representative of the Nagorno-Karabakh Armenians). While he reported the statements of these interviewees, it does not necessarily mean that he did so with the aim of proving the truth of what was asserted in those statements; rather, he merely conveyed other persons' opinions. However, it can be argued that, as the topic progressed, the author began mingling his own opinions with those of his sources, as is evidenced by phrases like "I can say, fully convinced, that...". Here, he accepted that a corridor indeed existed and introduced a novel suggestion that "it appears that the NFA battalions strived not for the liberation of the Khojaly civilians but for more bloodshed on their way to overthrow A. Mutalibov". However, this statement, whether taken alone or in conjunction with the earlier statements, left much room for speculation as to what specifically the "NFA battalions" had done to contribute to "more bloodshed", and did not contain any specific allegations as to any acts they had carried out to this end.
91. It must be noted in this context that it may appear that the narration in the impugned portion of the article was rather erratic, as a result of which many statements appear to be elusive, incomplete or even lacking a logical connection with one another. It is at times difficult to follow the author's train of thought and what specifically he meant to say, especially for a reader who is not very familiar with the various intricacies of the topic under discussion. For example, after the statement that part of the refugees were led by the Azerbaijani soldiers in the direction of Nakhichevanik, the narration immediately jumps to discussing the other group of refugees, so it does not clearly transpire what happened to the first group next. It might have been implied that, having been led in another direction (whether deliberately or not), the refugees had been unable to escape through the designated corridor, but came under enemy fire after they had approached unrelated enemy units which were located near Nakhichevanik, while the other group walked into friendly fire (whether deliberate or not). But none of the above was unambiguously stated, and other interpretations are also possible. As demonstrated by this example, the statements made and conclusions reached in the article were rather scant, vague, unclearly worded and open-ended.

The Court notes that “The Karabakh Diary” did not constitute a piece of investigative journalism focusing specifically on the Khojaly events and considers that the applicant’s statements about these events were made rather in passing, parallel to the main theme of the article. In this context, based on quite limited information sources, the applicant advanced rather unclearly worded ideas to the effect that certain Azerbaijani units had been partly responsible for the plight of the Khojaly victims.

92. Accordingly, although the article contained remarks that some of the Azerbaijani military units (referred to as “NFA battalions”) had, to a certain degree, shared responsibility with the perpetrators of the mass killings, it did not contain any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians, as such. As the role and responsibility of the Azerbaijani authorities in either failing to prevent or contributing to the Khojaly events is the subject of ongoing debate (see paragraph 87 above), the applicant as a journalist had a right under Article 10 to impart ideas concerning this matter. The Court notes, in this connection, that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see, among other authorities, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Even assuming that, in view of the possible scarcity or questionable nature of the applicant’s information sources, his remarks in “The Karabakh Diary” concerning the responsibility of some of the Azerbaijani defenders of Khojaly might have been exaggerated, they nevertheless fell well short of directly and specifically accusing them of committing any war crimes.
93. As to the remarks made in postings on the Internet forum of the AzeriTriColor website which were attributed to the applicant, the Court notes that the applicant denied making them. Nevertheless, having regard to the entirety of the evidence examined by the domestic courts in order to determine the applicant’s authorship of these postings, the Court notes that it appears to be quite convincing. In such circumstances, the Court will accept that the applicant’s authorship of these statements had been proved beyond reasonable doubt.
94. The following specific statements were made in the forum postings: “... part of the Khojaly inhabitants had been fired upon by our own

[troops]... Whether it was done intentionally or not is to be determined by investigators ... [They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions ... [The corpses] had been mutilated by our own ...”. The Court considers that these assertions were very specific in that they accused unidentified “provocateurs” from “NFA battalions” of shooting at their own civilians and mutilating their bodies. The Court notes that the author has not supported these statements with any evidence and has not relied on any specific sources. These statements contained assertions which were different from those made in “The Karabakh Diary”, in that they accused some Azerbaijani fighters of killing some of the victims (although perhaps not intentionally), and of deliberately mutilating the corpses of victims. As such, they were not of the same nature as mere hypothesising, as in “The Karabakh Diary”, about Azerbaijani soldiers’ possible responsibility for failure to prevent large-scale bloodshed, based on the sourced information that an escape corridor had existed and that the refugees had been prevented from using it. In respect of these Internet forum postings, the applicant has not claimed that either the Khojaly refugees or the Armenian officials interviewed by him, who were his primary sources in “The Karabakh Diary”, had ever specifically accused the Azerbaijani military of mutilating the corpses of their own civilians. In such circumstances, it could be argued that the statements made in the Internet forum postings could not be taken as an example of the “degree of exaggeration” or “provocation” permissible in the exercise of journalistic freedom.

95. In this regard, the Court reiterates that the exercise of freedom of expression carries with it duties and responsibilities, and the safeguard afforded by Article 10 to journalists is subject to the condition that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, *Radio France and Others v. France*, no. 53984/00, § 37, ECHR 2004-II, and *Colombani and Others*, cited above, § 65). In the present case, it is not clear whether the applicant intended to post these statements in his capacity as a journalist providing information to the public, or whether he simply expressed his personal opinions as an ordinary citizen in the course of an Internet debate. Nevertheless, it is clear that, by posting under the username “Eynulla Fatul-

layev”, the applicant, being a popular journalist, did not hide his identity and that he publicly disseminated his statements by posting them on a freely accessible popular Internet forum, a medium which in modern times has no less powerful an effect than the print media. The disseminated statements did not constitute value judgments, but were of a specific factual nature. While the truth of value judgments is not susceptible to proof, the existence of facts can be demonstrated (see *De Haes and Gijssels*, cited above, § 42). Moreover, directly accusing specific individuals of a specific form of misconduct entails an obligation to provide a sufficient factual basis for such an assertion (see, *mutatis mutandis*, *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04 35877/04, § 45, 18 December 2008).

96. However, the Court considers that, in the circumstances of the present case, it is not required to reach any definitive conclusions as to whether the above statements were supported by a sufficient factual basis or whether they were objectively true or false, for the following reasons. The Court stresses that the applicant was not convicted merely for having disseminated the above statements. Indeed, he was not held liable for the act of, *per se*, disseminating allegedly revisionist statements concerning historical events. Rather, the interference complained of in the present case took the form of a criminal conviction based on a finding that the statements disseminated by the applicant defamed specific individuals. Therefore, having accepted that the statements in the Internet forum postings were attributable to the applicant and that they were false or unverified, it is necessary to determine whether the domestic courts provided sufficient and relevant reasons for finding that those statements damaged the reputation of those specific individuals.
97. The individuals in question were four Khojaly refugees and two former soldiers who participated in the criminal proceedings in the capacity of private prosecutors. They claimed that the statements made by the applicant were slanderous and tarnished their honour and dignity. Moreover, the two former soldiers claimed that, by stating that the Azerbaijani soldiers had killed civilians and mutilated their corpses, the applicant had directly and falsely accused them personally of having committed grave crimes.
98. As to the alleged defamation of the Khojaly refugees, the Court considers that there was nothing in “The Karabakh Diary” or the Internet forum postings to suggest that the applicant aimed to deny the fact of the mass killing of the civilians or exculpate any suspected actual perpetrators, be they Armenian fighters, personnel of the 366th Regiment or any other individuals or military units. None of the impugned statements could be interpreted as doubting the gravity of the suffering inflicted on the Khojaly victims. While the author blamed the “NFA battalions” of having shot at some of the refugees and mutilated victims’ bodies, it cannot be said that this assertion was calculated to humiliate or debase the victims of the Khojaly events or to somehow imply that their fate was less unfortunate. On the contrary, the applicant expressed feelings of grief and deep sorrow for the plight of the victims and the survivors of what he referred to as the “Khojaly tragedy”. For these reasons, the Court cannot agree with the domestic courts’ finding that the article contained any statements undermining the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors who were Khojaly refugees.
99. As to the alleged false accusation that the remaining two private prosecutors had committed grave crimes, the Court notes that the applicant did indeed make accusatory statements in respect of unidentified “provocateurs” from “NFA battalions”. Even assuming that these assertions lacked a sufficient factual basis, the Court notes, firstly, that it is clear that these statements did not appear to implicate the entire Azerbaijani army or all of the Azerbaijani military units who fought in the region during the war or even all of those who participated in the defence of Khojaly during the battle of 25 to 26 February 1992. The statements appeared to concern only a part of the town’s defenders, referred to as “NFA battalions”. Secondly, the Court notes that these statements did not accuse any specific individuals by identifying them by name or otherwise. In particular, neither of the two private prosecutors who claimed to have fought in the Khojaly battle was named or otherwise identified either in “The Karabakh Diary” or in the Internet forum postings. No reasoning was advanced by the plaintiffs or by the domestic courts to show that these two individuals could be somehow identified as, or considered otherwise representative of, the “provocateurs” implicated in the applicant’s statements. In such circumstances, the Court considers that it has not been convincingly established that

the applicant's statements directly accused the two plaintiffs of having personally committed grave crimes.

100. Having regard to the above, the Court considers that, although "The Karabakh Diary" might have contained certain exaggerated or provocative assertions, the author did not cross the limits of journalistic freedom in performing his duty to impart information on matters of general interest. On the other hand, while certain assertions in the Internet forum postings attributed to the applicant might have arguably lacked sufficient factual basis, it was not convincingly shown that they were defamatory in respect of the specific individuals acting as private prosecutors in the applicant's case. In such circumstances, the Court finds that the reasons given by the domestic courts in support of the applicant's conviction cannot be regarded as relevant and sufficient and that, therefore, his conviction on charges of defamation did not meet a "pressing social need".
101. Moreover, in any event, even assuming that the interference met a "pressing social need", the Court considers that the requirement of proportionality was not satisfied in the present case.
102. The Court reiterates that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Skalka v. Poland*, no. 43425/98 43425/98, § § 41-42, 27 May 2003; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 93, ECHR 2004-XI). The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Cumpănă and Mazăre*, cited above, § 111). Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations (see *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-XII), they must not do so in a manner that unduly deters the media from fulfilling their role of informing the public on matters of general public interest. Investigative journalists are liable to be inhibited from reporting on matters of general interest if

they run the risk, as one of the standard sanctions impossible for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment. A fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression (see *Mahmudov and Agazade*, cited above, § 49).

103. In the instant case, the applicant was sentenced to two years and six months' imprisonment. This sanction was undoubtedly very severe, especially considering that the applicant had already been sued for the exact same statements in the civil proceedings and, as a consequence, had paid a substantial amount in damages. The Court reiterates that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence (*ibid.*, § 50; see also *Cumpănă and Mazăre*, cited above, § 115). The Court considers that the circumstances of the instant case disclose no justification for the imposition of a prison sentence on the applicant.
104. In view of the above, the Court finds that the interference with the applicant's exercise of his right to freedom of expression cannot be considered "necessary in a democratic society".
105. There has accordingly been a violation of Article 10 of the Convention in respect of the applicant's first criminal conviction.

2. Second criminal conviction

(a) The parties' submissions

106. The Government submitted that the applicant's conviction in the second set of criminal proceedings had also been prescribed by law and justified by "the interests of public safety".
107. The Government agreed with the domestic courts' assessment of the statements made by the applicant in "The Aliyevs Go to War". They noted that this article, which concerned possible attacks on various facilities in Azerbaijan, had appeared at a time of rising tension between Iran and a number of other members of the international community, which had led to widespread reports about possible military operations against Iran, Azerbaijan's geographical neighbour. In that context, the applicant had

- published a number of unverified and inaccurate statements of fact. He had failed to comply with the duties and responsibilities which went hand in hand with journalistic freedom and had failed to act in good faith and in compliance with the ethics of journalism in order to provide accurate and reliable information. The information published by the applicant had been obtained from various, sometimes unidentified, sources which the applicant had not verified by independent research.
108. For the above reasons, the Government concluded that the domestic courts' decisions had been based on striking a balance between the interests of public safety and the applicant's right protected by Article 10.
109. The applicant observed that the Government's submissions concerning this part of the complaint were "superficial and perfunctory", in the light of the seriousness of the offences of which he had been convicted as a result of merely publishing an analytical article.
110. The applicant submitted that, indeed, at the time when the article had been published there had been tension in the region as a result of the deterioration in US-Iranian relations. The worsening relations between Iran and the US and the probability of a war between these States were not the product of the applicant's imagination; they could be deduced from numerous statements by high-ranking US and Iranian officials and politicians, including the Presidents of those States. In their interviews at the time, Iranian officials had unambiguously stated that, in the event of a US attack on Iran, various facilities in Azerbaijan would be subject to an Iranian counter-attack.
111. "The Aliyevs Go to War" was analytical in nature and derived information from many other articles concerning this matter, published in various media outlets. The applicant noted that the subject matter of the article was clearly a matter of public concern. The fact that Azerbaijan was an active member of the US-led "anti-terrorism" coalition and had already sent peacekeeping forces to Iraq and Afghanistan reinforced the probability of Azerbaijan's involvement in the US-Iranian war, if it were to take place. The applicant noted that "hundreds of similar articles", reflecting opinions and conclusions concerning the possibility of an attack on Azerbaijan, had been published both before and after the publication of his article. In support of this, the applicant submitted several articles published by local and foreign print media and on Internet news sites in 2006 and 2007 (including *Zerkalo*, *Nash Vek*, *Russian Newsweek*, *Moscow News* and *Kavkazskiy Uzel*). All of these articles discussed Azerbaijan's geopolitical role in the context of US-Iranian relations and, on the basis of several remarks by Iranian officials, speculated that, in the event of a US-Iranian war, it was likely that Azerbaijan would also be involved and that Iran could even attack certain strategic facilities in Azerbaijani territory, such as petroleum and gas pipelines and airports.
112. Moreover, the applicant noted that his article had merely criticised the political decisions of the Government, including the authorities' personnel policies in the southern region of the country, and had suggested that, by appointing officials from outside the region to governing posts, the central authorities were alienating the region's local population, consisting largely of the Talysh minority. The article touched upon the difficult social and economic situation in this region which, coupled with potential separatist tendencies, were relevant considerations in the context of a possible war with neighbouring Iran. The applicant maintained that the publication of this article had been the result of his obligation to provide the newspaper's readers with comprehensive information about the events taking place in the country and in the region.
113. The applicant noted that he had been convicted under Articles 214.1 and 283 of the Criminal Code, despite the fact that he had committed none of the acts proscribed by those provisions. He had neither been involved in any terrorist activities, nor had he incited ethnic hostility. He had not aimed to create fear among the population or exert pressure on State authorities by committing or threatening to commit terrorist acts. He had merely published an analysis of possible future events, based on the information he had obtained from numerous other sources. The applicant also noted that the charges of tax evasion against him had been fabricated and that this should also be regarded as an interference with his freedom of expression.
114. The applicant reiterated that the actual, underlying reason for his conviction was his journalistic activity in general, as he was a harsh critic of the Government's policies, corruption and violations of citizens' civil and political rights.

(b) The Court's assessment

115. The applicant's conviction for publication of the second article indisputably amounted to an interference with the exercise of his right to freedom of expression. The Court accepts that this interference was prescribed by law; in particular, by Articles 214.1 and 283.2.2 of the Criminal Code. For the purposes of the following analysis, the Court will also accept the Government's submission that the interference pursued the legitimate aim of maintaining public safety. Accordingly, it remains to be determined whether the interference was "necessary in a democratic society".

116. In this connection, the Court reiterates the general principles on the necessity of restrictions on the freedom of expression and its own task in exercising its supervisory function under Article 10 § 2 of the Convention (see paragraphs 82-84 above), as well as the general principles concerning the role of the press in a democratic society (see paragraph 88 above). Specifically, the Court again stresses that there is little scope under Article 10 § 2 for restrictions on political speech or on debate on questions of public interest. The Court also reiterates that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings when replying even to the unjustified attacks and criticisms of its adversaries, particularly where other means are available (see *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV). Furthermore, where a publication cannot be categorised as inciting to violence or instigating ethnic hatred, Contracting States cannot restrict, with reference to maintaining public order and safety, the right of the public to be informed of matters of general interest, by bringing the weight of the criminal law to bear on the media (see *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999, and *Erdogdu v. Turkey*, no. 25723/94, § 71, ECHR 2000-VI).

117. The Court notes that "The Aliyevs Go to War" was an analytical article focusing on Azerbaijan's specific role in the greater picture of the dynamics of international politics relating to US-Iranian relations, which were relevant at the time of the publication of the article. As such,

the publication was part of a political debate on a matter of general and public concern. The Court notes in this connection that it has been its constant approach to require very strong reasons for justifying restrictions on political speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII, and *Karman v. Russia*, no. 29372/02, § 36, 14 December 2006).

118. The Court observes, more specifically, that the applicant criticised the foreign and domestic political moves made by the Azerbaijani Government, noting that the country's continued close alliance with the US was likely to lead to Azerbaijan's involvement in a possible US-Iranian war, which at the time of the publication in question appeared to be a hot topic of the day and was seriously discussed by various analysts as a probable scenario in which a confrontation between the US and Iran could develop. The author further proposed a hypothetical scenario of such a war, according to which Iran would respond by bombing a number of facilities on the territory of Azerbaijan, which was allegedly considered by Iran to be one of the allies of the US in the region. The Court notes that, indeed, the applicant was not the only one to comment on the probability of this scenario, as a number of other media sources had also suggested during that period that, in the event of a war, Azerbaijan was also likely to be involved and, referring to specific statements by Iranian officials, speculated about possible specific targets for Iranian attacks, including the Baku-Tbilisi-Ceyhan pipeline and various government facilities.

119. Arguably, the list of such "targets" provided by the applicant was longer and more detailed. However, in the Court's view, even assuming that the applicant's sources concerning the alleged existence of such a "target list" had not been fully verified, the fact that the applicant published this list, in itself, neither increased nor decreased the chances of a hypothetical Iranian attack. Moreover, it has never been claimed by the domestic authorities that, by publishing this list, the applicant revealed any State secrets or undermined any efforts of the national military defence authorities. In the context of the article as a whole, the inclusion of this "target list" could be construed simply as an attempt to convey to the readers a more dramatic picture of the specific consequences

of the country's possible involvement in a possible future war.

120. In this connection, the Court cannot accept the Government's argument that the applicant failed to support his "statements of fact" with references to reliable sources. Firstly, as mentioned above, similar statements had been made in numerous other publications. Secondly, the applicant's article contained the applicant's opinions about hypothetical scenarios of possible future events and, as such, those opinions were not susceptible of proof. Any opinions about future events involve, by their nature, a high degree of speculation. Whether the scenarios proposed by the applicant were likely or unlikely to happen was a matter of public debate, and any reasonable reader could be expected to understand the hypothetical nature of the applicant's remarks about the possible course of events in a future war.
121. The Court observes that the scope of the interference in the present case appeared to extend to the publication in its entirety. In particular, the domestic courts found *inter alia* that, by criticising Azerbaijan's support for the "anti-Iranian" UN resolution and writing about the possibility of Iran bombing certain targets in Azerbaijan, the applicant had committed the offence of threat of terrorism under Article 214.1 of the Criminal Code. The Court notes that it is not for it to rule on the constituent elements of the offences under domestic law of terrorism and threat of terrorism, by reviewing whether the *corpus delicti* of "threat of terrorism" actually arose from the applicant's actions. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, *Lehideux and Isorni*, cited above, § 50). The Court's task is merely to review under Article 10 the decisions they delivered pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see paragraph 84 above; see also *Incal*, cited above, § 48).
122. Having regard to the domestic courts' assessment of the facts, the Court notes that, based on a few (seemingly random) persons' testimonies, they found that the applicant's statements were aimed at "frightening the population" and had created panic among the public. In this regard, the Court reiterates that the freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (see paragraph 86 above). It was the applicant's task, as a journalist, to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government. The Court considers that, in doing so, he did not overstep any bounds set by Article 10 § 2 of the Convention.
123. Furthermore, the Court notes that the domestic courts characterised the applicant's statements as threatening the Government with destruction of public property and with acts endangering human life, with the aim of exerting influence on the Government to refrain from taking political decisions required by national interests. However, having regard to the circumstances of the case, the Court cannot but conclude that the domestic courts' finding that the applicant threatened the State with terrorist acts was nothing but arbitrary. The applicant, as a journalist and a private individual, clearly was not in a position to influence any of the hypothetical events discussed in the article and could not exercise any degree of control over any possible decisions by the Iranian authorities to attack any facilities in Azerbaijani territory. Neither did the applicant voice any approval of any such possible attacks, or argue in favour of them. As noted above, the Court considers that the article had the aim of informing the public of possible consequences (however likely or unlikely they might seem) of the Government's foreign policy and, more specifically, criticising the latter for making certain decisions, such as supporting the "anti-Iranian" UN Security Council Resolution. However, there is nothing in the article to suggest that the applicant's statements were aimed at threatening or "exerting influence" on the Government by any illegal means. In fact, the only means by which the applicant could be said to have "exerted influence" on the State authorities in the present case was by exercising his freedom of expression, in compliance with the bounds set by Article 10, and voicing his disagreement with the authorities' political decisions, as part of a public debate which should take place freely in any democratic society.
124. In view of the above, the Court finds that the domestic courts arbitrarily applied the criminal provisions on terrorism in the present case. Such arbitrary interference with the freedom of expression, which is one of the fundamental

freedoms serving as the foundation of a democratic society, should not take place in a state governed by the rule of law.

125. Similarly, the Court is not convinced by the reasons advanced by the domestic courts to justify the applicant's conviction under Article 283.2.2 of the Criminal Code. It notes that, in the context of discussing the Government's policies in connection with relations with the US and Iran, the applicant voiced an opinion that these policies, coupled with the central authorities' alleged mistakes in domestic administration, could result in political unrest among the inhabitants of the country's southern regions. The author mentioned that those regions faced a number of social and economic problems, such as unemployment and rising drug use. He also noted that the local population had expressed discontent with the central authorities' tendency to appoint people from outside the region to official positions within the regional administration.
126. In the Court's view, the above issues raised in the relevant passages of the applicant's article could be considered a matter of legitimate public concern which the applicant was entitled to bring to the public's attention through the press. The mere fact that he discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions cannot be regarded as incitement to ethnic hostility. Although the relevant passages may have contained certain categorical and acerbic opinions and a certain degree of exaggeration in criticising the central authorities' alleged treatment of the Talysh minority, the Court considers nevertheless that they contained no hate speech and could not be said to encourage inter-ethnic violence or to disparage any ethnic group in any way.
127. Having regard to the above, the Court finds that the domestic courts failed to provide any relevant reasons for the applicant's conviction on charges of threat of terrorism and incitement to ethnic hostility.
128. The Court also considers that the gravity of the interference in the present case is exacerbated by the particular severity of the penalties imposed on the applicant. Specifically, he was sentenced to eight years' imprisonment on the charge of threat of terrorism and to three years' imprisonment on the charge of incitement to ethnic hostility, which resulted, together with

previous sentences, in a merged sentence of eight years and six months' imprisonment. The circumstances of the case disclose no justification for the imposition of a prison sentence on the applicant. The Court considers that both the applicant's conviction and the particularly severe sanction imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression in Azerbaijan and dissuading the press from openly discussing matters of public concern.

129. In sum, the Court considers that the domestic courts overstepped the margin of appreciation afforded to them for restrictions on debates on matters of public interest. The applicant's conviction did not meet a "pressing social need" and was grossly disproportionate to any legitimate aims invoked. It follows that the interference was not "necessary in a democratic society".
130. In view of this finding, the Court considers it unnecessary to examine whether the applicant's conviction for a tax offence could also be linked to the interference with his freedom of expression.
131. There has accordingly been a violation of Article 10 of the Convention in respect of the applicant's second criminal conviction.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

132. Firstly, the applicant complained that, in the first set of criminal proceedings, he had not received a fair hearing by an impartial tribunal, because Judge I. Ismayilov, who had heard the criminal case, was the same judge who had previously examined the civil action against him. Secondly, he complained that he had not been tried by a "tribunal established by law", because the term of office of the Yasamal District Court judges had expired prior to his trial, and that, in both sets of criminal proceedings, the domestic courts were not independent from the executive. Article 6 § 1 of the Convention provides as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial

tribunal established by law.”

A. “Impartial tribunal”

1. *The parties’ submissions*

133. The Government submitted that the fact that the same judge had examined a civil claim against a person and later examined a criminal case against that same person did not, in itself, lead to the conclusion that the judge was not independent and impartial.

134. The applicant submitted that the judge who had already examined specific allegations against him in the context of a civil action could not have an impartial position when examining the same allegations in subsequent criminal proceedings. The applicant maintained that, in the criminal proceedings, Judge Ismayilov had routinely rejected his “lawful requests” and had “by all possible means defended” the position of the private prosecutors.

2. *The Court’s assessment*

135. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

136. The Court further reiterates that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Fey v. Austria*, 24 February 1993, § 28, Series A no. 255-A). As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). The mere fact that the judge rejected all or most of the applicant’s requests does not constitute such proof. Accordingly, the objective test should be applied in the present case.

137. Under the objective test, it must be determined whether, quite apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, in the accused. This implies that in deciding whether in

a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Fey*, cited above, § 30).

138. The Court notes, *inter alia*, that the nature of liability under civil law is different from that under criminal law, that different standards of proof apply in civil and criminal cases, that a criminal conviction does not preclude a finding of civil liability arising from the same facts and that, conversely, the existence of civil liability does not necessarily entail a finding of guilt under criminal law in respect of the same actions by the defendant. For these reasons, the Court considers that a situation where the same judge examines the questions of both civil liability and criminal liability arising from the same facts does not necessarily affect the judge’s impartiality. Nevertheless, the Court notes that whether the accused’s fear of a lack of impartiality can be considered to be objectively justified depends on the special features of each particular case (see *Hauschildt*, cited above, § 49).

139. The Court considers that, in the assessment of the special features of the present case, importance should be attached to the fact that the proceedings in question concerned alleged defamation of private individuals. Owing to this specific subject matter of the proceedings, the present case is not necessarily comparable to other situations where both criminal and civil liability may arise from the same facts. The Court further notes that the applicant’s fear of a lack of impartiality was based on the fact that Judge Ismayilov dealt with the questions of his civil and criminal liability not simultaneously, but in two separate sets of proceedings, with the civil case preceding the criminal case. The Court notes that both sets of proceedings concerned exactly the same set of allegedly defamatory statements made by the applicant. Ms Chaladze was the plaintiff in the first set of proceedings, while in the second set of proceedings she was a representative of several Khojaly refugees acting as private prosecutors. She made essentially the same submissions in both sets of proceedings. In each set of proceedings, in order to determine whether the applicant was liable under either the civil or criminal law on defamation, the judge had to satisfy himself, *inter alia*, that the statements made by the applicant were “false” (or unproven) and that, as such, they tarnished the dignity

of the survivors of the Khojaly events. In doing so, the judge was called upon to assess essentially the same or similar evidentiary material. It appears that, under criminal law on defamation, the judge had to additionally establish the element of criminal intent by determining whether the applicant “knowingly” disseminated defamatory statements (see paragraph 47 above). Nevertheless, the Court considers that, having decided the civil case against the applicant, the judge had already given an assessment to the applicant’s statements and reached a conclusion that they constituted false information tarnishing the dignity of Khojaly survivors. In such circumstances, where the applicant was subsequently prosecuted under criminal law on defamation, doubts could be raised as to the appearance of impartiality of the judge who had already pronounced his opinion concerning the same allegedly defamatory statements made by the applicant. Accordingly, the Court considers that, in the light of the special features of this particular case, the applicant’s fear of the judge’s lack of impartiality could be considered as objectively justified.

140. There has accordingly been a violation of Article 6 § 1 of the Convention in this respect.

B. “Independent ... tribunal established by law”

1. *The parties’ submissions*

141. The Government noted that Judge Ismayilov had indeed been appointed on 2 September 2000 for a five-year term. Under the Law on Courts and Judges, effective at the material time, his term had been due to expire on 3 September 2005. However, Law No. 817-IIQD of 28 December 2004, which entered into force on 30 January 2005, had introduced amendments to the Law on Courts and Judges which concerned, *inter alia*, new provisions regulating the procedure for selection and appointment of judges and their terms of office. In accordance with the Transitional Provisions of the Law No. 817-IIQD, the terms of office of all judges appointed before 1 January 2005 had been extended until the date on which new judges were appointed to the relevant courts pursuant to the new amendments to the Law on Courts and Judges. New judges had been appointed to the Yasamal District Court on 28 July 2007. Until that date, the old judges of the court, including Judge Ismayilov, had carried out their judicial functions in accordance with

Law No. 817-IIQD. Therefore, the applicant’s case had been heard by a “tribunal established by law”.

142. Lastly, the Government submitted that the applicant’s allegations concerning the domestic courts’ lack of independence were unsubstantiated.

143. The applicant reiterated his complaints. He also challenged the “quality” of Law No. 817-IIQD. He noted that, coupled with the enactment of the new Law on the Judicial Legal Council, which had given the Judicial Legal Council substantial powers in the process of selecting judges, the Transitional Provisions of Law No. 817-IIQD made the judges “fully dependent on the Judicial Legal Council”, because their subsequent reappointment depended on the latter.

2. *The Court’s assessment*

144. The Court reiterates that the object of the term “established by law” in Article 6 of the Convention is to ensure “that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament” (see *Gurov v. Moldova*, no. 36455/02, § 34, 11 July 2006). The phrase “established by law” covers not only the legal basis for the very existence of a “tribunal” but also the composition of the bench in each case (see *Posokhov v. Russia*, no. 63486/00 63486/00, § 39, ECHR 2003-IV).

145. The Court notes that, in the present case, Law No. 817-IIQD introduced amendments to the domestic law regulating, *inter alia*, the procedure of appointment and terms of office of judges. During the period of transition to this reformed system and pending the finalisation of new appointment procedures, the terms of office of all judges appointed prior to 1 January 2005 were extended in accordance with the Transitional Provisions of Law No. 817-IIQD, ostensibly with the purpose of ensuring the uninterrupted functioning of the judicial system. Thus, the term of office of Judge Ismayilov had been extended by virtue of a parliamentary enactment before the date when it was due to expire under the law effective prior to the reform and, contrary to what the applicant claimed, did not expire until 28 July 2007, well after the examination of the applicant’s case in the Yasamal District Court had been completed. Accordingly, in view of the fact that the extension of Judge Ismayilov’s term of office had been necessitated by the transition to new

rules on the appointment and terms of office of judges, that he had initially been appointed in accordance with all the requirements of the Law on Courts and Judges (contrast *Posokhov*, cited above, § 43, and *Fedotova v. Russia*, no. 73225/01 73225/01, § § 41-42, 13 April 2006), and that the extension of his term of office was regulated by a law emanating from Parliament (contrast *Gurov*, cited above, § 37), the Court considers that the applicant was tried by a “tribunal established by law”.

146. In so far as the applicant claimed that the extension of the judges' terms of office for an indefinite “transitional” period compromised their independence *vis-à-vis* the executive authorities (whose representatives formed part of the Judicial Legal Council, vested with the task of selecting candidates for judicial office) during that period, the Court notes that the applicant appeared to be suggesting that certain executive authorities (which the applicant failed to identify precisely) were somehow interested in having him convicted and, therefore, had unduly influenced Judge Ismayilov, whose independence was allegedly compromised following the enactment of Law No. 817-IQD. However, the Court notes that the first set of criminal proceedings against the applicant was instituted not by the State, but by private persons under the private prosecution procedure. In any event, the Court notes that the material in its possession does not contain sufficient evidence in support of the applicant's allegations of undue pressure being exerted on the domestic courts by the executive authorities. Likewise, there is insufficient evidence of the alleged lack of independence of the domestic courts in the second set of criminal proceedings.
147. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

148. The applicant complained that the statement made by the Prosecutor General to the press on 31 May 2007 (see paragraphs 36 and 37 above) amounted to an infringement of his right to the presumption of innocence secured in Article 6 § 2 of the Convention, which provides as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

A. Admissibility

1. *The parties' submissions*

149. The Government submitted that the applicant had not exhausted all the available domestic remedies in respect of this complaint. Firstly, they noted that, pursuant to Articles 449-451 of the CCrP, the applicant could have lodged with the supervising court a complaint concerning the “procedural steps or decisions of the prosecuting authority”, whereby he could have challenged the Prosecutor General's statements to the press. Secondly, the applicant could have alleged a violation of his presumption of innocence by bringing a separate court action under Article 147 of the Criminal Code or Chapter 27 of the CCP.
150. The applicant submitted that the remedies mentioned by the Government were ineffective.

2. *The Court's assessment*

151. The Court reiterates that the purpose of the domestic-remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those that relate to the breaches alleged and that, at the same time, are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198). The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. This rule is neither absolute nor capable of being applied automatically. For the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others v. Turkey*, 16 Septem-

ber 1996, § 69, *Reports* 1996-IV).

152. As to the Government's argument that the applicant had failed to make use of the procedure specified in Articles 449-451 of the CCrP, the Court notes that the relevant provisions concern the possibility of lodging a complaint against "procedural steps or decisions" of the prosecuting authorities. In the present case, the impugned statements were made by the Prosecutor General not in the context of the criminal proceedings themselves, but by way of a statement to the press. Therefore, the Court is not convinced that this statement to the press constituted a "procedural step" or "procedural decision" taken in the context of the relevant criminal proceedings, and the Government have not demonstrated by any evidence (such as court decisions in similar cases) that it qualified as such within the meaning of Articles 449-451 of the CCrP.

153. Likewise, the Court is not convinced by the Government's argument that the applicant had failed either to institute separate criminal proceedings accusing the Prosecutor General of defamation under Article 147 of the Criminal Code, or to bring a separate civil lawsuit complaining of a violation of his rights and obligations. The Court notes that, in the present case, the applicant specifically complained to the first-instance and higher courts about the Prosecutor General's statements and alleged a violation of his right under Article 6 § 2 of the Convention. His complaints under the Convention were summarily rejected. In this connection, the Court reiterates that an individual is not required to try more than one avenue of redress when there are several available. It is for the applicant to select the legal remedy that is most appropriate in the circumstances of the case (see, among other authorities, *Airey v. Ireland*, 9 October 1979, § 23, Series A no. 32, and *Boicenco v. Moldova*, no. 41088/05, § 80, 11 July 2006). The Government have not contested the effectiveness of the avenue of redress which the applicant tried in the present case, namely raising the issue of the presumption of innocence before the courts called upon to determine the criminal charges against him. Even assuming that the remedies suggested by the Government were capable of providing adequate redress, the Court considers that, having raised the issue of the presumption of innocence in the context of the criminal proceedings in question, the applicant should not be required to embark on another attempt to obtain redress by lodging a separate defama-

tion claim under criminal law or bringing a civil action for damages (see, *mutatis mutandis*, *Hajibeyli v. Azerbaijan*, no. 16528/05, § 43, 10 July 2008).

154. For these reasons, the Court dismisses the Government's objections as to the exhaustion of domestic remedies.

155. Moreover, the Court notes that Article 6 § 2 applies to persons "charged with a criminal offence". At the time of the Prosecutor General's interview to the press of 31 May 2007, the criminal investigation under Article 214.1 of the Criminal Code had already been instituted by the MNS on 16 May 2007, and the applicant had been transferred to the MNS detention facility on 29 May 2007 pending the Sabail District Court's decision to remand him in custody. Although the applicant had not been formally indicted until 3 July 2007, his transfer to the MNS detention facility formed part of the investigation commenced on 16 May 2007 by the investigation department of the MNS and thus made him a person "charged with a criminal offence" within the meaning of Article 6 § 2. The Prosecutor General's remarks, made in parallel with the MNS investigation, were explained by the existence of that investigation and had a direct link with it (compare *Alenet de Ribemont v. France*, 10 February 1995, § 37, Series A no. 308). Therefore, Article 6 § 2 of the Convention applies in this case.

156. The Court further notes that this complaint is not otherwise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

157. The Government noted that Article 6 § 2 of the Convention could not prevent the authorities from informing the public, with all the necessary discretion and circumspection, about criminal investigations in progress. They submitted that the applicant's presumption of innocence had not been violated in the present case. They noted that the Prosecutor General's comments had not depicted the applicant as a criminal. The Prosecutor General had simply commented on the reasons for instituting a criminal case and informed the public that an investigation was being conducted.

158. The applicant reiterated his complaint.

2. The Court's assessment

159. The Court reiterates that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Alenet de Ribemont*, cited above, § 35). It not only prohibits the premature expression by the tribunal itself of the opinion that the person “charged with a criminal offence” is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, 25 March 1983, § 38, Series A no. 62), but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Alenet de Ribemont*, cited above, § 41, and *Daktaras v. Lithuania*, no. 42095/98, § § 41-43, ECHR 2000-X). The Court stresses that Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see *Alenet de Ribemont*, cited above, § 38).
160. It has been the Court's consistent approach that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Khuzhin and Others v. Russia*, no. 13470/02, § 94, 23 October 2008, with further references). Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Butkevičius v. Lithuania*, no. 48297/99 48297/99, § 49, ECHR 2002-II).
161. The Court notes that in the present case the impugned statement was made by the Prosecutor General in an interview to the press, in a context independent of the criminal proceedings themselves. The Court acknowledges that the fact that the applicant was a well-known journalist required the State officials, including the Prosecutor General, to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, this circumstance cannot justify the lack of caution in the choice of words used by officials in their statements. Moreover, in the present case, the statement at issue was made just a few days following the institution of the criminal investigation. It was particularly important at this initial stage, even before the applicant had been formally charged, not to make any public allegations which could have been interpreted as confirming the guilt of the applicant in the opinion of an important public official.
162. The Prosecutor General's statement was reported, with almost identical word-for-word quotations, in at least two popular news media outlets. It is true that the statement was very succinct and that it appeared to have been aimed at informing the public about the fact of, and the reasons for, the institution of criminal proceedings against the applicant. Nevertheless, the statement unequivocally declared that the applicant's article published in his newspaper “indeed contain[ed] a threat of terrorism”. Moreover, following a brief explanation as to the content of the applicant's publication, the Prosecutor General made a further declaration that “this information constitutes a threat of terrorism”. Given the high position held by the Prosecutor General, particular caution should have been exercised in the choice of words for describing the pending criminal proceedings. The Court considers that these specific remarks, made without any qualification or reservation, amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism. Thus, these remarks prejudged the assessment of the facts by the competent judicial authority and could not but have encouraged the public to believe the applicant guilty before he had been proved guilty according to law.
163. There has accordingly been a violation of Article 6 § 2 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 3 of the Convention

164. The applicant complained about the conditions of his pre-trial detention. In particular, he alleged that, during his detention in Detention Facility No. 1, he had not been allowed to receive newspapers and magazines. He had been handcuffed and searched when taken out of his cell for questioning or other purposes. As to his conditions of detention after his transfer to the MNS detention facility, he alleged that he had not been allowed personal visits and that he had been held alone in a cell measuring 8 square metres, which had been badly ventilated and in which an electric light had been switched on throughout the day and night. He had been allowed to take a hot shower once a week and had had to wash his underwear himself using the cold water in his cell.

165. Even assuming that there were effective remedies available to the applicant in respect of the conditions of his detention and that he has exhausted those remedies, the Court considers that the applicant's description of his conditions of detention does not disclose an appearance of ill-treatment reaching the minimum level of severity required under Article 3 of the Convention. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 and 4 of the Convention.

B. Article 5 of the Convention

166. The applicant complained under Article 5 § 1 (c), 3 and 4 of the Convention about the Sabail District Court's decision of 3 July 2007 remanding him in custody, delivered in the context of the second set of criminal proceedings. In particular, he complained that there had been no reasonable suspicion that he had committed a crime and that the domestic courts had failed to give sufficient reasons for his detention on remand.

167. The Court notes that, prior to the Sabail District Court's detention order of 3 July 2007, the applicant had already been convicted and sentenced to a prison term on 20 April 2007 in the first set of criminal proceedings. That conviction had been upheld by the Court of Appeal on 6 June 2007 and, at the time of the detention order of 3 July 2007 in the second set of criminal proceedings, a cassation ap-

peal against that conviction was pending the Supreme Court's examination. In this connection, the Court notes that, in determining the period of detention pending trial, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, for example, *Hummatov v. Azerbaijan* (dec.), nos. 9852/03 and 13413/04, 18 May 2006). In the present case, the criminal charge in the first set of criminal proceedings against the applicant was determined on 20 April 2007 and, from that date, he was detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention. Even though, for whatever reason, an order for the applicant's "pre-trial detention" was made in the second set of proceedings subsequently to his conviction in the first set of criminal proceedings, no issue arises under Article 5 § 1 (c) and 3 of the Convention in respect of the applicant's detention after that date, as there was already another "lawful" basis for his detention during that period. The Court considers that no issue arises in the present case under Article 5 § 4 either.

168. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 and 4 of the Convention.

C. Other complaints

169. The applicant complained under Article 6 § 3 (a) of the Convention that he had not been informed promptly of the nature and cause of the accusation against him in the second set of proceedings. He also complained under Article 7 that, in both sets of criminal proceedings, the acts for which he had been convicted did not constitute a criminal offence. Lastly, he complained under Article 8 of the Convention that the searches conducted on 22 May 2007 in his flat and the newspapers' office had violated his right to respect for his home.

170. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 § 3 and 4 of the Convention.

V. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

171. Article 46 of the Convention provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

172. In the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Maestri v. Italy* [GC], no. 39748/98 39748/98, § 47, ECHR 2004-I; *Assanidze v. Georgia* [GC], no. 71503/01 71503/01, § 198, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99 48787/99, § 487, ECHR 2004-VII).

173. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99 46221/99, §

210, ECHR 2005-IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 39221/98 and 41963/98, § 249, ECHR 2000-VIII); and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

174. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see, for example, *Assanidze*, cited above, § 202).

175. The Court reiterates its above findings that both instances of interference with the applicant's freedom of expression were not justified under Article 10 § 2 of the Convention. In particular, in both instances, there existed no justification for imposing prison sentences on the applicant. The Court notes that, whereas the applicant was also convicted of a (*prima facie* unrelated) tax offence, by the date of delivery of the present judgment he has already served the part of the total sentence corresponding to that offence (four months' imprisonment), and that currently he is serving, in essence, the heavier part of the sentence corresponding to the press offences in respect of which the relevant violations have been found.

176. In such circumstances, in view of the above findings of violations of Article 10 of the Convention, it is not acceptable that the applicant still remains imprisoned. Accordingly, by its very nature, the situation found to exist in the instant case does not leave any real choice as to the measures required to remedy the violations of the applicant's Convention rights.

177. Therefore, having regard to the particular circumstances of the case and the urgent need to

put an end to the violations of Article 10 of the Convention, the Court considers that, as one of the means to discharge its obligation under Article 46 of the Convention, the respondent State shall secure the applicant's immediate release.

B. Article 41 of the Convention

178. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

(a) Pecuniary damage

179. The applicant claimed that, as a result of his conviction, he had been forced to close down several mass-media outlets which belonged to him personally: two newspapers, two Internet sites and one journal. He estimated the total value of these businesses at 203,652 euros (EUR), based on the initial capital invested to start them. He also claimed that, as the sole owner of the *Realny Azerbaijan* and *Gündəlik Azərbaycan* newspapers, he had sustained a loss of personal profit, in the estimated total amount of EUR 230,136 per year, for each year the newspapers had not been produced. He further claimed EUR 16,568 for advance rental payments for the newspapers' offices, which he had been unable to use after his conviction.

180. He further claimed pecuniary damage in respect of certain possessions that had been allegedly "confiscated" by the authorities during the searches of his flat and his editorial office, including: (a) several "photo archives" and other "investigative journalistic materials", which he valued at EUR 27,098; (b) computer equipment costing 23,000 US dollars; and (c) certain pieces of furniture from the editorial office, estimated to cost EUR 7,287.

181. Lastly, the applicant claimed EUR 8,146 in respect of the expenses that his parents had allegedly incurred in commuting to the prison to visit him, in providing him with food parcels in order to complement his prison diet, and for telephone communications with him.

182. The Government submitted that the applicant had failed to provide sufficient documentary evidence in support of any of the above claims

or to explain the method of calculation of the value of his media outlets and other estimated figures. They also submitted that the applicant had failed to provide any evidence that any of his possessions had been confiscated; instead, he had produced only a search record and a record confirming that one of his employees had submitted two computers to the authorities for investigation purposes.

183. The Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part.

184. As to the applicant's claims in respect of the value of the media outlets he had to close down and his loss of earnings, the Court notes that the applicant has not raised a complaint before the Court concerning the termination of activities of his newspapers and other media outlets. In any event, he has not submitted any documents or any other evidence in support of his claims in respect of the amounts invested in those media outlets and in respect of his future earnings from operating them as their owner and editor-in-chief. In particular, no records of past profits have been submitted. Likewise, the applicant has not submitted sufficient evidence in respect of the loss of advance rental payments.

185. As to the claims in respect of the allegedly confiscated property, the Court notes that, apart from the 23 computers seized from the newspapers' offices and confiscated pursuant to the Assize Court's judgment, it is unable to determine from the material in its possession that any of the other alleged property has indeed been permanently confiscated and that all of it had belonged personally to the applicant. As to the claim in respect of the confiscated computer equipment, the Court notes that the applicant has submitted no evidence in support of his estimates as to its value.

186. As to the remaining claims, the Court does not discern any causal link between the violations found and the pecuniary damage alleged.

187. For the above reasons, the Court rejects the applicant's claims in respect of pecuniary damage.

(b) Non-pecuniary damage

188. The applicant claimed EUR 70,000 in respect of

non-pecuniary damage.

189. The Government submitted that the finding of a violation would constitute sufficient reparation in respect of any non-pecuniary damage suffered.

190. In the light of the specific circumstances of the present case, the particular gravity of the violations of the applicant's freedom of expression and the fact that he had been sentenced to long-term imprisonment for press offences without any relevant justification, and bearing in mind that by the time of the examination of the present application he had spent more than two years in prison, the Court considers that the applicant must have undoubtedly endured serious moral suffering which cannot be compensated solely by the finding of violations. Moreover, although the Court has found above that the alleged pecuniary damage was unsupported or not fully supported by relevant evidence, it does not find it unreasonable to suppose that the applicant incurred other forms of damage which were directly due to the violations found (compare *Ilaşcu and Others*, cited above, § 489). The Court considers that, in this case, the above circumstance should also be taken into account when assessing the award for damages.

191. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

2. Costs and expenses

192. The applicant also claimed EUR 602 for the costs and expenses incurred before the domestic courts and EUR 2,200 for those incurred before the Court. He also claimed EUR 520 for translation expenses. In support of these claims, he submitted statements from a law office whose lawyers had represented him in the domestic proceedings, a copy of the contract for legal services in the Strasbourg proceedings, and copies of receipts issued by a translation company.

193. The Government submitted that the evidence submitted by the applicant was insufficient to conclude that the expenses claimed had been actually incurred.

194. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and

expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,822 covering costs under all heads, plus any tax that may be chargeable to the applicant on this amount.

3. Default interest

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

FOR THESE REASONS, THE COURT

1. Declares unanimously the complaints under Article 10, Article 6 § 1 (concerning the alleged lack of impartiality) and Article 6 § 2 of the Convention admissible and the remainder of the application inadmissible;
2. Holds unanimously that there has been a violation of Article 10 of the Convention in respect of the applicant's first criminal conviction;
3. Holds unanimously that there has been a violation of Article 10 of the Convention in respect of the applicant's second criminal conviction;
4. Holds unanimously that there has been a violation of Article 6 § 1 of the Convention;
5. Holds unanimously that there has been a violation of Article 6 § 2 of the Convention;
6. Holds by six votes to one that the respondent State shall secure the applicant's immediate release;
7. Holds unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 2,822 (two thousand eight hundred and twenty-two euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into New Azerbaijani

manats at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 22 April 2010, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Søren Nielsen, *Registrar*

Christos Rozakis, *President*

ECHR

ECJ

FOURTH SECTION

CASE OF KENNEDY v THE UNITED KINGDOM

(Application no. 26839/05)

JUDGMENT

STRASBOURG

18 May 2010

E-MAIL, SURVEILLANCE, SECRET, PRIVATE LIFE, DEMOCRACY, CORRESPONDENCE, MISUSE OF POWER.

IN THE CASE OF KENNEDY V. THE UNITED KINGDOM,

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

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 27 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 26839/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Malcolm Kennedy ("the applicant"), on 12 July 2005.
2. The applicant was represented by N. Mole of the AIRE Centre, a non-governmental organisation based in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott of the Foreign and Commonwealth Office.
3. The applicant complained about an alleged interception of his communications, claiming a violation of Article 8. He further alleged that the hearing before the Investigatory Powers Tribunal was not attended by adequate safeguards as required under Article 6 and, under Article 13, that he had as a result been denied an effective remedy.
4. On 14 November 2008 the Vice-President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the applica-

tion at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background facts

5. On 23 December 1990, the applicant was arrested for drunkenness and taken to Hammer-smith Police Station. He was held overnight in a cell shared by another detainee, Patrick Quinn. The next day, Mr Quinn was found dead with severe injuries. The applicant was charged with his murder. The applicant alleged that the police had framed him for the murder in order to cover up their own wrongdoing. In September 1991, the applicant was found guilty of the murder of Mr Quinn and was sentenced to life imprisonment. In February 1993, his conviction was overturned on appeal. At a first retrial, one of the police officers, a key prosecution witness, failed to appear. He was subsequently declared mentally unstable and was withdrawn from the proceedings. Following a second retrial, the applicant was convicted in 1994 of manslaughter and sentenced to nine years' imprisonment. The case was controversial in the United Kingdom on account of missing and conflicting police evidence which led some – including a number of Members of Parliament – to question the safety of the applicant's conviction.
6. In 1996, the applicant was released from prison. Following his release, he became active in campaigning against miscarriages of justice generally. He subsequently started a removal business called Small Moves, undertaking small moves and van hire in London. Although his business did well at the beginning, he subsequently began to experience interference with his business telephone calls. He alleged that local calls to his telephone were not being put through to him and that he was receiving a number of time-wasting hoax calls. The applicant suspected that this was because his mail, telephone and email communications were being intercepted. As a result of the interference, the applicant's business began to suffer.
7. The applicant believed that the interception of his communications was directly linked to his high profile case and his subsequent involve-

ment in campaigning against miscarriages of justice. He alleged that the police and security services were continually and unlawfully renewing an interception warrant – originally authorised for the criminal proceedings against him – in order to intimidate him and undermine his business activities.

B. Domestic proceedings

8. On 10 July 2000 the applicant made subject access requests to MI5 and GCHQ (the United Kingdom's intelligence agencies responsible for national security) under the Data Protection Act 1998 ("DPA" – see paragraphs 21 to 22 below). The object of the requests was to discover whether information about him was being processed by the agencies and to obtain access to the content of the information. Both requests were refused on the basis that the information requested was exempt from the disclosure requirements of the 1998 Act on the grounds of national security under certificates issued by the Secretary of State on 22 July 2000 (MI5) and 30 July 2000 (GCHQ).
9. On 6 July 2001 the applicant lodged two complaints with the Investigatory Powers Tribunal ("IPT"). First, the applicant complained under sections 65(2)(b) and 65(4) of the Regulation of Investigatory Powers Act 2000 ("RIPA" – see paragraphs 25 to 80 below) that his communications were being intercepted in "challengeable circumstances", within the meaning of section 65(7) RIPA (i.e. under an interception warrant or in circumstances in which there ought to have been an interception warrant or where consideration ought to have been given to obtaining an interception warrant). Second, the applicant complained under sections 6(1) and 7(1) of the Human Rights Act 1998 ("HRA") and section 65(2)(a) RIPA that there was an unlawful interference with his rights under Article 8 of the Convention.
10. The applicant's Grounds of Claim and Complaint outlined the grounds for bringing the proceedings as follows:

"4(a) That the authorities' conduct was, and is, incompatible with his rights under Article 8 of the Convention and a violation of equivalent rights of his at common law. Such conduct is unlawful as a result of HRA s. 6(1) and forms the basis for a complaint under RIPA s. 65.

(b) To the extent any such conduct purports to have the authority of a warrant issued or renewed under RIPA Part I or the correspond-

ing predecessor provisions of the Interception of Communications Act 1985 ("IOCA"), the issue and renewal of that warrant, as well as the conduct itself, has at all times lacked the necessary justification, whether under the express provisions of RIPA Part I (or IOCA), Article 8(2) of the Convention, or the general law.

(c) Moreover the authorities' conduct was and is unlawful because in breach of the requirements of the Data Protection Act 1998 ("DPA"). Conduct in breach of those requirements takes place in challengeable circumstances under RIPA s. 65(4) and (7) and is also incompatible with the Complainant's rights under Article 8 of the Convention.

5. In addition, the Complainant relies in these proceedings on his right to a fair hearing under Article 6(1) of the Convention. In light of that right, the Complainant makes certain submissions about the way in which these proceedings ought to be conducted ..."

11. The applicant requested specific directions regarding the conduct of the proceedings in order to ensure the protection of his Convention rights under Article 6 § 1. In particular, he requested that his arguments and evidence be presented at an oral hearing; that all hearings be conducted in public; that there be mutual disclosure and inspection between the parties of all witness statements and evidence upon which parties sought to rely and exchange of skeleton arguments in relation to planned legal submissions; that evidence of each party be heard in the presence of the other party or their legal representatives, with oral evidence being open to cross-examination by the other party; that any opinion received from a Commissioner be disclosed to the parties, who would have the opportunity to make oral representations in light of it; that each party be able to apply for a derogation from any of the above in relation to a particular piece of evidence; and that, following its final determination, the IPT state its findings and give reasons for its conclusions on each relevant issue. He argued that to the extent that the IPT's rules of procedure (see paragraphs 84 to 87 below) prevented the directions sought, they were incompatible with his right to a fair hearing.
12. The Grounds of Claim and Complaint referred to the applicant's belief that his communications were being intercepted and that any warrant in place was being continually renewed.
13. Paragraph 13 of the Grounds of Claim and Complaint noted:

"So far as the proceedings are brought in reliance on HRA s. 7(1)(a) or (b), the Complainant submits that:

(a) The interception, and retention or other processing of intercept product, by any of the Respondents amounts to an interference with the Complainant's right to respect for private life and correspondence protected by Article 8(1) of the Convention;

(b) The interception and processing have at no time been in accordance with the law as required by Article 8(2);

(c) The interception and its purported authorisation (if any), and processing, have at no time been justified as necessary in a democratic society as required by Article 8(2)."

14. Paragraph 14 of the Grounds of Claim and Complaint expanded on the applicant's submissions:

"In particular, the Complainant submits that:

(a) the proper inference from the circumstances described by the Complainant, amplified by the refusal of the [authorities] to deny the activities alleged, is that it is established on the balance of probabilities that the interception and processing took place. At minimum there is a reasonable likelihood that interception and processing ... has taken place and continues to take place (*Hewitt and Harman v. UK*, 12175/86, EComHR Report 9.5.89, paras. 26-32).

(b) The interception is not in accordance with the law so far as involving a breach of any requirement of the DPA (including the Data Protection Principles) ...

(c) The complainant poses no risk to national security nor in his case could any other ground for authorising interception of his communications reasonably be considered to exist. It cannot be said that interception of his communications has at any material time been a necessary or proportionate interference ... with his rights under Article 8(1)."

15. As to remedies, the Grounds of Claim and Complaint noted the following:

"17. If the Tribunal finds that the Complainant succeeds on the claim or complaint, it is asked to make ... :

(a) a final order prohibiting each Respondent from intercepting any communication by the Complainant ... or retaining or otherwise processing the product of any such interception, except on the grounds, and subject to the pro-

cedure, provided for by RIPA Part I;

(b) an order ... quashing or cancelling any warrant or authorisation relating to any such interception;

(c) an order requiring the destruction of any product of such interception ...

(d) an award of compensation ... and/or damages ... for the loss and damage sustained by the Complainant in consequence of the matters complained of (including economic loss resulting from interference with his business communications)."

16. On 23 January 2003, the IPT, presided over by Lord Justice Mummery, issued a joint Ruling on Preliminary Issues of Law in the applicant's case together with a case involving a complaint by British-Irish Rights Watch and others in which a similar challenge to the IPT's Rules was made (see paragraphs 84 to 87 below).

17. On 9 December 2004, the IPT, again presided over by Lord Justice Mummery, issued a second ruling on preliminary issues of law in the applicant's case. In the introduction to its ruling, the IPT summarised the case before it as follows:

"1. On 6 July 2001 the Complainant made (a) a complaint to the Tribunal under the Regulation of Investigatory Powers Act ... and (b) a claim under the Human Rights Act 1998 ... in respect of alleged ongoing interception by one or more of the respondent agencies (the Security Service, GCHQ and the Commissioner of Police for the Metropolis) over a period dating back to June 1996 ...

2. The Complainant also alleges harassment, intrusive surveillance, interference with property, removal of documents, interference with a web site and e-mails and interception of privileged communications by the respondent agencies.

3. The Complainant seeks a final order prohibiting the agencies from intercepting any communication by him in the course of its transmission by means of a telecommunications system or retaining or otherwise processing the product of any such interception except on the grounds and subject to the procedure provided by RIPA Part I.

4. He also seeks an order requiring the destruction of any product of such interception held by each respondent, whether or not obtained pursuant to any warrant or authorisation; and an award of compensation under s 67(7) RIPA and/or damages sustained by the

Complainant in consequence of the matters complained of.”

18. The ruling dealt with a number of matters relating to the extent of its jurisdiction in respect of the applicant’s complaints relating to conduct prior to the entry into force of RIPA.
19. Following its ruling of 9 December 2004, the IPT proceeded to examine the applicant’s specific complaints in private.
20. On 17 January 2005, the IPT notified the applicant that no determination had been made in his favour in respect of his complaints. This meant either that there had been no interception or that any interception which took place was lawful.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Applicable legislation

1. *Subject access requests under the Data Protection Act (“DPA”) 1998*

21. Section 7(1) DPA grants individuals the right to request details of any information about them held by persons or organisations which record, store, or process personal data.
22. Under section 28 DPA, personal data is exempt from disclosure under section 7(1) if an exemption is required for the purpose of safeguarding national security.

2. *The Human Rights Act 1998*

23. The HRA incorporates the Convention into United Kingdom law. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, except where it is constrained to act in that way as a result of primary legislation which cannot be interpreted so as to be compatible with Convention rights. Under section 7(1), a person claiming that a public authority has acted unlawfully under section 6(1) may bring proceedings against it in the appropriate court or rely on the Convention right in any legal proceedings.
24. Under section 4(2), if a court is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility. “Court”, in section 4, is defined as meaning the Supreme Court; the Judicial Committee of the Privy Council;

the Court Martial Appeal Court; in Scotland, the High Court of Justiciary (sitting otherwise than as a trial court) or the Court of Session; or in England and Wales or Northern Ireland, the High Court or the Court of Appeal. Section 4(6) clarifies that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the legislative provision in question and is not binding on the parties to the proceedings in which it is made.

3. *Interception warrants*

25. Since 2 October 2000, the interception of communications has been regulated by the Regulation of Investigatory Powers Act 2000 (“RIPA”). The explanatory notes which accompany RIPA explain that the main purpose of RIPA is to ensure that investigatory powers are exercised in accordance with human rights.
26. Section 71 RIPA provides for the adoption of codes of practice by the Secretary of State in relation to the exercise and performance of his powers and duties under the Act. Draft codes of practice must be laid before Parliament and are public documents. They can only enter into force in accordance with an order of the Secretary of State. The Secretary of State can only make such an order if a draft of the order has been laid before Parliament and approved by a resolution of each House.
27. Under section 72(1) RIPA, a person exercising or performing any power or duty relating to interception of communications must have regard to the relevant provisions of a code of practice. The provisions of a code of practice may, in appropriate circumstances, be taken into account by courts and tribunals under section 72(4) RIPA.
28. The Interception of Communications Code of Practice (“the Code”) entered into force on 1 July 2002. It is now available on the Home Office website.

(a) **The issue of an interception warrant**

29. Interception is permitted in several cases, exhaustively listed in section 1(5) RIPA. Section 1(5)(b), the relevant provision in the present case, provides that interception is lawful if authorised by an interception warrant. Any unlawful interception is a criminal offence under section 1(1).
30. Section 2(2) defines “interception” as follows:

“For the purposes of this Act, but subject to

the following provisions of this section, a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, he—

- (a) so modifies or interferes with the system, or its operation,
- (b) so monitors transmissions made by means of the system, or
- (c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,

as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.”

31. Section 5(1) allows the Secretary of State to issue a warrant authorising the interception of the communications described in the warrant. Under section 5(2), no warrant for interception of internal communications (i.e. communications within the United Kingdom) shall be issued unless the Secretary of State believes:

- “(a) that the warrant is necessary on grounds falling within subsection (3); and
- (b) that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

32. Section 5(3) provides:

“Subject to the following provisions of this section, a warrant is necessary on grounds falling within this subsection if it is necessary—

- (a) in the interests of national security;
- (b) for the purpose of preventing or detecting serious crime; [or]
- (c) for the purpose of safeguarding the economic well-being of the United Kingdom ...”

33. The term “national security” is not defined in RIPA. However, it has been clarified by the Interception of Communications Commissioner appointed under RIPA’s predecessor (the Interception of Communications Act 1985) who, in his 1986 report, stated that he had adopted the following definition:

“[activities] which threaten the safety or well-being of the State, and which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means.”

34. Section 81(2)(b) RIPA defines “serious crime” as crime which satisfies one of the following

criteria:

“(a) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more;

(b) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose.”

35. Section 81(5) provides:

“For the purposes of this Act detecting crime shall be taken to include—

- (a) establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed; and
- (b) the apprehension of the person by whom any crime was committed;

and any reference in this Act to preventing or detecting serious crime shall be construed accordingly ...”

36. Under section 5(4), the Secretary of State must, when assessing whether the requirements in section 5(2) are met, consider whether the information sought to be obtained under the warrant could reasonably be obtained by other means.

37. Section 5(5) provides that a warrant shall not be considered necessary for the purpose of safeguarding the economic well-being of the United Kingdom unless the information which it is thought necessary to obtain is information relating to the acts or intentions of persons outside the British Islands.

38. Section 7(2)(a) requires the Secretary of State personally to issue all warrants of the nature at issue in the present case, except in cases of urgency where he must nonetheless personally authorise the issuing of the warrant. Section 6(2) provides an exhaustive list of those who may apply for an interception warrant, including the heads of national intelligence bodies, heads of police forces and the Customs and Excise Commissioners.

39. Paragraphs 2.4 to 2.5 of the Code provide additional guidance on the application of the proportionality and necessity test in section 5(2):

“2.4 Obtaining a warrant under the Act will only ensure that the interception authorised

is a justifiable interference with an individual's rights under Article 8 of the European Convention of Human Rights (the right to privacy) if it is necessary and proportionate for the interception to take place. The Act recognises this by first requiring that the Secretary of State believes that the authorisation is necessary on one or more of the statutory grounds set out in section 5(3) of the Act. This requires him to believe that it is necessary to undertake the interception which is to be authorised for a particular purpose falling within the relevant statutory ground.

2.5 Then, if the interception is necessary, the Secretary of State must also believe that it is proportionate to what is sought to be achieved by carrying it out. This involves balancing the intrusiveness of the interference, against the need for it in operational terms. Interception of communications will not be proportionate if it is excessive in the circumstances of the case or if the information which is sought could reasonably be obtained by other means. Further, all interception should be carefully managed to meet the objective in question and must not be arbitrary or unfair."

(b) The contents of an application and an interception warrant

40. Section 8 sets out the requirements as to the contents of an interception warrant as regards the identification of the communications to be intercepted:

"(1) An interception warrant must name or describe either—

(a) one person as the interception subject; or

(b) a single set of premises as the premises in relation to which the interception to which the warrant relates is to take place.

(2) The provisions of an interception warrant describing communications the interception of which is authorised or required by the warrant must comprise one or more schedules setting out the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying the communications that may be or are to be intercepted.

(3) Any factor or combination of factors set out in accordance with subsection (2) must be one that identifies communications which are likely to be or to include—

(a) communications from, or intended for, the person named or described in the warrant in accordance with subsection (1); or

(b) communications originating on, or intend-

ed for transmission to, the premises so named or described."

41. Paragraph 4.2 of the Code provides:

"An application for a warrant is made to the Secretary of State. Interception warrants, when issued, are addressed to the person who submitted the application. This person may then serve a copy upon any person who may be able to provide assistance in giving effect to that warrant. Each application, a copy of which must be retained by the applicant, should contain the following information:

- Background to the operation in question.

- Person or premises to which the application relates (and how the person or premises feature in the operation).

- Description of the communications to be intercepted, details of the communications service provider(s) and an assessment of the feasibility of the interception operation where this is relevant.

- Description of the conduct to be authorised as considered necessary in order to carry out the interception, where appropriate.

- An explanation of why the interception is considered to be necessary under the provisions of section 5(3).

- A consideration of why the conduct to be authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

- A consideration of any unusual degree of collateral intrusion and why that intrusion is justified in the circumstances. In particular, where the communications in question might affect religious, medical or journalistic confidentiality or legal privilege, this must be specified in the application.

- Where an application is urgent, supporting justification should be provided.

- An assurance that all material intercepted will be handled in accordance with the safeguards required by section 15 of the Act."

(c) Safeguards

42. Section 15 RIPA is entitled "Restrictions on use of intercepted material etc." and provides, insofar as relevant to internal communications, as follows:

"(1) ... it shall be the duty of the Secretary of State to ensure, in relation to all interception warrants, that such arrangements are in force as he considers necessary for securing—

(a) that the requirements of subsections (2) and (3) are satisfied in relation to the intercepted material and any related communications data;

...

(2) The requirements of this subsection are satisfied in relation to the intercepted material and any related communications data if each of the following—

(a) the number of persons to whom any of the material or data is disclosed or otherwise made available,

(b) the extent to which any of the material or data is disclosed or otherwise made available,

(c) the extent to which any of the material or data is copied, and

(d) the number of copies that are made,

is limited to the minimum that is necessary for the authorised purposes.

(3) The requirements of this subsection are satisfied in relation to the intercepted material and any related communications data if each copy made of any of the material or data (if not destroyed earlier) is destroyed as soon as there are no longer any grounds for retaining it as necessary for any of the authorised purposes.

(4) For the purposes of this section something is necessary for the authorised purposes if, and only if—

(a) it continues to be, or is likely to become, necessary as mentioned in section 5(3);

...

(5) The arrangements for the time being in force under this section for securing that the requirements of subsection (2) are satisfied in relation to the intercepted material or any related communications data must include such arrangements as the Secretary of State considers necessary for securing that every copy of the material or data that is made is stored, for so long as it is retained, in a secure manner ...”

43. Section 16 sets out extra safeguards which apply in the case of interception of external communications only.

44. Section 19 imposes a broad duty on all those involved in interception under RIPA to keep secret, among other matters, “everything in the intercepted material” (section 19(3)(e)). Under section 19(4), disclosure of such material is a

criminal offence punishable by up to five years’ imprisonment.

45. Paragraph 6.1 of the Code requires all material intercepted under the authority of a section 8(l) warrant to be handled in accordance with safeguards put in place by the Secretary of State under section 15 of the Act. Details of the safeguards are made available to the Commissioner (see paragraph 57 below) and any breach of the safeguards must be reported to him.

46. Paragraphs 6.4 to 6.8 of the Code provide further details of the relevant safeguards:

“Dissemination of intercepted material

6.4 The number of persons to whom any of the material is disclosed, and the extent of disclosure, must be limited to the minimum that is necessary for the authorised purposes set out in section 15(4) of the Act. This obligation applies equally to disclosure to additional persons within an agency, and to disclosure outside the agency. It is enforced by prohibiting disclosure to persons who do not hold the required security clearance, and also by the need-to-know principle: intercepted material must not be disclosed to any person unless that person’s duties, which must relate to one of the authorised purposes, are such that he needs to know about the material to carry out those duties. In the same way only so much of the material may be disclosed as the recipient needs; for example if a summary of the material will suffice, no more than that should be disclosed.

6.5 The obligations apply not just to the original interceptor, but also to anyone to whom the material is subsequently disclosed. In some cases this will be achieved by requiring the latter to obtain the originator’s permission before disclosing the material further. In others, explicit safeguards are applied to secondary recipients.

Copying

6.6 Intercepted material may only be copied to the extent necessary for the authorised purposes set out in section 15(4) of the Act. Copies include not only direct copies of the whole of the material, but also extracts and summaries which identify themselves as the product of an interception, and any record referring to an interception which is a record of the identities of the persons to or by whom the intercepted material was sent. The restrictions are implemented by requiring special treatment of such copies, extracts and summaries that are made by recording their making, distribu-

tion and destruction.

Storage

6.7 Intercepted material, and all copies, extracts and summaries of it, must be handled and stored securely, so as to minimise the risk of loss or theft. It must be held so as to be inaccessible to persons without the required level of security clearance. This requirement to store intercept product securely applies to all those who are responsible for the handling of this material, including communications service providers ...

Destruction

6.8 Intercepted material, and all copies, extracts and summaries which can be identified as the product of an interception, must be securely destroyed as soon as it is no longer needed for any of the authorised purposes. If such material is retained, it should be reviewed at appropriate intervals to confirm that the justification for its retention is still valid under section 15(3) of the Act."

47. Specific guidance is given as to the vetting of those involved in intercept activities in paragraph 6.9 of the Code:

"6.9 Each intercepting agency maintains a distribution list of persons who may have access to intercepted material or need to see any reporting in relation to it. All such persons must be appropriately vetted. Any person no longer needing access to perform his duties should be removed from any such list. Where it is necessary for an officer of one agency to disclose material to another, it is the former's responsibility to ensure that the recipient has the necessary clearance."

48. The Government's policy on security vetting was announced to Parliament by the Prime Minister on 15 December 1994. In his statement, the Prime Minister explained the procedure for security vetting and the kinds of activities which would lead to the exclusion of an individual from participation in work vital to the interests of the State.
49. The Security Service Act 1989 and the Intelligence Services Act 1994 impose further obligations on the heads of the security and intelligence services to ensure the security of information in their possession.

(d) Duration of an interception warrant

50. Section 9(1)(a) provides that an interception warrant for internal communications ceases to have effect at the end of the "relevant period"

The "relevant period" is defined in section 9(6) as:

"(a) in relation to an unrenewed warrant issued in a case [issued] under the hand of a senior official, ... the period ending with the fifth working day following the day of the warrant's issue;

(b) in relation to a renewed warrant the latest renewal of which was by an instrument endorsed under the hand of the Secretary of State with a statement that the renewal is believed to be necessary on grounds falling within section 5(3)(a) [national security] or (c) [economic well-being], ... the period of six months beginning with the day of the warrant's renewal; and

(c) in all other cases, ... the period of three months beginning with the day of the warrant's issue or, in the case of a warrant that has been renewed, of its latest renewal."

51. Section 9(1)(b) provides that an interception warrant may be renewed by the Secretary of State at any time before its expiry where he believes that the warrant continues to be necessary on grounds falling within section 5(3).
52. The Secretary of State is required under Section 9(3) to cancel an interception warrant if he is satisfied that the warrant is no longer necessary on grounds falling within section 5(3).
53. Section 10(2) imposes an obligation on the Secretary of State to delete any factor set out in a schedule to an interception warrant which he considers is no longer relevant for identifying communications which, in the case of that warrant, are likely to be or to include communications from, or intended for, the interception subject.
54. Paragraph 4.13 of the Code provides:
- "The Secretary of State may renew a warrant at any point before its expiry date. Applications for renewals must be made to the Secretary of State and should contain an update of the matters outlined in paragraph 4.2 above. In particular, the applicant should give an assessment of the value of interception to the operation to date and explain why he considers that interception continues to be necessary for one or more of the purposes in section 5(3)."
55. Paragraph 4.16 of the Code provides:

"The Secretary of State is under a duty to cancel an interception warrant if, at any time before its expiry date, he is satisfied that the warrant is no longer necessary on grounds

falling within section 5(3) of the Act. Intercepting agencies will therefore need to keep their warrants under continuous review. In practice, cancellation instruments will be signed by a senior official on his behalf."

(e) Duty to keep records

56. Paragraph 4.18 of the Code imposes record-keeping obligations on intercepting agencies and provides:

"The oversight regime allows the Interception of Communications Commissioner to inspect the warrant application upon which the Secretary of State based his decision, and the applicant may be required to justify the content. Each intercepting agency should keep the following to be made available for scrutiny by the Commissioner as he may require:

-all applications made for warrants complying with section 8(l) and applications made for the renewal of such warrants;

- all warrants, and renewals and copies of schedule modifications (if any);

- where any application is refused, the grounds for refusal as given by the Secretary of State;

- the dates on which interception is started and stopped."

4. The Commissioner

(a) Appointment and functions

57. Section 57 RIPA provides that the Prime Minister shall appoint an Interception of Communications Commissioner ("the Commissioner"). He must be a person who holds or has held high judicial office. The Commissioner is appointed for a three-year, renewable term. To date, there have been two Commissioners appointed under RIPA. Both are former judges of the Court of Appeal.
58. The Commissioner's functions include to keep under review the exercise and performance by the Secretary of State of powers and duties in relation to interception conferred or imposed on him by RIPA; the exercise and performance of powers and duties in relation to interception by the persons on whom such powers or duties are conferred or imposed; and the adequacy of the arrangements by virtue of which the duty which is imposed on the Secretary of State by section 15 (safeguards – see paragraph 42 above) is sought to be discharged.
59. Section 58 RIPA places a duty on those involved in the authorisation or execution of intercept-

tion warrants to disclose to the Commissioner all documents and information which he requires in order to carry out his functions. As noted above (see paragraph 56), the Code requires intercepting agencies to keep accurate and comprehensive records for this purpose.

60. In his 2005-2006 report, the Commissioner described his inspections as follows:

"12. In accordance with [my] duties I have continued my practice of making twice yearly visits to ... the intercepting agencies and the departments of the Secretaries of State/Ministers which issue the warrants. Prior to each visit, I obtain a complete list of warrants issued or renewed or cancelled since my previous visit. I then select, largely at random, a sample of warrants for inspection. In the course of my visit I satisfy myself that those warrants fully meet the requirements of RIPA, that proper procedures have been followed and that the relevant safeguards and Codes of Practice have been followed. During each visit I review each of the files and the supporting documents and, when necessary, discuss the cases with the officers concerned. I can view the product of interception. It is of first importance to ensure that the facts justified the use of interception in each case and that those concerned with interception fully understand the safeguards and the Codes of Practice.

13. I continue to be impressed by the quality, dedication and enthusiasm of the personnel carrying out this work on behalf of the Government and the people of the United Kingdom. They have a detailed understanding of the legislation and are always anxious to ensure that they comply both with the legislation and the appropriate safeguards ..."

61. The Commissioner is required to report to the Prime Minister if he finds that there has been a violation of the provisions of RIPA or if he considers that the safeguards under section 15 have proved inadequate (sections 58(2) and (3) RIPA). The Commissioner must also make an annual report to the Prime Minister regarding the exercise of his functions (section 58(4)). Under section 58(6), the Prime Minister must lay the annual report of the Commissioner before Parliament. Finally, the Commissioner is required to assist the IPT with any request for information or advice it may make (section 57(3) and paragraph 78 below).

(b) Relevant extracts of reports

62. In his 2000 report, the Commissioner noted, as regards the discharge of their duties by the

Secretaries of State:

"12. ... I have been impressed with the care that they take with their warrantry work, which is very time consuming, to ensure that warrants are issued only in appropriate cases and, in particular, in ensuring that the conduct authorised is proportionate to what is sought to be achieved by the intercepts."

63. At paragraph 15, on the question of safeguards, he said:

"... my advice and approval were sought and given in respect of the safeguard documents either before or shortly after 2 October 2000. The Home Secretary also sought my advice in relation to them and they were approved by him ..."

64. As to the need for secret surveillance powers, the Commissioner commented:

"45. The interception of communications is, as my predecessors have expressed in their Report, an invaluable weapon for the purpose set out in section 5(3) of RIPA and, in particular, in the battle against serious crime ..."

65. In his report for 2001, the Commissioner noted:

"10. Many members of the public are suspicious about the interception of communications, and some believe that their own conversations are subject to unlawful interception by the security, intelligence or law enforcement agencies ... In my oversight work I am conscious of these concerns. However, I am as satisfied as I can be that the concerns are, in fact, unfounded. Interception of an individual's communications can take place only after a Secretary of State has granted a warrant and the warrant can be granted on strictly limited grounds set out in Section 5 of RIPA, essentially the interests of national security and the prevention or detection of serious crime. Of course, it would theoretically be possible to circumvent this procedure, but there are in place extensive safeguards to ensure that this cannot happen, and it is an important part of my work to ensure that these are in place, and that they are observed. Furthermore, any attempt to get round the procedures which provide for legal interception would, by reason of the safeguards, involve a major conspiracy within the agency concerned which I believe would, for practical purposes, be impossible. I am as satisfied as it is possible to be that deliberate unlawful interception of communications of the citizen does not take place ..."

66. He said of the section 15 safeguards:

"31. In addressing the safeguards contained within section 15 of RIPA, GCHQ developed a new set of internal compliance documentation for staff, together with an extensive training programme that covered staff responsibilities under both RIPA and the Human Rights Act. This compliance documentation was submitted to the Foreign Secretary who was satisfied that it described and governed the arrangements required under section 15. I have also been told it also constituted the written record of the arrangements required to be put in place by the Director, GCHQ, under section 4(2)(a) of the Intelligence Services Act 1994 (to ensure that no information is obtained or disclosed by GCHQ except so far as is necessary for its statutory functions). In discharging my functions under section 57(1)(d), I examined the documentation and the processes which underpin it and satisfied myself that adequate arrangements existed for the discharge of the Foreign Secretary's duties under section 15 of RIPA. Of course, GCHQ recognises that its compliance processes must evolve over time, particularly as they become more familiar with the intricacies of the new legislation and develop new working practices, and that the process of staff education remains a continuing one. To this end, GCHQ has developed further training programmes and is issuing revised compliance documentation as part of the ongoing process (see also ... paragraph 56 under Safeguards).

32. In advance of the coming into force of RIPA, GCHQ approached me as to the warrants it would seek after that date and provided a detailed analysis as to how those warrants would be structured – this was helpful as it gave me an insight into how GCHQ saw the workings of RIPA/Human Rights Act and permitted me to comment in advance. Since the commencement of RIPA, in reviewing warrants I have looked carefully at the factors to be considered by the Secretary of State when determining whether to issue an interception warrant, and especially the new requirement to consider 'proportionality' under section [5(2)(b)] of RIPA."

67. Again, he commented on the diligence of the authorities in carrying out their duties under the Act:

"56. Sections 15 and 16 of RIPA lay a duty on the Secretary of State to ensure that arrangements are in force as safeguards in relation to dissemination, disclosure, copying, storage, and destruction etc., of intercepted material. These sections require careful and detailed safeguards to be drafted by each of the agencies referred to earlier in this Report and for

those safeguards to be approved by the Secretary of State. This had been done. I have been impressed by the care with which these documents have been drawn up, reviewed and updated in the light of technical and administrative developments. Those involved in the interception process are aware of the invasive nature of this technique, and care is taken to ensure that intrusions of privacy are kept to the minimum. There is another incentive to agencies to ensure that these documents remain effective in that the value of interception would be greatly diminished as a covert intelligence tool should its existence and methodology become too widely known. The sections 15 and 16 requirements are very important. I am satisfied that the agencies are operating effectively within their safeguards."

68. The Commissioner's 2002 report noted:

"18. ... As I mentioned in my last Report I have been impressed by the care with which [the safeguard] documents have been drawn up. My advice and approval was sought for the documents and I am approached to agree amendments to the safeguards when they are updated in light of technical and administrative developments."

69. This was repeated in paragraph 16 of his 2004 report.

70. In his 2005-2006 report, the Commissioner explained his role as follows:

"7. ... essentially I see the role of Commissioner as encompassing these primary headings:

(a) To protect people in the United Kingdom from any unlawful intrusion of their privacy. This is provided for by Article 8 of the European Convention on Human Rights. I must be diligent to ensure that this does not happen, and alert to ensure that there are systems in place so that this does not and cannot happen. Over the long period that I have held my present post, I have found no evidence whatsoever of any desire within the Intelligence or the Law Enforcement Agencies in this field to act wrongfully or unlawfully. On the contrary, I have found a palpable desire on the part of all these Agencies to ensure that they do act completely within the four walls of the law. To this end, they welcome the oversight of the Commissioner and over the years have frequently sought my advice on issues that have arisen, and they have invariably accepted it. In any event, I believe that the legislation together with the safeguards and Codes of Practice that are in place make it technically virtually impossible to deliberately intercept a citizen's communications unlawfully with intent to

avoid legal requirements.

(b) To assist the Agencies to do the work entrusted to them and, bearing in mind the number of organisations that I am now required to oversee, this occurs quite frequently. My work is, of course, limited to the legal as opposed to the operational aspects of their work. They take great care with their work and I have been impressed by its quality.

(c) To ensure that proper safeguards and Codes of Practice are in place to protect the public and the Agencies themselves. These have to be approved by the Secretaries of State. But every Secretary of State with whom I have worked has required to be informed as to whether the Commissioner has approved them before he or she is willing to do so.

(d) To advise Ministers, and Government Departments, in relation to issues arising on the interception of communications, the acquisition and disclosure of communications data, to approve the safeguards documents and the Codes of Practice."

71. The Commissioner said of the Secretaries of State whom he had met in the previous year:

"14. It is clear to me that each of them gives a substantial amount of time and takes considerable care to satisfy himself or herself that warrants are necessary for the authorised purposes, and that what is proposed is proportionate. If the Secretary of State wishes to have further information in order to be satisfied that he or she should grant the warrant then it is requested and given. Outright and final refusal of an application is comparatively rare, because the requesting agencies and the senior officials in the Secretary of State's Department scrutinise the applications with care before they are submitted for approval. However, the Secretary of State may refuse to grant the warrant if he or she considers, for example, that the strict requirements of necessity or proportionality are not met, and the agencies are well aware that the Secretary of State does not act as a 'rubber stamp'."

72. In his 2007 report, The Commissioner commented on the importance of interception powers in tackling terrorism and serious crime:

"2.9 I continue to be impressed as to how interception has contributed to a number of striking successes during 2007. It has played a key role in numerous operations including, for example, the prevention of murders, tackling large-scale drug importations, evasion of Excise duty, people smuggling, gathering intelligence both within the United Kingdom and

overseas on terrorist and various extremist organisations, confiscation of firearms, serious violent crime and terrorism. I have provided fully detailed examples in the Confidential Annex to this Report. I think it is very important that the public is re-assured as to the benefits of this highly intrusive investigative tool particularly in light of the on-going debate about whether or not intercept product should be used as evidence in a court of law.

...

7.1 As I said in my first Report last year, the interception of communications is an invaluable weapon for the purposes set out in section 5(3) of RIPA. It has continued to play a vital part in the battle against terrorism and serious crime, and one that would not have been achieved by other means ...”

73. As regards errors by the relevant agencies in the application of RIPA’s provisions, he noted:

“2.10 Twenty-four interception errors and breaches have been reported to me during the course of 2007. This is the same number of errors reported in my first Annual Report (which was for a shorter period) and is a significant decrease in the number reported by my predecessor. I consider the number of errors to be too high. By way of example, details of some of these errors are recorded below. It is very important from the point of view of the public that I stress that none of the breaches or errors were deliberate, that all were caused by human error or procedural error or by technical problems and that in every case either no interception took place or, if there was interception, the product was destroyed immediately on discovery of the error. The most common cause of error tends to be the simple transposition of numbers by mistake e.g., 1965 instead of 1956. The examples that I give are typical of the totality and are anonymous so far as the targets are concerned. Full details of all the errors and breaches are set out in the Confidential Annex.”

74. According to the statistics in the report, on 31 December 2007, 929 interception warrants issued by the Home Secretary were in force.

5. *The Investigatory Powers Tribunal*

(a) **The establishment of the IPT, its powers and its procedures**

75. The IPT was established under section 65(1) RIPA to hear allegations by citizens of wrongful interference with their communications as a result of conduct covered by RIPA. Members of the tribunal must hold or have held high ju-

dicial office or be a qualified lawyer of at least ten years’ standing. Any person may bring a claim before the IPT and, save for vexatious or frivolous applications, the IPT must determine all claims brought before it (sections 67(1), (4) and (5) RIPA).

76. Section 65(2) provides that the IPT is the only appropriate forum in relation to proceedings for acts incompatible with Convention rights which are proceedings against any of the intelligence services; and complaints by persons who allege to have been subject to the investigatory powers of RIPA. It has jurisdiction to investigate any complaint that a person’s communications have been intercepted and, where interception has occurred, to examine the authority for such interception. Sections 67(2) and 67(3)(c) provide that the IPT is to apply the principles applicable by a court on an application for judicial review.
77. Under section 67(8) RIPA, there is no appeal from a decision of the IPT “except to such extent as the Secretary of State may by order otherwise provide”. No order has been passed by the Secretary of State.
78. Under section 68(2), the IPT has the power to require a relevant Commissioner to provide it with all such assistance (including the Commissioner’s opinion as to any issue falling to be determined by the IPT) as it thinks fit. Section 68(6) and (7) requires those involved in the authorisation and execution of an interception warrant to disclose or provide to the IPT all documents and information it may require.
79. Section 68(4) deals with reasons for the IPT’s decisions and provides that:

“Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—

- (a) a statement that they have made a determination in his favour; or
- (b) a statement that no determination has been made in his favour.”

80. The IPT has the power to award compensation and to make such other orders as it thinks fit, including orders quashing or cancelling any section 8(1) warrant and orders requiring the destruction of any records obtained under a section 8(1) warrant (section 67(7) RIPA). In the

event that a claim before the IPT is successful, the IPT is generally required to make a report to the Prime Minister (section 68(5)).

(b) The power to adopt rules of procedure

81. As to procedure, section 68(1) provides as follows:

“Subject to any rules made under section 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint or reference brought before or made to them.”

82. Section 69(1) RIPA provides that the Secretary of State may make rules regulating any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings before it. Under section 69(2), such rules may:

“(c) prescribe the form and manner in which proceedings are to be brought before the Tribunal or a complaint or reference is to be made to the Tribunal;

...

(f) prescribe the forms of hearing or consideration to be adopted by the Tribunal in relation to particular proceedings, complaints or references ... ;

(g) prescribe the practice and procedure to be followed on, or in connection with, the hearing or consideration of any proceedings, complaint or reference (including, where applicable, the mode and burden of proof and the admissibility of evidence);

(h) prescribe orders that may be made by the Tribunal under section 67(6) or (7);

(i) require information about any determination, award, order or other decision made by the Tribunal in relation to any proceedings, complaint or reference to be provided (in addition to any statement under section 68(4)) to the person who brought the proceedings or made the complaint or reference, or to the person representing his interests.”

83. Section 69(6) provides that in making the rules the Secretary of State shall have regard to:

“(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and

(b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to

national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.”

(c) The Rules

84. The Secretary of State has adopted rules to govern the procedure before the IPT in the form of the Investigatory Powers Tribunal Rules 2000 (“the Rules”). The Rules cover various aspects of the procedure before the IPT. As regards disclosure of information, Rule 6 provides:

“(1) The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.

(2) Without prejudice to this general duty, but subject to paragraphs (3) and (4), the Tribunal may not disclose to the complainant or to any other person:

(a) the fact that the Tribunal have held, or propose to hold, an oral hearing under rule 9(4);

(b) any information or document disclosed or provided to the Tribunal in the course of that hearing, or the identity of any witness at that hearing;

(c) any information or document otherwise disclosed or provided to the Tribunal by any person pursuant to section 68(6) of the Act (or provided voluntarily by a person specified in section 68(7));

(d) any information or opinion provided to the Tribunal by a Commissioner pursuant to section 68(2) of the Act;

(e) the fact that any information, document, identity or opinion has been disclosed or provided in the circumstances mentioned in subparagraphs (b) to (d).

(3) The Tribunal may disclose anything described in paragraph (2) with the consent of:

(a) in the case of sub-paragraph (a), the person required to attend the hearing;

(b) in the case of sub-paragraphs (b) and (c), the witness in question or the person who disclosed or provided the information or document;

(c) in the case of sub-paragraph (d), the Com-

missioner in question and, to the extent that the information or opinion includes information provided to the Commissioner by another person, that other person;

(d) in the case of sub-paragraph (e), the person whose consent is required under this rule for disclosure of the information, document or opinion in question.

(4) The Tribunal may also disclose anything described in paragraph (2) as part of the information provided to the complainant under rule 13(2), subject to the restrictions contained in rule 13(4) and (5).

(5) The Tribunal may not order any person to disclose any information or document which the Tribunal themselves would be prohibited from disclosing by virtue of this rule, had the information or document been disclosed or provided to them by that person.

(6) The Tribunal may not, without the consent of the complainant, disclose to any person holding office under the Crown (except a Commissioner) or to any other person anything to which paragraph (7) applies.

(7) This paragraph applies to any information or document disclosed or provided to the Tribunal by or on behalf of the complainant, except for ... statements [as to the complainant's name, address and date of birth and the public authority against which the proceedings are brought]."

85. Rule 9 deals with the forms of hearings and consideration of the complaint:

"(1) The Tribunal's power to determine their own procedure in relation to section 7 proceedings and complaints shall be subject to this rule.

(2) The Tribunal shall be under no duty to hold oral hearings, but they may do so in accordance with this rule (and not otherwise).

(3) The Tribunal may hold, at any stage of their consideration, oral hearings at which the complainant may make representations, give evidence and call witnesses.

(4) The Tribunal may hold separate oral hearings which:

(a) the person whose conduct is the subject of the complaint,

(b) the public authority against which the section 7 proceedings are brought, or

(c) any other person specified in section 68(7) of the Act,

may be required to attend and at which that person or authority may make representations, give evidence and call witnesses.

(5) Within a period notified by the Tribunal for the purpose of this rule, the complainant, person or authority in question must inform the Tribunal of any witnesses he or it intends to call; and no other witnesses may be called without the leave of the Tribunal.

(6) The Tribunal's proceedings, including any oral hearings, shall be conducted in private."

86. The taking of evidence is addressed in Rule 11:

"(1) The Tribunal may receive evidence in any form, and may receive evidence that would not be admissible in a court of law.

(2) The Tribunal may require a witness to give evidence on oath.

(3) No person shall be compelled to give evidence at an oral hearing under rule 9(3)."

87. Finally, Rule 13 provides guidance on notification to the complainant of the IPT's findings:

"(1) In addition to any statement under section 68(4) of the Act, the Tribunal shall provide information to the complainant in accordance with this rule.

(2) Where they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact.

...

(4) The duty to provide information under this rule is in all cases subject to the general duty imposed on the Tribunal by rule 6(1).

(5) No information may be provided under this rule whose disclosure would be restricted under rule 6(2) unless the person whose consent would be needed for disclosure under that rule has been given the opportunity to make representations to the Tribunal."

(d) The practice of the IPT

88. In its joint ruling on preliminary issues of law (see paragraph 16 above), the IPT clarified a number of aspects of its procedure. The IPT sat, for the first time, in public. As regards the IPT procedures and the importance of the cases before it, the IPT noted:

"10. The challenge to rule 9(6) [requiring oral hearings to be held in private] and to most of the other rules governing the basic procedures of the Tribunal have made this the most

significant case ever to come before the Tribunal. The Tribunal are left in no doubt that their rulings on the legal issues formulated by the parties have potentially important consequences for dealing with and determining these and future proceedings and complaints. Counsel and those instructing them were encouraged to argue all the issues in detail, in writing as well as at the oral hearings held over a period of three days in July and August 2002. At the end of September 2002 the written submissions were completed when the parties provided, at the request of the Tribunal, final comments on how the Rules ought, if permissible and appropriate, to be revised and applied by the Tribunal, in the event of a ruling that one or more of the Rules are incompatible with Convention rights and/or *ultra vires*."

89. The IPT concluded (at paragraph 12) that:

"... (a) the hearing of the preliminary issues should have been conducted in public, and not in private as stated in rule 9(6); (b) the reasons for the legal rulings should be made public; and (c) in all other respects the Rules are valid and binding on the Tribunal and are compatible with Articles 6, 8 and 10 of the Convention."

90. Specifically on the applicability of Article 6 S 1 to the proceedings before it, the IPT found:

"85. The conclusion of the Tribunal is that Article 6 applies to a person's claims under section 65(2)(a) and to his complaints under section 65(2)(b) of RIPA, as each of them involves 'the determination of his civil rights' by the Tribunal within the meaning of Article 6(1)."

91. After a review of the Court's case-law on the existence of a "civil right", the IPT explained the reasons for its conclusions:

"95. The Tribunal agree with the Respondents that there is a sense in which the claims and complaints brought by virtue of s 65(2) of RIPA fall within the area of public law. They arise out of the alleged exercise of very wide discretionary, investigatory, state powers by public authorities, such as the intelligence and security agencies and the police. They are concerned with matters of national security, of public order, safety and welfare. The function of the Tribunal is to investigate and review the lawfulness of the exercise of such powers. This is no doubt intended to ensure that the authorities comply with their relevant public law duties, such as by obtaining appropriate warrants and authorisations to carry out interception and surveillance.

96. The public law element is reinforced by the

directions to the Tribunal in sections 67(2) and 67(3)(c) of RIPA to apply to the determinations the same principles as would be applied by a court in judicial review proceedings. Such proceedings are concerned with the procedural and substantive legality of decisions and actions of public authorities.

97. The fact that activities, such as interception of communications and surveillance, may also impact on the Convention rights of individuals, such as the right to respect for private life and communications in Article 8, does not of itself necessarily mean that the Tribunal make determinations of civil rights ...

98. Further, the power of the Tribunal to make an award of compensation does not necessarily demonstrate that the Tribunal determine civil rights ...

99. Applying the approach in the Strasbourg cases that account should be taken of the content of the rights in question and of the effect of the relevant decision on them ..., the Tribunal conclude that the public law or public order aspects of the claims and complaints to the Tribunal do not predominate and are not decisive of the juristic character of the determinations of the Tribunal. Those determinations have a sufficiently decisive impact on the private law rights of individuals and organisations to attract the application of Article 6.

100. The jurisdiction of the Tribunal is invoked by the initiation of claims and complaints by persons wishing to protect, and to obtain redress for alleged infringements of, their underlying rights of confidentiality and of privacy for person, property and communications. There is a broad measure of protection for such rights in English private law in the torts of trespass to person and property, in the tort of nuisance, in the tort of misfeasance in a public office, in the statutory protection from harassment and in the developing equitable doctrine of breach of confidence ...

101. Since 2 October 2000 there has been added statutory protection for invasion of Article 8 rights by public authorities. This follows from the duties imposed on public authorities by section 6 and the rights conferred on victims by section 7 of the [Human Rights Act]. The concept of 'civil rights and obligations' is a fair and reasonable description of those common law and statutory rights and obligations, which form the legal foundation of a person's right to bring claims and make complaints by virtue of section 65.

102. The fact that the alleged infringements of those rights is by public authorities in pur-

ported discretionary exercise of administrative investigatory powers does not detract from the 'civil' nature of the rights and obligations in issue ...

...

107. For all practical purposes the Tribunal is also the only forum for the effective investigation and determination of complaints and for granting redress for them where appropriate ...

108. In brief, viewing the concept of determination of 'civil rights' in the round and in the light of the Strasbourg decisions, the Tribunal conclude that RIPA, which puts all interception, surveillance and similar intelligence gathering powers on a statutory footing, confers, as part of that special framework, additional 'civil rights' on persons affected by the unlawful exercise of those powers. It does so by establishing a single specialised Tribunal for the judicial determination and redress of grievances arising from the unlawful use of investigatory powers."

92. As to the proper construction of Rule 9 regarding oral hearings, the IPT found:

"157. The language of rule 9(2) is clear:

'The Tribunal shall be under no duty to hold oral hearings but may do so in accordance with this rule (and not otherwise).'

158. Oral hearings are in the discretion of the Tribunal. They do not have to hold them, but they may, if they so wish, do so in accordance with Rule 9.

159. In the exercise of their discretion the Tribunal 'may hold separate oral hearings.' That exercise of discretion, which would be a departure from normal adversarial procedures, is expressly authorised by rule 9(4).

160. The Tribunal should explain that, contrary to the views apparently held by the Complainants' advisers, the discretion in rule 9(4) neither expressly nor impliedly precludes the Tribunal from exercising their general discretion under rule 9(2) to hold inter partes oral hearings. It is accepted by the Respondents that the Tribunal may, in their discretion, direct joint or collective oral hearings to take place. That discretion was in fact exercised in relation to this very hearing. The exercise of discretion must take into account the relevant provisions of other rules, in particular the Tribunal's general duty under rule 6(1) to prevent the potentially harmful disclosure of sensitive information in the carrying out of their functions. As already explained, this hearing has

neither required nor involved the disclosure of any such information or documents emanating from the Complainants, the Respondents or anyone else. The hearing has only been concerned with undiluted legal argument about the procedure of the Tribunal.

161. The Tribunal have reached the conclusion that the absence from the Rules of an absolute right to either an inter partes oral hearing, or, failing that, to a separate oral hearing in every case is within the rule-making power in section 69(1). It is also compatible with the Convention rights under Article 6, 8 and 10. Oral hearings involving evidence or a consideration of the substantive merits of a claim or complaint run the risk of breaching the [neither confirm nor deny] policy or other aspects of national security and the public interest. It is necessary to provide safeguards against that. The conferring of a discretion on the Tribunal to decide when there should be oral hearings and what form they should take is a proportionate response to the need for safeguards, against which the tribunal, as a judicial body, can balance the Complainants' interests in a fair trial and open justice according to the circumstances of the particular case."

93. Regarding Rule 9(6) which stipulates that oral hearings must be held in private, the IPT held:

"163. The language of rule 9(6) is clear and unqualified.

'The Tribunal's proceedings, including any oral hearings, shall be conducted in private.'

164. The Tribunal are given no discretion in the matter. Rule 6(2)(a) stiffens the strictness of the rule by providing that the Tribunal may not even disclose to the Complainant or to any other person the fact that the Tribunal have held, or propose to hold, a separate oral hearing under rule 9(4). The fact of an oral hearing is kept private, even from the other party ...

...

167. ... the very fact that this rule is of an absolute blanket nature is, in the judgment of the Tribunal in the circumstances, fatal to its validity ... the Tribunal have concluded that the very width of the rule preventing any hearing of the proceedings in public goes beyond what is authorised by section 69 of RIPA.

...

171. There is no conceivable ground for requiring legal arguments on pure points of proce-

dural law, arising on the interpretation and validity of the Rules, to be held in private ...

172. Indeed, purely legal arguments, conducted for the sole purpose of ascertaining what is the law and not involving the risk of disclosure of any sensitive information, should be heard in public. The public, as well as the parties, has a right to know that there is a dispute about the interpretation and validity of the relevant law and what the rival legal contentions are.

173. The result is that rule 9(6) is *ultra vires* section 69. It does not bind the Tribunal. The Secretary of State may exercise his discretion under section 69(1) to make fresh rules on the point, but, unless and until he does, the Tribunal may exercise their discretion under section 68(1) to hear the legal arguments in public under rule 9(3), subject to their general and specific duties, such as rule 6(1) in the Rules and in RIPA. It is appropriate to exercise that discretion to direct that the hearing of the preliminary issues shall be treated as if it had taken place under rule 9(3) in public, because such a preliminary hearing of purely legal arguments solely on procedural issues does not pose any risk to the duty of the Tribunal under rule 6(1) or to the maintenance of the [neither confirm nor deny] policy. The transcripts of the hearing should be made available for public consumption."

94. Regarding other departures from the normal rules of adversarial procedure as regards the taking of evidence and disclosure in Rule 6, the IPT concluded:

"181. ... that these departures from the adversarial model are within the power conferred on the Secretary of State by section 69(1), as limited by section 69(6). A reasonable rule-making body, having regard to the mandatory factors in section 69(6), could properly conclude that these departures were necessary and proportionate for the purposes stated in section 69(6)(b). In the context of the factors set out in that provision and, in particular, the need to maintain the [neither confirm nor deny] policy, the procedures laid down in the Rules provide a 'fair trial' within Article 6 for the determination of the civil rights and obligations arising in claims and complaints under section 65 of RIPA.

182. They are also compatible with Convention rights in Articles 8 and 10, taking account of the exceptions for the public interest and national security in Articles 8(2) and 10(2), in particular the effective operation of the legitimate policy of [neither confirm nor deny] in relation to the use of investigatory powers. The

disclosure of information is not an absolute right where there are competing interests, such as national security considerations, and it may be necessary to withhold information for that reason, provided that, as in the kind of cases coming before this Tribunal, it is strictly necessary to do so and the restriction is counterbalanced by judicial procedures which protect the interests of the Complainants ..."

95. Finally, as regards the absence of reasons following a decision that the complaint is unsuccessful, the IPT noted:

"190. The Tribunal conclude that, properly interpreted in context on ordinary principles of domestic law, rule 13 and section 68(4) of RIPA do not apply to prevent publication of the reasons for the rulings of the Tribunal on the preliminary issues on matters of procedural law, as they are not a 'determination' of the proceedings brought before them or of the complaint made to them within the meaning of those provisions. Those provisions concern decisions of the Tribunal which bring the claim or complaint to an end, either by a determination of the substantive claim or complaint on its merits ...

191. ... In the circumstances there can be publication of the reasons for legal rulings on preliminary issues, but, so far as determinations are concerned, the Tribunal are satisfied that section 68(4) and rule 13 are valid and binding and that the distinction between information given to the successful complainants and that given to unsuccessful complainants (where the [neither confirm nor deny] policy must be preserved) is necessary and justifiable."

96. In a second ruling on preliminary issues of law in the *British-Irish Rights Watch and others* case, which involved external communications (i.e. communications between the United Kingdom and abroad), the IPT issued its findings on the complaint in that case. The issue for consideration was identified as:

"3. ... whether ... 'the process of filtering intercepted telephone calls made from the UK to overseas telephones ... breaches Article 8(2) [of the European Convention on Human Rights] because it is not 'in accordance with the law' ..."

97. Given that the challenge in the case related solely to the lawfulness of the filtering process as set out in the RIPA legislation, the IPT issued a public ruling which explained the reasons for its findings in the case. In its ruling, it examined the relevant legislative provisions and concluded that they were sufficiently accessible and

foreseeable to be in accordance with the law.

98. As the applicant's case demonstrates, once general legal issues have been determined, if the IPT is required to consider the specific facts of the case, and in particular whether interception has taken place, any such consideration will take place in private. Rule 6 prevents the applicant participating in this stage of proceedings.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

99. The applicant complained that his communications were being unlawfully intercepted in order to intimidate him and undermine his business activities, in violation of Article 8 of the Convention, which reads as follows:

"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 freedoms of others."

100. He further argued that the regime established under RIPA for authorising interception of internal communications did not comply with the requirements of Article 8 § 2 of the Convention.

A. Admissibility

1. *The parties' submissions*

(a) The Government

101. The Government argued that the applicant had failed to advance a general challenge to the Convention-compliance of the RIPA provisions on interception of internal communications before the IPT, and that he had accordingly failed to exhaust domestic remedies in respect of this complaint. They pointed out that at the same time as the applicant was pursuing his complaint with the IPT, the *British-Irish Rights Watch and others* case was also under consid-

eration by the IPT. Pursuant to the arguments of the parties in that case, the IPT issued a general public ruling of the IPT on the compatibility of the RIPA scheme as regards external communications with Article 8 (see paragraphs 96 to 97 above). No such ruling on the subject of internal communications was issued in the applicant's case.

102. The Government emphasised that the applicant's Grounds of Claim and Complaint alleged interception of the applicant's business calls and a violation of Article 8 on the facts of the applicant's case. The Government noted that the paragraphs of the Grounds of Claim and Complaint relied upon by the applicant in his submissions to this Court to support his allegation that a general complaint was advanced were misleading. It was clear from the description of his complaint and the subsequent paragraphs particularising his claim that the reference to interception was to an alleged interception in his case, and not to interception in general, and that the complaint that the interception was not in accordance with the law related to an alleged breach of the Data Protection Act, and not to any alleged inadequacies of the RIPA regime (see paragraphs 12 and 14 above).

103. The Government submitted that Article 35 § 1 had a special significance in the context of secret surveillance, as the IPT was specifically designed to be able to consider and investigate closed materials. It had extensive powers to call for evidence from the intercepting agencies and could request assistance from the Commissioner, who had detailed working knowledge and practice of the section 8(1) warrant regime.

104. As regards the applicant's specific complaint that his communications had been unlawfully intercepted, the Government contended that the complaint was manifestly ill-founded as the applicant had failed to show that there had been an interference for the purposes of Article 8. In their submission, he had not established a reasonable likelihood, as required by the Court's case-law, that his communications had been intercepted.

105. The Government accordingly invited the Court to find both the general and the specific complaints under Article 8 inadmissible.

(b) The applicant

106. The applicant refuted the suggestion that his

complaint before the IPT had failed to challenge the Convention-compatibility of the RIPA regime on internal communications and that he had, therefore, failed to exhaust domestic remedies in this regard. He pointed out that one of the express grounds of his complaint to the IPT had been that “the interception and processing ha[d] at no time been in accordance with the law as required by Article 8(2)” (see paragraph 13 above). He argued that his assertion before the IPT was that any warrants issued or renewed under RIPA violated Article 8.

107. The applicant further disputed that there had been no interference in his case, maintaining that he had established a reasonable likelihood that interception had taken place and that, in any event, the mere existence of RIPA was sufficient to show an interference.

2. The Court’s assessment

108. As regards the Government’s objection that the applicant failed to exhaust domestic remedies, the Court considers that the summary of the applicant’s case set out by the IPT in its ruling of 9 January 2004 (see paragraph 17 above) as well as the Grounds of Claim and Complaint themselves (see paragraphs 10 to 15 above) support the Government’s contention that the applicant’s complaint concerned only the specific allegation that his communications were actually being intercepted. Further, it can be inferred from the fact that the IPT issued a general public ruling on the compliance of the RIPA provisions on external communications with Article 8 in the *British-Irish Rights Watch and others* case (see paragraphs 96 to 97 above) that, had a similar argument in respect of internal communications been advanced by the applicant, a similar public ruling would have been issued in his case. No such ruling was handed down. The Court therefore concludes that the applicant failed to raise his arguments as regards the overall Convention-compatibility of the RIPA provisions before the IPT.

109. However, the Court recalls that where the Government claims non-exhaustion they must satisfy the Court that the remedy proposed was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of*

Judgments and Decisions 1996-IV; and *Sejdivic v. Italy* [GC], no. 56581/00 56581/00, § 46, ECHR 2006-II). While the Government rely on the *British-Irish Rights Watch and others* case to demonstrate that the IPT could have issued a general ruling on compatibility, they do not address in their submissions to the Court what benefit, if any, is gained from such a general ruling. The Court recalls that it is in principle appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention in order that the Court can have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008-...; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 154, ECHR 2009-...). However, it is important to note in this case that the applicant’s challenge to the RIPA provisions is a challenge to primary legislation. If the applicant had made a general complaint to the IPT, and if that complaint been upheld, the tribunal did not have the power to annul any of the RIPA provisions or to find any interception arising under RIPA to be unlawful as a result of the incompatibility of the provisions themselves with the Convention (see paragraph 24 above). No submissions have been made to the Court as to whether the IPT is competent to make a declaration of incompatibility under section 4(2) of the Human Rights Act. However, it would appear from the wording of that provision that it is not. In any event, the practice of giving effect to the national courts’ declarations of incompatibility by amendment of offending legislation is not yet sufficiently certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation giving rise to a remedy which an applicant is required to exhaust (see *Burden v. the United Kingdom*, cited above, § 43 to 44). Accordingly, the Court considers that the applicant was not required to advance his complaint regarding the general compliance of the RIPA regime for internal communications with Article 8 § 2 before the IPT in order to satisfy the requirement under Article 35 § 1 that he exhaust domestic remedies.

110. The Court takes note of the Government’s argument that Article 35 § 1 has a special significance in the context of secret surveillance given the extensive powers of the IPT to investigate complaints before it and to access

confidential information. While the extensive powers of the IPT are relevant where the tribunal is examining a specific complaint of interception in an individual case and it is necessary to investigate the factual background, their relevance to a legal complaint regarding the operation of the legislative regime is less clear. In keeping with its obligations under RIPA and the Rules (see paragraphs 83 to 84 above), the IPT is not able to disclose information to an extent, or in a manner, contrary to the public interest or prejudicial to national security or the prevention or detection of serious crime. Accordingly, it is unlikely that any further elucidation of the general operation of the interception regime and applicable safeguards, such as would assist the Court in its consideration of the compliance with the regime with the Convention, would result from a general challenge before the IPT.

111. As regards the Government's second objection that there has been no interference in the applicant's case, the Court considers that this raises serious questions of fact and of law which cannot be settled at this stage of the examination of the application but require an examination of the merits of the complaint.
112. In conclusion, the applicant's complaint under Articles 8 cannot be rejected for non-exhaustion of domestic remedies under Article 35 § 1 or as manifestly ill-founded within the meaning of Article 35 § 3. The Court notes, in addition, that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The existence of an "interference"*

(a) **The parties' submissions**

i *The applicant*

113. The applicant insisted that his communications had been intercepted. He maintained that there were reasonable grounds for believing that he had been subject to interception and submitted that objectively verifiable facts supported the possibility of interception, pointing to his long campaign regarding the alleged miscarriage of justice in his case and the allegation of police impropriety made at his re-trial.
114. Noting the Government's submission that neither preventing calls from being put through nor hoax calls amounted to interception for

the purposes of RIPA, the applicant emphasised that such conduct clearly amounted to an interference for the purposes of Article 8 of the Convention. In the event that RIPA did not apply to such measures, he argued that the Government had failed to indicate the alternative legal regime put in place to prevent such interference with individuals' private lives as required by the positive obligations under Article 8.

115. Finally, and in any event, relying on *Weber and Saravia v. Germany* (dec.), no. 54934/00 54934/00, § 78, ECHR 2006-XI, the applicant contended that he was not required to demonstrate that the impugned measures had actually been applied to him in order to establish an interference with his private life. He invited the Court to follow its judgment in *Liberty and Others v. the United Kingdom*, no. 58243/00, § § 56 to 57, 1 July 2008, and find that the mere existence of a regime for surveillance measures entailed a threat of surveillance for all those to whom the legislation could be applied.

ii *The Government*

116. The Government accepted that if the applicant's complaint regarding the general Convention-compatibility of the RIPA scheme was admissible, then he could claim to be a victim without having to show that he had actually been the subject of interception. However, they argued that the Court had made it clear that, in a case argued on the basis that the intelligence authorities had in fact been engaging in unlawful surveillance, the principles set out in § § 34 to 38 of the Court's judgment in *Klass and Others v. Germany*, 6 September 1978, Series A no. 28 did not apply and, instead, the applicant was required to substantiate his claim with evidence sufficient to satisfy the Court that there was a reasonable likelihood that unlawful interception had occurred (citing *Halford v. the United Kingdom*, 25 June 1997, § 57, Reports 1997-III; and *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 49, 22 May 2008). In their view, the applicant had not established a reasonable likelihood of unlawful interception in his case, for four reasons: (i) there was no evidence to support a claim that the applicant's communications were being intercepted; (ii) the Government emphatically denied that any unlawful interception had taken place; (iii) the rejection of the applicant's complaint by the IPT supported this position (see paragraph 20 above); and (iv) the Commissioner's 2001

report also supported this position (see paragraph 65 above).

117. The Government further argued that complaints regarding calls not being put through or hoax calls did not show that there had been any interception in the applicant's case. They pointed out that, under section 2(2) RIPA, preventing calls from being put through and hoax calls were excluded from the definition of interception (see paragraph 30 above). As such, these activities would not fall within the remit of RIPA. The Government further argued that there was no factual foundation for the applicant's claims that any interception was intended to intimidate him.

(b) The Court's assessment

118. It is not disputed that mail, telephone and email communications, including those made in the context of business dealings, are covered by the notions of "private life" and "correspondence" in Article 8 § 1.

119. The Court has consistently held in its case-law that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, *inter alia*, *Klass and Others*, cited above, § 33; *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X; and *Krone Verlag GmbH & Co. KG v. Austria* (no. 4), no. 72331/01 72331/01, § 26, 9 November 2006). However, in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them, the Court has permitted general challenges to the relevant legislative regime.

120. The Court's approach to assessing whether there has been an interference in cases raising a general complaint about secret surveillance measures was set out in its *Klass and Others* judgment, cited above, § § 34 to 38 and 41:

"34. ... The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (*l'effet utile*) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially

weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.

35. In the light of these considerations, it has now to be ascertained whether, by reason of the particular legislation being challenged, the applicants can claim to be victims ... of a violation of Article 8 ... of the Convention ...

36. The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 ... could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8 ..., or even to be deprived of the right granted by that Article ..., without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.

...

The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 ..., since otherwise Article 8 ... runs the risk of being nullified.

37. As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification in the circumstances laid down in the Federal Constitutional Court's judgment ... To that extent, the disputed legislation directly

affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore, as the Delegates rightly pointed out, this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8 ...

...

38. Having regard to the specific circumstances of the present case, the Court concludes that each of the applicants is entitled to '(claim) to be the victim of a violation' of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance ...

...

41. The first matter to be decided is whether and, if so, in what respect the contested legislation, in permitting the above-mentioned measures of surveillance, constitutes an interference with the exercise of the right guaranteed to the applicants under Article 8 para. 1 ...

...

In its report, the Commission expressed the opinion that the secret surveillance provided for under the German legislation amounted to an interference with the exercise of the right set forth in Article 8 para. 1 Neither before the Commission nor before the Court did the Government contest this issue. Clearly, any of the permitted surveillance measures, once applied to a given individual, would result in an interference by a public authority with the exercise of that individual's right to respect for his private and family life and his correspondence. Furthermore, in the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an 'interference by a public authority' with the exercise of the applicants' right to respect for private and family life and for correspondence."

121. Subsequently, in *Malone v. the United Kingdom*, 2 August 1984, § 64, Series A no. 82, the Court noted:

"Despite the applicant's allegations, the Government have consistently declined to dis-

close to what extent, if at all, his telephone calls and mail have been intercepted otherwise on behalf of the police ... They did, however, concede that, as a suspected receiver of stolen goods, he was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed. As the Commission pointed out in its report ..., the existence in England and Wales of laws and practices which permit and establish a system for effecting secret surveillance of communications amounted in itself to an 'interference ... with the exercise' of the applicant's rights under Article 8 ..., apart from any measures actually taken against him (see the above-mentioned *Klass and Others* judgment, *ibid.*). This being so, the Court, like the Commission ..., does not consider it necessary to inquire into the applicant's further claims that both his mail and his telephone calls were intercepted for a number of years."

122. Following *Klass and Others* and *Malone*, the former Commission, in a number of cases against the United Kingdom in which the applicants alleged actual interception of their communications, emphasised that the test in *Klass and Others* could not be interpreted so broadly as to encompass every person in the United Kingdom who feared that the security services may have conducted surveillance of him. Accordingly, the Commission required applicants to demonstrate that there was a "reasonable likelihood" that the measures had been applied to them (see, for example, *Esbest v. the United Kingdom*, no. 18601/91, Commission decision of 2 April 1993; *Redgrave v. the United Kingdom*, no. 202711/92, Commission decision of 1 September 1993; and *Matthews v. the United Kingdom*, no. 28576/95, Commission decision of 16 October 1996).

123. In cases concerning general complaints about legislation and practice permitting secret surveillance measures, the Court has reiterated the *Klass and Others* approach on a number of occasions (see, *inter alia*, *Weber and Saravia*, cited above, § 78; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00 62540/00, § 58 to 60, 28 June 2007; *Iliya Stefanov*, cited above, § 49; *Liberty and Others*, cited above, § 56 to 57; and *lordachi and Others v. Moldova*, no. 25198/02, § 30 to 35, 10 February 2009). Where actual interception was alleged, the Court has held that in order for there to be an interference, it has to be satisfied that there was a reasonable likelihood that surveillance measures were applied to the applicant (see *Halford*,

cited above, § 56 to 57). The Court will make its assessment in light of all the circumstances of the case and will not limit its review to the existence of direct proof that surveillance has taken place given that such proof is generally difficult or impossible to obtain (see *Iliya Stefanov*, cited above, § 50).

124. Sight should not be lost of the special reasons justifying the Court's departure, in cases concerning secret measures, from its general approach which denies individuals the right to challenge a law *in abstracto*. The principal reason was to ensure that the secrecy of such measures did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court (see *Klass and Others*, cited above, § 34 and 36). In order to assess, in a particular case, whether an individual can claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court must have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him. Where there is no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such cases, even where the actual risk of surveillance is low, there is a greater need for scrutiny by this Court.
125. The Court observes that the present applicant complained of an interference with his communications both on the basis that, given the circumstances of his particular case, he had established a reasonable likelihood of interception and on the basis of the very existence of measures permitting secret surveillance.
126. The applicant has alleged that the fact that calls were not put through to him and that he received hoax calls demonstrates a reasonable likelihood that his communications are being intercepted. The Court disagrees that such allegations are sufficient to support the applicant's contention that his communications have been intercepted. Accordingly, it concludes that the applicant has failed to demonstrate a reasonable likelihood that there was actual interception in his case.
127. Insofar as the applicant complains about the RIPA regime itself, the Court observes, first, that the RIPA provisions allow any individual who

alleges interception of his communications to lodge a complaint with an independent tribunal (see paragraph 75 above), a possibility which was taken up by the applicant. The IPT concluded that no unlawful, within the meaning of RIPA, interception had taken place.

128. As to whether a particular risk of surveillance arises in the applicant's case, the Court notes that under the provisions of RIPA on internal communications, any person within the United Kingdom may have his communications intercepted if interception is deemed necessary on one or more of the grounds listed in section 5(3) (see paragraphs 31 to 32 above). The applicant has alleged that he is at particular risk of having his communications intercepted as a result of his high-profile murder case, in which he made allegations of police impropriety (see paragraph 5 above), and his subsequent campaigning against miscarriages of justice. The Court observes that neither of these reasons would appear to fall within the grounds listed in section 5(3) RIPA. However, in light of the applicant's allegations that any interception is taking place without lawful basis in order to intimidate him (see paragraph 7 above), the Court considers that it cannot be excluded that secret surveillance measures were applied to him or that he was, at the material time, potentially at risk of being subjected to such measures.
129. In the circumstances, the Court considers that the applicant can complain of an interference with his Article 8 rights. The Government's objection concerning the applicant's lack of victim status is accordingly dismissed.
- 2. The justification for the interference**
130. Any interference can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one of more of the legitimate aims to which paragraph 2 of Article 8 refers and is necessary in a democratic society in order to achieve any such aim.
- (a) The parties' submissions**
- i *The applicant*
131. The applicant did not dispute that the surveillance of internal communications in the United Kingdom had a basis in domestic law, namely the provisions of RIPA. Nor did he dispute that both the relevant legislation and the Code were publicly available. However, he argued that the RIPA provisions, and in particular sec-

tions 5, 8 and 15 on the issuing of warrants and the relevant safeguards, were not in accordance with the law as required by Article 8 § 2 of the Convention as they did not meet the foreseeability requirement set out in the Court's jurisprudence. In particular, he alleged that section 8(1) RIPA, which stipulated the basic contents of an interception warrant, did not indicate with sufficient clarity how decisions as to which individuals were to be put under surveillance were made; that RIPA did not define the categories of persons who could have their telephones tapped; and that it did not clarify the procedures in place to regulate the interception and processing of intercept material. He contended that the safeguards referred to in section 15 RIPA were inadequate as they were subject to unknown "arrangements" considered necessary by the Secretary of State. The other procedural safeguards in place including the possibility of launching proceedings before the IPT, were, in the applicant's view, also inadequate to protect against abuse.

132. The applicant relied on the Court's judgment in *Liberty and Others*, cited above, as to the lack of clarity of the relevant provisions of RIPA's predecessor, the Interception of Communications Act 1985, and argued that the changes introduced to the surveillance regime by RIPA were inadequate to address the flaws identified in that case. He concluded that any interference therefore automatically failed to meet the requirement that it must be in accordance with the law and relied in this regard on the conclusions of a report by a surveillance law expert instructed by him, Dr Goold, appended to his submissions. He further highlighted the conclusion of the Court in *Liberty and Others*, cited above, § 68, that the fact that extracts of the code of practice adopted under section 71 RIPA were in the public domain suggested that it was possible for a State to make public certain details about the operation of a scheme for external surveillance without compromising national security.
133. The applicant argued that the Court's decisions in *Valenzuela Contreras v. Spain*, 30 July 1998, *Reports of Judgments and Decisions* 1998-V; *Huvig v. France*, 24 April 1990, Series A no. 176-B; *Kruslin v. France*, 24 April 1990, Series A no. 176-A; *Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II; *Al-Nashif v. Bulgaria*, no. 50963/99 50963/99, 20 June 2002; and *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V had expanded on the issue of "foreseeability" and indicated a departure from the narrower scope of earlier decisions which tolerated the restrictive extent to which national security had imposed blanket secrecy on the publication of surveillance procedures. This broader approach had been confirmed by the Court's recent ruling in *Liberty and Others*, cited above. The applicant argued that the RIPA scheme remained "unnecessarily opaque" and that further details about the operation, beyond those currently included in the Code, should be made available in order to comply with the Convention requirements regarding clarity and precision.
134. As to the safeguards and the arrangements put in place by the Secretary of State under section 15 RIPA, the applicant contended that there was a circularity in the fact that the person responsible for issuing warrants was also responsible for the establishment of the safeguards. He referred to the Court's observation in *Liberty and Others*, cited above, § 66, that details of the arrangements were neither in the legislation nor otherwise in the public domain. As regards the role of the Commissioner, the applicant argued that, as the Court found in *Liberty and Others*, cited above, § 67, the existence of the Commissioner did not contribute towards the accessibility and clarity of the arrangements under section 15 RIPA as he was unable to reveal what the arrangements were.
135. More generally, the applicant alleged that the Government had failed to address properly the safeguards available to prevent abuse of power. He argued that the legislation failed to identify the nature of the offences which could give rise to an interception order, to define persons liable to have their telephones tapped, to set limits on the duration of telephone tapping and to explain the procedure to be followed in examining and storing data obtained, the precautions to be taken in communicating the data and the circumstances in which data could or should be destroyed (citing *Weber and Saravia*, cited above, § 95).
136. He argued in particular that in *Weber and Saravia*, the law under consideration set out the precise offences the prevention and detection of which could give rise to an interception order, which he alleged was not the case with RIPA. He pointed to the opinion of his expert, Dr Goold, that the definition of "serious crime" in section 81(2)(b) RIPA (see paragraph 34 above) was excessively broad and did not refer to any specific offences by name, and Dr Goold's conclusion that it could not be said that the

grounds for issuing a section 8(1) warrant, as set out in section 5(3) RIPA, were sufficiently clear so as to enable an individual to predict what sorts of conduct might give rise to secret surveillance. He further considered that there was no information as to how the categories of persons liable to have their telephones tapped were “strictly controlled”, as the Government suggested (see paragraph 142 below).

ii *The Government*

137. The Government submitted that any interference which may have arisen in the present case satisfied the requirements of Article 8 § 2. The Government emphasised the duty of democratic governments to uphold the criminal law and protect citizens from terrorist threats and organised crime. In order to discharge this duty, the power to intercept the communications of specific targets was necessary. They pointed to the Commissioner’s consistent conclusions that the interception powers under RIPA were an invaluable weapon for the protection of national security and the fight against organised crime (see paragraphs 64 and 72 above). Further, in order for interception to yield useful intelligence, the fact of the interception, as well as the methods by which it could be effected, had to be kept secret. If possible targets were able to gain insight into sensitive interception techniques and capabilities, then they would be able to take steps to undermine the usefulness of any intelligence gathered against them. The Government explained that they had had experience of information about surveillance techniques being put in the public domain, which had led directly to the loss of important sources of intelligence. They insisted that their policy of “neither confirm nor deny” was important to ensure the overall effectiveness of surveillance operations.

138. Generally, regarding the applicant’s reliance on the Court’s judgment in *Liberty and Others*, cited above, the Government emphasised that that case concerned the Interception of Communications Act 1985, and not RIPA. Accordingly, they argued, the Court had not given a view as to whether it considered that the provisions of RIPA satisfied the requirements of Article 8. In finding a violation of Article 8 in *Liberty and Others* as a result of the failure of the Government to provide any public indication of the procedure for selecting for examination, sharing, storing and destroying intercepted data, the Court referred specifically at § 68 of its judgment to the fact that under

RIPA, the Government had published a code of practice giving details about the operation of the scheme. In the Government’s view, the publication of the Code was a feature by which the RIPA scheme could be distinguished from its predecessor in a significant and relevant respect. They also contrasted the finding of the Court in *Liberty and Others*, § 66, as regards the former arrangements regarding safeguards under section 6 Interception of Communications Act with the section 15 RIPA arrangements and the relevant provisions of the Code.

139. On the question whether any interference was in accordance with the law, the Government considered, first, that the statutory provisions of RIPA provided a sufficient basis in domestic law for any interference. They noted that the applicant did not appear to dispute this. As to whether the law was accessible, the Government pointed out that both RIPA and the Code were public accessible. They concluded that the accessibility requirement was satisfied, again noting the absence of any dispute on the matter from the applicant.

140. Regarding foreseeability, the Government highlighted at the outset the special context of secret surveillance. Referring to, *inter alia*, *Weber and Saravia*, cited above, § 93, the Government emphasised that foreseeability could not mean that an individual should be able to foresee when the authorities were likely to intercept his communications so that he could adapt his conduct accordingly. However, they agreed that there needed to be clear, detailed rules on interception, as outlined in § 95 of the Court’s judgment in *Weber and Saravia* to guard against the risk of arbitrary exercise of secret surveillance powers. The Court had recently clarified in *Liberty and Others*, cited above, § § 67 to 69, that not every provision regulating secret surveillance had to be set out in primary legislation. The test was whether there was a sufficient indication of the safeguards in a form accessible to the public in order to avoid abuses of power (citing *Weber and Saravia*, § 95). The Government accordingly contended that account should be taken of all relevant circumstances, including the nature, scope and duration of possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the remedies provided by national law (citing *Association for European Integration and Human Rights and Ekimdzchiev v. Bulgaria*, cited above, § 77). They also argued that the Court should consider any evidence as to the actual

operation of the warrant system and whether the system appeared to be working properly or was in fact subject to abuse (referring to *Association for European Integration and Human Rights and Ekimdzhiev*, § 92 to 93).

141. Addressing each of the individual safeguards set out in *Weber and Saravia* in turn, the Government contended, first, as regards the nature of offences which could give rise to an interception order, that section 5(3) RIPA, supplemented by the Code and the relevant definitions provided in the Act, was sufficiently clear and precise in setting out the grounds on which a section 8(1) warrant could be issued. As to the applicant's particular complaint that the term "national security" lacked clarity, the Government emphasised that the term was not criticised by the Court in *Liberty and Others* when it was considered in the context of RIPA's predecessor, a fact which was unsurprising given that the term was a frequently-used legislative concept in the legal systems of many Contracting States and appeared in Article 8 § 2 of the Convention itself. The Government invited the Court to follow the Commission in *Christie v. the United Kingdom*, no. 21482/93, Commission decision of 27 June 1994, in finding that the term "national security" was sufficiently foreseeable for the purposes of Article 8, noting that the applicant had cited no authority to the contrary. The Government also contested the applicant's complaint that "serious crime" was not sufficiently specific and that RIPA failed to clarify the exact offences for the prevention of which a section 8(1) warrant could be issued. They pointed out that nothing in *Weber and Saravia*, cited above, § 27, supported the proposition that the legislative framework had to refer to the relevant offences by name in order to comply with the foreseeability requirement. They concluded that "serious crime", as defined in the Act, provided an adequate indication of the circumstances in which interception could be authorised.
142. Second, as regards the categories of persons liable to have their telephones tapped, the Government acknowledged that RIPA allowed any type of communication transmitted over a telecommunications system to be intercepted. However, the categories of persons liable to have their telephones tapped were strictly controlled by RIPA. The factors by reference to which interception was undertaken had to be specifically identified in the schedule to the warrant. Further, a person would only become a subject of interception, and a set of premises would only be named in an interception warrant, if the interception operation was necessary on one or more of the grounds listed in section 5(3) (see paragraphs 31 to 32 above). The Government disputed that the Court's conclusion in *Weber and Saravia*, cited above, § 97, was at odds with this approach as, in their submission, that judgment merely approved the approach taken in the G10 Act without ruling out other possible methods of satisfying the Article 8 § 2 requirements.
143. Third, RIPA set out strict limits regarding the duration of any interception activity and the circumstances in which a warrant could be renewed (see paragraphs 50 to 51 above).
144. Fourth, RIPA, supplemented by the Code, contained detailed provisions on the procedure to be followed for examining, using and storing the data obtained and the precautions to be taken when communicating the data to other parties. Although in principle an intercepting agency could listen to all intercepted material in order to determine whether it contained valuable intelligence, where it contained no such intelligence the material would be swiftly and securely destroyed. Section 15 RIPA provided an exhaustive definition of the "authorised purposes" and, in particular, section 15(4) identified limits on the number of persons to whom intercept material could be disclosed (see paragraph 42 above). These provisions were supplemented by the provisions of chapter 6 of the Code (see paragraphs 45 to 47 above). In particular, paragraph 6.4 of the Code specified that disclosure could only be made to persons with security clearance and paragraph 6.9 provided for distribution lists of vetted persons to be maintained. Disclosure was further limited by the "need-to-know" principle, which restricted both those who could gain access to intercept material and the extent of any such access. Paragraph 6.5 of the Code clarified that the obligation not to disclose intercept information applied to any person to whom such information had been disclosed. Any breach of these safeguards was an offence under section 19 RIPA (see paragraph 44 above). The requirement to keep records in respect of the making, distribution and destruction of intercept material also provided an important safeguard. Section 15(3) made it clear that intercept material had to be destroyed as soon as there were no longer grounds for retaining it as "necessary" for any of the exhaustively defined authorised purposes. Where human or technical error had resulted in material being gathered where it

should not have been, the intercept material was immediately destroyed. Finally, where intercept material was retained, paragraph 6.8 of the Code required it to be reviewed at appropriate intervals to ensure that the justification for its retention remained valid.

145. The Government emphasised that information concerning the arrangements put in place under section 15 RIPA had been published in the Code. However, in order to maintain the operational effectiveness of interception techniques, it was not possible to publish full details of the arrangements. In the view of the Government, the publication of any more detail than had already been published would be contrary to national security and prejudicial to the prevention and detection of serious crime. They argued that the decision as to how much information on safeguards could safely be put in the public domain without undermining the interests of national security or prejudicing the prevention and detection of serious crime fell within their margin of appreciation. It was also significant that the full details of the arrangements in place were made available to the Commissioner, who was required to keep them under review. The Government emphasised that the Commissioner's approval was sought and given in respect of the safeguard documents either before or shortly after the entry into force of RIPA (see paragraph 63 above). They further emphasised that the Commissioner had expressed his satisfaction with the section 15 safeguards in every report prepared since 2000. They referred in particular to the Commissioner's 2002 and 2004 reports (see paragraphs 68 to 69 above).
146. In conclusion, the Government contended that in light of the detail in the legislation and the applicable code, the RIPA regime satisfied the requirement of lawfulness.
147. The Government also insisted that any interference pursued a legitimate aim. The Government emphatically denied, in this regard, the applicant's allegation that interception was being used to intimidate him and undermine his business activities. The three relevant objectives set out in section 5(3) RIPA, namely safeguarding national security, preventing or detecting serious crime and safeguarding the economic well-being of the United Kingdom, were all legitimate aims for the purposes of Article 8(2).
148. As to proportionality, the Government pointed

to the fact that the Court had already accepted that secret surveillance could be necessary in a democratic society (see *Klass and Others*, cited above, § 48) and argued that the surveillance regime in RIPA was necessary and proportionate. The Government further argued that States enjoyed a fairly wide margin of appreciation when legislating in this field (citing *Weber and Saravia*, § 106). They reiterated that the protection of national security in particular was a heavy political responsibility affecting the whole population. Decisions in this area accordingly required a democratic legitimacy which could not be provided by the Court. This had been implicitly recognised by the Court in its *Klass and Others* judgment, cited above, § 49.

149. The Government accepted that in order to demonstrate respect for Article 8(2), there had to be adequate and effective guarantees against abuse of power. They reiterated that the assessment of whether such guarantees were present had to be made in light of all the circumstances of the case. In respect of the surveillance regime applicable in the United Kingdom, the Government emphasised that any interception without lawful authority was a criminal offence under section 1 RIPA (see paragraph 29 above); that the Secretary of State personally issued and modified warrants (see paragraph 38 above); and that guidance was publicly available in the form of the Code. They further pointed to the additional safeguards available in the form of the section 15 safeguards, the oversight of the Commissioner and the jurisdiction of the IPT. They concluded that the RIPA regime contained adequate and effective guarantees against abuse. The involvement of Secretaries of State in the issuing of an interception warrant provided a real and practical safeguard in the system, as demonstrated by the findings of the Commissioner as to the care and attention they demonstrated in their warrantry work (see paragraphs 62, 67 and 71 above). Further, it was significant that none of the Commissioners' reports referred to any deliberate breach of the RIPA provisions or any unlawful use of interception powers to intimidate a person. Any errors or breaches which had arisen had been the result of technical or human error and had been promptly corrected upon their discovery. As to the jurisdiction of the IPT, the Government emphasised that a challenge could be brought at any time by a person who suspected that his communications were being intercepted. They contrasted

this unlimited jurisdiction with the legal regime at issue in *Weber and Saravia* where judicial oversight was limited to cases where an individual had been notified that measures had been taken against him. The applicant in the present case was able to bring his complaint before two senior judges, who ruled that there was no unlawful interception in his case.

150. In conclusion, the Government invited the Court to find that there had been no violation of Article 8 in the present case.

(b) The Court's assessment

i *General principles*

151. The requirement that any interference must be "in accordance with the law" under Article 8 § 2 will only be met where three conditions are satisfied. First, the impugned measure must have some basis in domestic law. Second, the domestic law must be compatible with the rule of law and accessible to the person concerned. Third, the person affected must be able to foresee the consequences of the domestic law for him (see, among many other authorities, *Rotaru v. Romania*, cited above, § 52; *Liberty and Others*, cited above, § 59; and *Lordachi and Others*, cited above, § 37).

152. The Court has held on several occasions that the reference to "foreseeability" in the context of interception of communications cannot be the same as in many other fields (see *Malone*, cited above, § 67; *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Association for European Integration*, cited above, § 79; and *Al-Nashif*, cited above, § 121). In its admissibility decision in *Weber and Saravia*, cited above, §§ 93 to 95, the Court summarised its case-law on the requirement of legal "foreseeability" in this field:

"93. ... foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see, inter alia, [v. Sweden, judgment of 26 August 1987, Series A no. 116], p. 23, § 51). However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident (see, inter alia, *Malone*, cited above, p. 32, § 67; *Huvig*, cited above, pp. 54-55, § 29; and *Rotaru*). It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technol-

ogy available for use is continually becoming more sophisticated (see *Kopp v. Switzerland*, judgment of 25 March 1998, Reports 1998-II, pp. 542-43, § 72, and *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, Reports 1998-V, pp. 1924-25, § 46). The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Malone*, *ibid.*; *Kopp*, cited above, p. 541, § 64; *Huvig*, cited above, pp. 54-55, § 29; and *Valenzuela Contreras*, *ibid.*).

94. Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Malone*, cited above, pp. 32-33, § 68; *Leander*, cited above, p. 23, § 51; and *Huvig*, cited above, pp. 54-55, § 29).

95. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (see, inter alia, *Huvig*, cited above, p. 56, § 34; *Amann*, cited above, § 76; *Valenzuela Contreras*, cited above, pp. 1924-25, § 46; and *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003)."

153. As to the question whether an interference was "necessary in a democratic society" in pursuit of a legitimate aim, the Court recalls that powers to instruct secret surveillance of citizens are only tolerated under Article 8 to the extent that they are strictly necessary for safeguarding democratic institutions. In practice, this means that there must be adequate and effective guarantees against abuse. The assess-

ment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law (see *Klass and Others*, cited above, § 5 49 to 50; and *Weber and Saravia*, cited above, § 106).

154. The Court has acknowledged that the Contracting States enjoy a certain margin of appreciation in assessing the existence and extent of such necessity, but this margin is subject to European supervision. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the “interference” to what is “necessary in a democratic society”. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded (see *Kvasnica v. Slovakia*, no. 72094/01, § 80, 9 June 2009).

ii *Application of the general principles to the facts of the case*

155. The Court recalls that it has found there to be an interference under Article 8 § 1 in respect of the applicant’s general complaint about the RIPA provisions and not in respect of any actual interception activity allegedly taking place. Accordingly, in its examination of the justification for the interference under Article 8 § 2, the Court is required to examine the proportionality of the RIPA legislation itself and the safeguards built into the system allowing for secret surveillance, rather than the proportionality of any specific measures taken in respect of the applicant. In the circumstances, the lawfulness of the interference is closely related to the question whether the “necessity” test has been complied with in respect of the RIPA regime and it is therefore appropriate for the Court to address jointly the “in accordance with the law” and “necessity” requirements (see *Kvasnica*, cited above, § 84). Further, the Court considers it clear that the surveillance measures permitted by RIPA pursue the legitimate aims of the protection of national security, the prevention of crime and the protection of the economic well-being of the country. This was not disputed by the parties.

156. In order to assess whether the RIPA provisions meet the foreseeability requirement, the Court

must first examine whether the provisions of the Code can be taken into account insofar as they supplement and further explain the relevant legislative provisions. In this regard, the Court refers to its finding in *Silver and Others v. the United Kingdom*, 25 March 1983, § 5 88 to 89, Series A no. 61 that administrative orders and instructions concerning the scheme for screening prisoners’ letters established a practice which had to be followed save in exceptional circumstances and that, as a consequence, although they did not themselves have the force of law, to the extent to which those concerned were made sufficiently aware of their contents they could be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the Prison Rules.

157. In the present case, the Court notes, first, that the Code is a public document and is available on the Internet (see paragraphs 26 and 28 above). Prior to its entry into force, it was laid before Parliament and approved by both Houses (see paragraph 26 above). Those exercising duties relating to interception of communications must have regard to its provisions and the provisions of the Code may be taken into account by courts and tribunals (see paragraph 27 above). In light of these considerations, the Court finds that the provisions of the Code can be taken into account in assessing the foreseeability of the RIPA regime.

158. The Court will therefore examine the RIPA regime with reference to each of the safeguards and the guarantees against abuse outlined in *Weber and Saravia* (see paragraphs 152 and 153 above) and, where relevant, to its findings in respect of the previous legislation at issue in *Liberty and Others*, cited above.

159. As to the nature of the offences, the Court emphasises that the condition of foreseeability does not require States to set out exhaustively by name the specific offences which may give rise to interception. However, sufficient detail should be provided of the nature of the offences in question. In the case of RIPA, section 5 provides that interception can only take place where the Secretary of State believes that it is necessary in the interests of national security, for the purposes of preventing or detecting serious crime or for the purposes of safeguarding the economic well-being of the United Kingdom (see paragraphs 31 to 32 above). The applicant criticises the terms “national security” and “serious crime” as being insufficiently

clear. The Court disagrees. It observes that the term “national security” is frequently employed in both national and international legislation and constitutes one of the legitimate aims to which Article 8 § 2 itself refers. The Court has previously emphasised that the requirement of “foreseeability” of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on “national security” grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance (*Al-Nashif*, cited above, § 121). Similar considerations apply to the use of the term in the context of secret surveillance. Further, additional clarification of how the term is to be applied in practice in the United Kingdom has been provided by the Commissioner, who has indicated that it allows surveillance of activities which threaten the safety or well-being of the State and activities which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means (see paragraph 33 above). As for “serious crime”, this is defined in the interpretative provisions of the Act itself and what is meant by “detecting” serious crime is also explained in the Act (see paragraphs 34 to 35 above). The Court is of the view that the reference to serious crime, together with the interpretative clarifications in the Act, gives citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to secret surveillance measures. The Court therefore considers that, having regard to the provisions of RIPA, the nature of the offences which may give rise to an interception order is sufficiently clear (compare and contrast *Iordachi and Others*, cited above, § 46).

160. The Court observes that under RIPA, it is possible for the communications of any person in the United Kingdom to be intercepted. However, it should be recalled that, in contrast to the *Liberty and Others* case which concerned the legislation on interception of communications between the United Kingdom and any other country, the present case concerns internal communications, i.e. communications within the United Kingdom. Further, the legislation must describe the categories of persons who, in practice, may have their communications intercepted. In this respect, the Court observes that there is an overlap between the condition that the categories of persons be set out and the condition that the nature of the offences

be clearly defined. The relevant circumstances which can give rise to interception, discussed in the preceding paragraph, give guidance as to the categories of persons who are likely, in practice, to have their communications intercepted. Finally, the Court notes that in internal communications cases, the warrant itself must clearly specify, either by name or by description, one person as the interception subject or a single set of premises as the premises in respect of which the warrant is ordered (see paragraphs 40 to 41 above). Names, addresses, telephone numbers and other relevant information must be specified in the schedule to the warrant. Indiscriminate capturing of vast amounts of communications is not permitted under the internal communications provisions of RIPA (cf. *Liberty and Others*, cited above, § 64). The Court considers that, in the circumstances, no further clarification in the legislation or the Code of the categories of persons liable to have their communications intercepted can reasonably be required.

161. In respect of the duration of any telephone tapping, the Act clearly stipulates, first, the period after which an interception warrant will expire and, second, the conditions under which a warrant can be renewed (see paragraph 50 to 51 above). Although a warrant can be renewed indefinitely, the Secretary of State himself must authorise any renewal and, upon such authorisation, must again satisfy himself that the warrant remains necessary on the grounds stipulated in section 5(3) (see paragraph 51 above). In the context of national security and serious crime, the Court observes that the scale of the criminal activities involved is such that their planning often takes some time. Subsequent investigations may also be of some duration, in light of the general complexity of such cases and the numbers of individuals involved. The Court is therefore of the view that the overall duration of any interception measures will depend on the complexity and duration of the investigation in question and, provided that adequate safeguards exist, it is not unreasonable to leave this matter for the discretion of the relevant domestic authorities. The Code explains that the person seeking the renewal must make an application to the Secretary of State providing an update and assessing the value of the interception operation to date. He must specifically address why he considers that the warrant remains necessary on section 5(3) grounds (see paragraph 54 above). Further, under section 9(3) RIPA, the Secretary of State is

obliged to cancel a warrant where he is satisfied that the warrant is no longer necessary on section 5(3) grounds (see paragraph 52 above). There is also provision in the Act for specific factors in the schedule to the warrant to be deleted where the Secretary of State considers that they are no longer relevant for identifying communications from or to the interception subject (see paragraph 53 above). The Code advises that the duty on the Secretary of State to cancel warrants which are no longer necessary means, in practice, that intercepting agencies must keep their warrants under continuous review (see paragraph 55 above). The Court concludes that the provisions on duration, renewal and cancellation are sufficiently clear.

162. As regards the procedure for examining, using and storing the data, the Government indicated in their submissions that, under RIPA, an intercepting agency could, in principle, listen to all intercept material collected (see paragraph 144 above). The Court recalls its conclusion in *Liberty and Others*, cited above, § 65, that the authorities' discretion to capture and listen to captured material was very wide. However, that case, unlike the present case, involved external communications, in respect of which data were captured indiscriminately. Contrary to the practice under the Interception of Communications Act 1985 concerning external communications, interception warrants for internal communications under RIPA relate to one person or one set of premises only (cf. *Liberty and Others*, cited above, § 64), thereby limiting the scope of the authorities' discretion to intercept and listen to private communications. Moreover, any captured data which are not necessary for any of the authorised purposes must be destroyed.

163. As to the general safeguards which apply to the processing and communication of intercept material, the Court observes that section 15 RIPA imposes a duty on the Secretary of State to ensure that arrangements are in place to secure any data obtained from interception and contains specific provisions on communication of intercept material (see paragraph 42 above). Further details of the arrangements are provided by the Code. In particular, the Code strictly limits the number of persons to whom intercept material can be disclosed, imposing a requirement for the appropriate level of security clearance as well as a requirement to communicate data only where there is a "need to know". It further clarifies that only so much of

the intercept material as the individual needs to know is to be disclosed and that where a summary of the material would suffice, then only a summary should be disclosed. The Code requires intercept material, as well as copies and summaries of such material, to be handled and stored securely to minimise the risk of threat or loss. In particular, it must be inaccessible to those without the necessary security clearance (see paragraphs 46 to 47 above). A strict procedure for security vetting is in place (see paragraph 48 above). In the circumstances, the Court is satisfied that the provisions on processing and communication of intercept material provide adequate safeguards for the protection of data obtained.

164. As far as the destruction of intercept material is concerned, section 15(3) RIPA requires that the intercept material and any related communications data, as well as any copies made of the material or data, must be destroyed as soon as there are no longer any grounds for retaining them as necessary on section 5(3) grounds (see paragraph 42 above). The Code stipulates that intercept material must be reviewed at appropriate intervals to confirm that the justification for its retention remains valid (see paragraph 55 above).

165. The Code also requires intercepting agencies to keep detailed records of interception warrants for which they have applied (see paragraph 56 above), an obligation which the Court considers is particularly important in the context of the powers and duties of the Commissioner and the IPT (see paragraphs 166 to 167 below)

166. 166. As regards supervision of the RIPA regime, the Court observes that apart from the periodic review of interception warrants and materials by intercepting agencies and, where appropriate, the Secretary of State, the Interception of Communications Commissioner established under RIPA is tasked with overseeing the general functioning of the surveillance regime and the authorisation of interception warrants in specific cases. He has described his role as one of protecting members of the public from unlawful intrusion into their private lives, of assisting the intercepting agencies in their work, of ensuring that proper safeguards are in place to protect the public and of advising the Government and approving the safeguard documents (see paragraph 70 above). The Court notes that the Commissioner is independent of the executive and the legislature and is a person

who holds or has held high judicial office (see paragraph 57 above). He reports annually to the Prime Minister and his report is a public document (subject to the non-disclosure of confidential annexes) which is laid before Parliament (see paragraph 61 above). In undertaking his review of surveillance practices, he has access to all relevant documents, including closed materials and all those involved in interception activities have a duty to disclose to him any material he requires (see paragraph 59 above). The obligation on intercepting agencies to keep records ensures that the Commissioner has effective access to details of surveillance activities undertaken. The Court further notes that, in practice, the Commissioner reviews, provides advice on and approves the section 15 arrangements (see paragraphs 59 and 68 above). The Court considers that the Commissioner's role in ensuring that the provisions of RIPA and the Code are observed and applied correctly is of particular value and his biannual review of a random selection of specific cases in which interception has been authorised provides an important control of the activities of the intercepting agencies and of the Secretary of State himself.

167. The Court recalls that it has previously indicated that in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge (see *Klass and Others*, cited above, § 56). In the present case, the Court highlights the extensive jurisdiction of the IPT to examine any complaint of unlawful interception. Unlike in many other domestic systems (see, for example, the G 10 Law discussed in the context of *Klass and Others* and *Weber and Saravia*, both cited above), any person who suspects that his communications have been or are being intercepted may apply to the IPT (see paragraph 76 above). The jurisdiction of the IPT does not, therefore, depend on notification to the interception subject that there has been an interception of his communications. The Court emphasises that the IPT is an independent and impartial body, which has adopted its own rules of procedure. The members of the tribunal must hold or have held high judicial office or be experienced lawyers (see paragraph 75 above). In undertaking its examination of complaints by individuals, the IPT has access to closed material and has the power to require the Commissioner to provide it with any assistance it thinks fit and the

power to order disclosure by those involved in the authorisation and execution of a warrant of all documents it considers relevant (see paragraph 78 above). In the event that the IPT finds in the applicant's favour, it can, *inter alia*, quash any interception order, require destruction of intercept material and order compensation to be paid (see paragraph 80 above). The publication of the IPT's legal rulings further enhances the level of scrutiny afforded to secret surveillance activities in the United Kingdom (see paragraph 89 above).

168. Finally, the Court observes that the reports of the Commissioner scrutinise any errors which have occurred in the operation of the legislation. In his 2007 report, the Commissioner commented that none of the breaches or errors identified were deliberate and that, where interception had, as a consequence of human or technical error, unlawfully taken place, any intercept material was destroyed as soon as the error was discovered (see paragraph 73 above). There is therefore no evidence that any deliberate abuse of interception powers is taking place.

169. In the circumstances, the Court considers that the domestic law on interception of internal communications together with the clarifications brought by the publication of the Code indicate with sufficient clarity the procedures for the authorisation and processing of interception warrants as well as the processing, communicating and destruction of intercept material collected. The Court further observes that there is no evidence of any significant shortcomings in the application and operation of the surveillance regime. On the contrary, the various reports of the Commissioner have highlighted the diligence with which the authorities implement RIPA and correct any technical or human errors which accidentally occur (see paragraphs 62, 67, 71 and 73 above). Having regard to the safeguards against abuse in the procedures as well as the more general safeguards offered by the supervision of the Commissioner and the review of the IPT, the impugned surveillance measures, insofar as they may have been applied to the applicant in the circumstances outlined in the present case, are justified under Article 8 § 2.

170. There has accordingly been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

171. The applicant complained of a violation of his right to a fair hearing in respect of the proceedings before the Investigatory Powers Tribunal. He relied on Article 6 of the Convention, which provides insofar as relevant that:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”.

A. Admissibility

172. The Government contested the applicability of Article 6 § 1 to the proceedings in question, arguing that there was no “civil right” in the present case. The Court considers, in light of the parties’ submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It therefore concludes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. The complaint must therefore be declared admissible.

B. Merits

1. The applicability of Article 6 § 1

(a) The parties’ submissions

173. The applicant alleged that the proceedings before the IPT involved the determination of his civil rights. This was the conclusion reached by the IPT in its ruling on preliminary issues of law, in which it found that Article 6 § 1 was applicable. The applicant referred to the Court’s practice whereby, where national courts had conducted a comprehensive and convincing analysis on the basis of relevant Convention case-law and principles, as in the present case, the Court would need very strong reasons to depart from their conclusions and substitute its own views for those of national courts in interpreting domestic law (citing, *inter alia*, *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A; and *Roche v. the United Kingdom* [GC], no. 32555/96 32555/96, § 120, ECHR 2005-X). He concluded that the IPT was correct to find that Article 6 § 1 was applicable to the proceedings before it.

174. The Government argued that although the applicant had a right, as a matter of domestic

law, to complain to the IPT while the alleged interception was ongoing, the right at issue was not a “civil” right for the purposes of Article 6 § 1 (relying on the Court’s judgments in *Klass and Others*, cited above, § § 57 to 58 and 75; and *Association for European Integration and Human Rights*, cited above, § 106). They contended that, insofar as the use of interception powers remains validly secret, the requirements of Article 6 could not apply to the dispute (referring to *Klass and Others*, cited above, § 75). In the present case, the applicant’s position before the IPT was that the interception was continuing. As a result, the Government considered that the validity of the “neither confirm nor deny” stance taken by the authorities could not be impugned. The particular position taken by the Court in interception cases (including *Association for European Integration and Human Rights*) that rights in the field of secret interception powers were not civil rights was, they argued, supported by the Court’s general jurisprudence on “civil rights” (citing *Ferrazzini v. Italy* [GC], no. 44759/98, § § 25, 28 and 30, ECHR 2001-VII; and *Maaouia v. France* [GC], no. 39652/98, § 38, ECHR 2000-X).

175. The Government pointed to the Court’s consistent case-law that the concept of “civil rights and obligations” was autonomous and could not be interpreted solely by reference to the domestic law of the respondent State and concluded that the fact that RIPA offered the additional safeguard of an application to the IPT at any time could not in itself make Article 6 § 1 apply to such disputes. As regards the applicant’s argument that the Court should be slow to interfere with the ruling of the IPT that Article 6 § 1 was applicable, the Government contested that the question whether Article 6 § 1 was applicable was a matter of domestic law. In their view, *Ferrazzini*, cited above, § 24, was support for the proposition that the applicability of Article 6 § 1 was a matter of Convention law and fell within the competence of the Court.

176. The Government finally noted that the IPT’s ruling was issued before the Court’s judgment in *Association for European Integration and Human Rights*, cited above, § 106, in which the Court reached the conclusion that Article 6 § 1 did not apply to such proceedings. It was clear that secret powers of interception which were used solely in the interests of national security or in order to prevent and detect serious crime formed part of the “hard core of public author-

ity prerogatives”, such that it was inappropriate to classify any related rights and obligations as “civil” in nature (citing *Ferrazzini*, § 29; and *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 61, ECHR 2007-IV).

(b) The Court’s assessment

177. The Court in *Klass and Others*, cited above, did not express an opinion on whether Article 6 § 1 applied to proceedings concerning a decision to place a person under surveillance (see § 75 of the Court’s judgment). However, the matter was considered by the former Commission in its prior report (*Klass and Others*, no. 5029/71, Report of the Commission, Series B no. 26, pp 35 to 37, § § 57 to 61). In particular, the Commission noted (§ 58):

“... Supervisory measures of the kind in question are typical acts of State authority in the public interest and carried out *jure imperii*. They cannot be questioned before any courts in many legal systems. They do not at all directly concern private rights. The Commission concludes therefore, that [Article] 6 does not apply to this kind of State interference on security grounds.”

178. In its recent ruling on the applicability of Article 6 § 1 to proceedings concerning secret surveillance in *Association for European Integration and Human Rights*, cited above, § 106, the Court referred generally to the finding of the Commission in its report in the case of *Klass and Others* that Article 6 § 1 was not applicable in either its civil or criminal limb. In the absence of submissions from the parties on the matter, the Court concluded that nothing in the circumstances of the case before it altered the conclusion in the *Klass and Others* report and that there was therefore no violation of Article 6 § 1.

179. The Court notes that, in the present case, the IPT was satisfied that rights of confidentiality and of privacy for person, property and communications enjoyed a broad level of protection in English private law and that the proceedings before the tribunal therefore involved the determination of “civil rights” within the meaning of Article 6 § 1. The Court recalls that, according to its case-law, the concept of “civil rights and obligations” cannot be interpreted solely by reference to the domestic law of the respondent State. It has on several occasions affirmed the principle that this concept is “autonomous”, within the meaning of Article 6 § 1 of the Convention (see *Ferrazzini*

v. Italy [GC], no. 44759/98, § 24, ECHR 2001-VII; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X). However, in the present case, it is unnecessary to reach a conclusion as to whether Article 6 § 1 applies to proceedings of this nature as, for the reasons outlined below, assuming that Article 6 § 1 applies to the proceedings, the Court considers that the IPT’s rules of procedure complied with the requirements of Article 6 § 1.

2. Compliance with Article 6 § 1

(a) The parties’ submissions

180. The applicant recalled that restrictions on court proceedings could only be compatible with Article 6 § 1 where they pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be pursued. Further, limitations could not impair the very essence of fair trial rights and any restrictions had to be sufficiently counterbalanced by the procedures followed by the judicial authorities (citing *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 61, ECHR 2000-II). Although the applicant appeared to accept that the restrictions on the procedure before the IPT pursued the legitimate aim of securing that information was not disclosed contrary to the public interest, national security or the detection and prevention of serious crime, he argued that they were not proportionate and impaired the very essence of his right to a fair hearing. In particular, the applicant contended that Rule 6(2) to (5) (restrictions on disclosure and evidence), Rule 9 (secrecy of proceedings) and section 68 RIPA together with Rule 13 (the refusal to provide any reasons to unsuccessful complainants) were contrary to the principle of equality of arms.

181. The applicant submitted that even where national security was at stake, a domestic court could not infringe the fair hearing principle in a blanket and uncritical manner. He argued that less restrictive measures were available to achieve the aim pursued, including arrangements to protect witnesses’ identities, disclosure of documents with redactions approved by the IPT, provision of a summary of particularly sensitive material under the supervision of the IPT and appointment of special advocates to whom disclosure of sensitive material could be made. He referred to a recent report on secret evidence published in June 2009 by the non-governmental organisation, JUSTICE,

which called for the strengthening of disclosure procedures and increased transparency in court proceedings.

182. The Government emphasised that even where Article 6 § 1 applied to a field falling within the traditional sphere of public law, this did not in itself determine how the various guarantees of Article 6 should be applied to such disputes (citing *Vilho Eskelinen and Others*, cited above, § 64). The obligation to read the Convention as a whole meant that the scope of the Article 6 guarantees in such a case should be in harmony with the Court's approach to judicial control under Article 8. The Government argued that the overarching consideration was that an individual could not be notified of interception measures while interception was ongoing or where notification would jeopardise the capabilities or operations of intercepting agencies. They therefore disputed that the less restrictive measures proposed by the applicant were appropriate. They noted that protection of witnesses' identities would not assist in keeping secret whether interception had occurred. Nor would disclosure of redacted documents or summaries of sensitive material. Further, unless they were appointed in every case, the appointment of special advocates would also allow a complainant to draw inferences about whether his communications had been intercepted.

183. The Government argued that the procedure before the IPT offered as fair a procedure as could be achieved in the context of secret surveillance powers. In particular, a complainant did not have to overcome any evidential burden to apply to the IPT and any legal issues could be determined in a public judgment after an *inter partes* hearing. Further, the IPT had full powers to obtain any material it considered necessary from relevant bodies and could call upon the assistance of the Commissioner. It could appoint an advocate to assist it at closed hearings. Finally, in the event that the complainant was successful, a reasoned decision would be provided. The Government accordingly disputed that the very essence of the applicant's right to a fair trial had been impaired.

(b) The Court's assessment

184. The Court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not

place him at a substantial disadvantage *vis-à-vis* his opponent (see, for example, *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; *Foucher v. France*, judgment of 18 March 1997, *Reports* 1997-II, § 34; and *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 380-81, § 47). The Court has held nonetheless that, even in proceedings under Article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, § 70, *Reports* 1996-II; *Jasper v. the United Kingdom* [GC], no. 27052/95, § § 51 to 53, ECHR 2000-II; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 205, ECHR 2009-....). A similar approach applies in the context of civil proceedings.

185. The Court notes that the IPT, in its preliminary ruling of 23 January 2003, considered the applicant's complaints regarding the compliance of the Rules with Article 6 § 1. It found that, with the exception of Rule 9(6) which required all oral hearings to be held in private, the Rules challenged by the applicant were proportionate and necessary, with special regard to the need to preserve the Government's "neither confirm nor deny policy" (see paragraphs 92 to 95 above).

186. At the outset, the Court emphasises that the proceedings related to secret surveillance measures and that there was therefore a need to keep secret sensitive and confidential information. In the Court's view, this consideration justifies restrictions in the IPT proceedings. The question is whether the restrictions, taken as a whole, were disproportionate or impaired the very essence of the applicant's right to a fair trial.

187. In respect of the rules limiting disclosure, the Court recalls that the entitlement to disclosure of relevant evidence is not an absolute right. The interests of national security or the need to keep secret methods of investigation of crime

must be weighed against the general right to adversarial proceedings (see, *mutatis mutandis*, *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X). The Court notes that the prohibition on disclosure set out in Rule 6(2) admits of exceptions, set out in Rules 6(3) and (4). Accordingly, the prohibition is not an absolute one. The Court further observes that documents submitted to the IPT in respect of a specific complaint, as well as details of any witnesses who have provided evidence, are likely to be highly sensitive, particularly when viewed in light of the Government's "neither confirm nor deny" policy. The Court agrees with the Government that, in the circumstances, it was not possible to disclose redacted documents or to appoint special advocates as these measures would not have achieved the aim of preserving the secrecy of whether any interception had taken place. It is also relevant that where the IPT finds in the applicant's favour, it can exercise its discretion to disclose such documents and information under Rule 6(4) (see paragraph 84 above).

188. As regards limitations on oral and public hearings, the Court recalls, first, that the obligation to hold a hearing is not absolute. There may be proceedings in which an oral hearing is not required and where the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials. The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court (see *Jussila v. Finland* [GC], no. 73053/01, § 41 to 42, ECHR 2006-XIII). The Court notes that Rule 9(2) provides that oral hearings are within the IPT's discretion and it is clear that there is nothing to prevent the IPT from holding an oral hearing where it considers that such a hearing would assist its examination of the case. As the IPT held in its preliminary ruling, its discretion to hold oral hearings extends to *inter partes* oral hearings, where such hearings can take place without breaching the IPT's duty to prevent the potentially harmful disclosure of sensitive information (see paragraph 92 above). Finally, in respect of the stipulation in Rule 9(6) that hearings must be held in private (interpreted by the IPT not to apply to cases involving the determination of preliminary issues of law – see paragraph 93 above), the Court notes that it is clear from the terms of Article 6 § 1 itself that national security may justify the

exclusion of the public from the proceedings.

189. Concerning the provision of reasons, the Court emphasises that the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303-A). In the context of the IPT's proceedings, the Court considers that the "neither confirm nor deny" policy of the Government could be circumvented if an application to the IPT resulted in a complainant being advised whether interception had taken place. In the circumstances, it is sufficient that an applicant be advised that no determination has been in his favour. The Court further notes in this regard that, in the event that a complaint is successful, the complainant is entitled to have information regarding the findings of fact in his case (see paragraph 87 above).
190. In light of the above considerations, the Court considers that the restrictions on the procedure before the IPT did not violate the applicant's right to a fair trial. In reaching this conclusion, the Court emphasises the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considers that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights.
191. Accordingly, assuming that Article 6 § 1 applies to the proceedings in question, there has been no violation of that Article.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

192. The applicant further complained that he had no effective remedy in respect of the alleged violation of Articles 6 § 1 and 8 of the Convention. He relied on Article 13 of the Convention, which provides insofar as relevant as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation

has been committed by persons acting in an official capacity.”

A. Admissibility

193. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

194. The applicant maintained that he had an “arguable claim” under Articles 6 § 1 and 8, and that the proceedings before the IPT did not afford him a remedy as required by Article 13 of the Convention as it did not comply with the requirements of Article 6 § 1.

195. The Government contended that there was no violation of Article 13 in the present case. In particular, they argued that the applicant had no arguable claim to be a victim of a violation of Article 6 § 1 or Article 8; that insofar as the applicant’s complaints were in essence ones that challenged the relevant legislative scheme, the Article 13 complaint must fail (citing *Leander v. Sweden*, 26 March 1987, § 77(d), Series A no. 116); and that in any event the IPT offered an effective remedy.

2. *The Court's assessment*

196. Having regard to its conclusions in respect of Article 8 and Article 6 § 1 above, the Court considers that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications.

197. In respect of the applicant’s general complaint under Article 8, the Court reiterates its case-law to the effect that Article 13 does not require the law to provide an effective remedy where the alleged violation arises from primary legislation (see *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98; and *Leander*, cited above, § 77(d)).

198. There has accordingly been no violation of Article 13.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Joins to the merits the Government’s objec-

tion regarding the applicant’s lack of victim status and declares the application admissible;

2. Holds that there has been no violation of Article 8 of the Convention and dismisses in consequence the Government’s above-mentioned objection;
3. Holds that there has been no violation of Article 6 § 1 of the Convention;
4. Holds that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 18 May 2010, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Lawrence Early, Registrar

Lech Garlicki, President

ECHR

ECJ

FOURTH SECTION

CASE OF K.U. v FINLAND

(Application no. 2872/02)

JUDGMENT

STRASBOURG

2 December 2008

FINAL

02/03/2009

INTERNET, PEDOPHILIA, DATING, CHILD, FREEDOM OF EXPRESSION, PRIVACY, POSITIVE OBLIGATIONS, SERVICE PROVIDER

IN THE CASE OF K.U. V FINLAND,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 13 November 2008, Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2872/02) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national ("the applicant") on 1 January 2002. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).
2. The applicant was represented by Mr P. Hutunen, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.
3. The applicant alleged, in particular, that the State had failed in its positive obligation to protect his right to respect for private life under Article 8 of the Convention.
4. By a decision of 27 June 2006, the Court declared the application admissible.
5. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was re-

quired (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations. In addition, third-party comments were received from the Helsinki Foundation for Human Rights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1986.
7. On 15 March 1999 an unknown person or persons placed an advertisement on a dating site on the Internet in the name of the applicant, who was 12 years old at the time, without his knowledge. The advertisement mentioned his age and year of birth, gave a detailed description of his physical characteristics, a link to the web page he had at the time, which showed his picture, as well as his telephone number, which was accurate save for one digit. In the advertisement, it was claimed that he was looking for an intimate relationship with a boy of his age or older "to show him the way".
8. The applicant became aware of the announcement on the Internet when he received an e-mail from a man, offering to meet him and "then to see what you want".
9. The applicant's father requested the police to identify the person who had placed the advertisement in order to prefer charges against that person. The service provider, however, refused to divulge the identity of the holder of the so-called dynamic IP address in question, regarding itself bound by the confidentiality of telecommunications as defined by law.
10. The police then asked the Helsinki District Court (*käräjäoikeus*, *tingsrätten*) to oblige the service provider to divulge the said information pursuant to section 28 of the Criminal Investigations Act (*esitutkintalaki*, *förundersökningslagen*; Act no. 449/1987 449/1987, as amended by Act no. 692/1997 692/1997).
11. In a decision issued on 19 January 2001, the District Court refused since there was no explicit legal provision authorising it to order the service provider to disclose telecommunications identification data in breach of professional secrecy. The court noted that by virtue

of Chapter 5a, section 3, of the Coercive Measures Act (*pakkokeinolaki, tvångsmedelslagen*; Act no. 450/1987 450/1987) and section 18 of the Protection of Privacy and Data Security in Telecommunications Act (*laki yksityisyyden-suojasta televiestinnässä ja teletoinnin tietoturvasta, lag om integritetsskydd vid telekommunikation och dataskydd inom televerksamhet*; Act no. 565/1999 565/1999) the police had the right to obtain telecommunications identification data in cases concerning certain offences, notwithstanding the obligation to observe secrecy. However, malicious misrepresentation was not such an offence.

12. On 14 March 2001 the Court of Appeal (*hovioikeus, hovrätten*) upheld the decision and on 31 August 2001 the Supreme Court (*korkein oikeus, högsta domstolen*) refused leave to appeal.
13. The person who answered the dating advertisement and contacted the applicant was identified through his e-mail address.
14. The managing director of the company which provided the Internet service could not be charged, because in his decision of 2 April 2001 the prosecutor found that the alleged offence had become time-barred. The alleged offence was a violation of the Personal Data Act (*henkilötietolaki, personuppgiftslagen*; Act no. 523/99, which entered into force on 1 June 1999). More specifically, the service provider had published a defamatory announcement on its website without verifying the identity of the sender.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. The Finnish Constitution Act (*Suomen hallitusmuoto, Regeringsform för Finland*; Act no. 94/1919, as amended by Act no. 969/1995) was in force until 1 March 2000. Its section 8 corresponded to Article 10 of the current Finnish Constitution (*Suomen perustuslaki, Finlands grundlag*; Act no. 731/1999 731/1999), which provides that everyone's right to private life is guaranteed.
16. At the material time, Chapter 27, Article 3, of the Penal Code (*rikoslaki, strafflagen*; Act no. 908/1974) provided:

“A person who in a manner other than that stated above commits an act of malicious misrepresentation against another by a derogatory statement, threat or other degrading act shall be sentenced for malicious misrepresentation to a fine or to imprisonment for a maximum period of three months.

If the malicious misrepresentation is committed in public or in print, writing or a graphic representation disseminated by the guilty party or which the guilty party causes, the person responsible shall be sentenced to a fine or to imprisonment for a maximum period of four months.”
17. At the material time, Chapter 5a, section 3, of the Coercive Measures Act provided:

“Preconditions of telecommunications monitoring

Where there is reason to suspect a person of

 - 1) an offence punishable by not less than four months' imprisonment,
 - 2) an offence against a computer system using a terminal device, a narcotics offence, or
 - 3) a punishable attempt to commit an offence referred to above in this section,

the authority carrying out the criminal investigation may be authorised to monitor a telecommunications connection in the suspect's possession or otherwise presumed to be in his use, or temporarily to disable such a connection, if the information obtained by the monitoring or the disabling of the connection can be assumed to be very important for the investigation of the offence ...”
18. Section 18, subsection 1(1) of the Protection of Privacy and Data Security in Telecommunications Act, which entered into force on 1 July 1999 and was repealed on 1 September 2004, provided:

“Notwithstanding the obligation of secrecy provided for in section 7, the police have the right to obtain:

 - (1) identification data on transmissions to a particular transcriber connection, with the consent of the injured party and the owner of the subscriber connection, necessary for the purpose of investigating an offence referred to in Chapter 16, Article 9a, Chapter 17, Article 13(2) or Chapter 24, Article 3a of the Penal Code (Act no. 39/1889) ...”
19. Section 48 of the Personal Data Act provides that the service provider is under criminal liability to verify the identity of the sender before publishing a defamatory announcement on its website. Section 47 provides that the service

provider is also liable in damages.

20. At the material time, processing and publishing sensitive information concerning sexual behaviour on an Internet server without the subject's consent was criminalised as a data protection offence in section 43 of the Personal Files Act (Act no. 630/1995 630/1995) and Chapter 38, Article 9 (Act no. 578/1995) of the Penal Code, and as a data protection violation in section 44 of the Personal Files Act. Furthermore, it could have caused liability in damages by virtue of section 42 (Act no. 471/1987 471/1987) of the said Act.
21. Section 17 of the Exercise of Freedom of Expression in Mass Media Act (*laki sanavapauden käyttämisestä joukkoviestinnässä, lagen om yttrandefrihet i masskommunikation*: Act no. 460/2003 460/2003), which came into force on 1 January 2004, provides:

"Release of identifying information for a network message

At the request of an official with the power of arrest, a public prosecutor or an injured party, a court may order the keeper of a transmitter, server or other similar device to release information required for the identification of the sender of a network message to the requester, provided that there are reasonable grounds to believe that the contents of the message are such that providing it to the public is a criminal offence. However, the release of the identifying information to the injured party may be ordered only in the event that he or she has the right to bring a private prosecution for the offence. The request shall be filed with the District Court of the domicile of the keeper of the device, or with the Helsinki District Court, within three months of the publication of the message in question. The court may reinforce the order by imposing a threat of a fine."

III. RELEVANT INTERNATIONAL MATERIALS

A. The Council of Europe

22. The rapid development of telecommunications technologies in recent decades has led to the emergence of new types of crime and has also enabled the commission of traditional crimes by means of new technologies. The Council of Europe recognised the need to respond adequately and rapidly to this new challenge as far back as in 1989, when the Committee of Ministers adopted Recommendation No.

R (89) 9 on computer-related crime. Resolved to ensure that the investigating authorities possessed appropriate special powers in investigating computer-related crimes, in 1995 the Committee of Ministers adopted Recommendation No. R (95) 13 concerning problems of criminal procedural law connected with information technology. In point 12 of the principles appended thereto, it recommended that:

"Specific obligations should be imposed on service-providers who offer telecommunication services to the public, either through public or private networks, to provide information to identify the user, when so ordered by the competent investigating authority."

23. The other principles relating to the obligation to co-operate with the investigating authorities stated:

"9. Subject to legal privileges or protection, most legal systems permit investigating authorities to order persons to hand over objects under their control that are required to serve as evidence. In a parallel fashion, provisions should be made for the power to order persons to submit any specified data under their control in a computer system in the form required by the investigating authority.

10. Subject to legal privileges or protection, investigating authorities should have the power to order persons who have data in a computer system under their control to provide all necessary information to enable access to a computer system and the data therein. Criminal procedural law should ensure that a similar order can be given to other persons who have knowledge about the functioning of the computer system or measures applied to secure the data therein."

24. In 1996, the European Committee on Crime Problems set up a committee of experts to deal with cybercrime. It was felt that, although the previous two recommendations on substantive and procedural law had not gone unheeded, only a binding international instrument could ensure the necessary efficiency in the fight against cyber-space offences. The Convention on Cybercrime was opened for signature on 23 November 2001 and entered into force on 1 July 2004. It is the first and only international treaty on crimes committed via Internet and is open to all States. The Convention requires countries to establish as criminal offences the following acts: illegal access to a computer system, illegal interception of computer data, interference with data or a com-

puter system, misuse of devices, computer-related forgery and fraud, child pornography, the infringement of copyright and related rights. The additional protocol to the Convention, adopted in 2003, further requires the criminalisation of hate speech, xenophobia and racism. The scope of the Convention's procedural provisions goes beyond the offences defined in the Convention in that it applies to any offence committed by means of a computer system:

"Article 14 - Scope of procedural provisions

1. Each Party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures provided for in this section for the purpose of specific criminal investigations or proceedings.
 2. ... each Party shall apply the powers and procedures referred to in paragraph 1 of this article to:
 - a) the criminal offences established in accordance with Articles 2 through 11 of this Convention;
 - b) other criminal offences committed by means of a computer system; and
 - c) the collection of evidence in electronic form of a criminal offence.
 3. ..."
25. The procedural powers include the following: expedited preservation of stored data, expedited preservation and partial disclosure of traffic data, production order, search and seizure of computer data, real-time collection of traffic data and interception of content data. Of particular relevance is the power to order a service provider to submit subscriber information relating to its services; indeed, the explanatory report describes the difficulty in identifying the perpetrator as being one of the major challenges in combating crime in the networked environment:

"Article 18 – Production order

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order:
 - a) a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium; and
 - b) a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that ser-

vice provider's possession or control.

2. The powers and procedures referred to in this Article shall be subject to Articles 14 and 15.
 3. For the purpose of this Article the term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services, other than traffic or content data and by which can be established:
 - a) the type of communication service used, the technical provisions taken thereto and the period of service;
 - b) the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;
 - c) any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement."
26. The explanatory report notes that, in the course of a criminal investigation, subscriber information may be needed mainly in two situations. Firstly, to identify which services and related technical measures have been used or are being used by a subscriber, such as the type of telephone service used, type of other associated services used (for example call forwarding, voice-mail), telephone number or other technical address (for example e-mail address). Secondly, when a technical address is known, subscriber information is needed in order to assist in establishing the identity of the person concerned. A production order provides a less intrusive and less onerous measure which law enforcement authorities can apply instead of measures such as interception of content data and real-time collection of traffic data, which must or can be limited only to serious offences (Articles 20 and 21).
27. A global conference "Cooperation against Cybercrime" held in Strasbourg on 1-2 April 2008 adopted "Guidelines for the cooperation between law enforcement and internet service providers against cybercrime." Their purpose is to help law enforcement authorities and Internet service providers structure their interaction in relation to cybercrime issues. In order to enhance cyber-security and minimise use of services for illegal purposes, it was considered essential that the two parties cooperate with

each other in an efficient manner. The guidelines outline practical measures to be taken by law enforcement agencies and service providers, encouraging them to exchange information in order to strengthen their capacity to identify and combat emerging types of cyber-crime. In particular, service providers were encouraged to cooperate with law enforcement agencies to help minimise the extent to which services are used for criminal activity as defined by law.

B. The United Nations

28. Out of a number of resolutions adopted in the field of cyberspace, the most pertinent for the purposes of the present case are General Assembly resolutions 55/63 of 4 December 2000 and 56/121 of 19 December 2001 on "Combating the criminal misuse of information technologies". Among the measures to combat such misuse, it was recommended in Resolution 55/63 that:

"(f) Legal systems should permit the preservation of and quick access to electronic data pertaining to particular criminal investigations;"

29. The subsequent resolution took note of the value of the various measures and again invited member States to take them into account.

C. The European Union

30. On 15 March 2006 the European Parliament and the Council of the European Union adopted Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, amending the previous data retention Directive 2002/58/EC. The aim of the Directive is to harmonise member States' provisions concerning the obligations of communications providers with respect to the retention of certain data, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each member State in its national law. It applies to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It does not apply to the content of electronic communications. The Directive requires member States to ensure that certain categories of data are retained for a period between six months and two years. Article 5 specifies the data to be retained:

"1. Member States shall ensure that the following categories of data are retained under this Directive:

(a) data necessary to trace and identify the source of a communication:

...

(2) concerning Internet access, Internet e-mail and Internet telephony:

...

(iii) the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;"

31. Member States had until 15 September 2007 to implement the Directive. However, 16 states, including Finland, made use of the right to postpone their application to Internet access, Internet telephony and Internet e-mail until 15 March 2009.

IV. COMPARATIVE LAW

32. A comparative review of national legislation of the member States of the Council of Europe shows that in most countries there is a specific obligation on the part of telecommunications service providers to submit computer data, including subscriber information, in response to a request by the investigating or judicial authorities, regardless of the nature of a crime. Some countries have only general provisions on the production of documents and other data, which could in practice be extended to cover also the obligation to submit specified computer and subscriber data. Several countries have not yet implemented the provisions of Article 18 of the Council of Europe Convention on Cybercrime.

V. THIRD PARTY SUBMISSIONS

33. The Helsinki Foundation for Human Rights submitted that the present case raises the question of balancing the protection of privacy, honour and reputation on the one hand and the exercise of freedom of expression on the other. It took the view that the present case offers the Court an opportunity to define the State's positive obligations in this sphere and thereby to promote common standards in the use of the Internet throughout the member States.
34. It pointed out that the Internet is a very special method of communication and one of the

fundamental principles of its use is anonymity. The high level of anonymity encourages free speech and expression of various ideas. On the other hand, Internet is a powerful tool for defaming or insulting people or violating their right to privacy. Due to the anonymity of the Internet, the victim of a violation is in a vulnerable position. Contrary to traditional media, the victim cannot easily identify the defaming person due to the fact that it is possible to hide behind a nickname or even to use a false identity.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 8 AND 13 OF THE CONVENTION

35. The applicant complained under Article 8 of the Convention that an invasion of his private life had taken place and that no effective remedy existed to reveal the identity of the person who had put a defamatory text on the Internet in his name, contrary to Article 13 of the Convention.

Article 8 provides:

“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 freedoms of others.”

Article 13 provides:

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

A. The parties' submissions

36. The applicant submitted that Finnish legislation at the time protected the criminal whereas the victim had no means to obtain redress or protection against a breach of privacy. Under the Penal Code the impugned act was punish-

able, but the Government had neglected to ensure that the Protection of Privacy and Data Security in Telecommunications Act and the Coercive Measures Act were consistent with each other. He argued that the random possibility of seeking civil damages, particularly from a third party, was not sufficient to protect his rights. He emphasised that he did not have the means to identify the person who had placed the advertisement on the Internet. While compensation might in some cases be an effective remedy, this depended on whether it was paid by the person who infringed the victim's rights, which was not the case in his application. According to the Government, new legislation was in place which, had it existed at the time of the events, would have rendered this complaint unnecessary. In the applicant's view, the Government had not provided any justification for the failure to afford him this protection at the material time. He considered, therefore, that there had been breaches of Articles 8 and 13.

37. The Government emphasised that in the present case the interference with the applicant's private life had been committed by another individual. The impugned act was considered in domestic law as an act of malicious misrepresentation and would have been punishable as such, which had a deterrent effect. An investigation was started to identify the person who had placed the advertisement on the Internet, but was unsuccessful due to the legislation in force at the time, which aimed to protect freedom of expression and the right to anonymous expression. The legislation protected the publisher of an anonymous Internet message so extensively that the protection also covered messages that possibly interfered with another person's privacy. This side-effect of the protection was due to the fact that the concept of a message interfering with the protection of privacy was not clear-cut, and therefore it had not been possible to exclude clearly such messages from the protection provided by law. There were however other avenues of redress available, for example the Personal Data Act, which provided protection against malicious misrepresentation in that the operator of the server, on the basis of that Act's provisions on criminal liability and liability in damages, was obliged to ensure that sensitive data recorded by it were processed with the consent of the data subject. Furthermore, although the personal data offence had become time-barred the applicant still had the possibility to seek compensation

from the publisher of the advertisement. By comparison with the case of *X and Y v. the Netherlands* (judgment of 26 March 1985, Series A no. 91), in the present case liability in damages in the context of a less serious offence provided a sufficient deterrent effect. In addition, there were other mechanisms available to the applicant, such as a pre-trial police investigation, prosecution, court proceedings and damages.

38. The Government submitted that it was important to look at the legislative situation at the material time in its social context, when a rapid increase in the use of the Internet was just beginning. The current legislation, the Exercise of Freedom of Expression in Mass Media Act (sections 2 and 17), which took effect on 1 January 2004, gives the police more extensive powers to break the protection of the publisher of an anonymous Internet message for the purposes of crime investigation. The new legislation reflects the legislator's reaction to social development where increased use – and at the same time abuse – of the Internet has required a re-definition of the limits of protection. Thus, because of a changed situation in society, subsequent legislation has further strengthened the protection of private life in respect of freedom of expression, and especially the protection of publishers of anonymous Internet messages.
39. However, most essential in the present case was that even the legislation in force at the material time provided the applicant with means of action against the distribution of messages invading privacy, in that the operator of the Internet server on which the message was published was obliged by law to verify that the person in question had consented to the processing of sensitive information concerning him or her on the operator's server. This obligation was bolstered by criminal liability and liability in damages. Thus, the legislation provided the applicant with sufficient protection of privacy and effective legal remedies.

B. The Court's assessment

40. The Court notes at the outset that the applicant, a minor of 12 years at the time, was the subject of an advertisement of a sexual nature on an Internet dating site. The identity of the person who had placed the advertisement could not, however, be obtained from the Internet provider due to the legislation in place at the time.
41. There is no dispute as to the applicability of Article 8: the facts underlying the application concern a matter of "private life", a concept which covers the physical and moral integrity of the person (see *X and Y v. the Netherlands*, cited above, § 22). Although this case is seen in domestic law terms as one of malicious misrepresentation, the Court would prefer to highlight these particular aspects of the notion of private life, having regard to the potential threat to the applicant's physical and mental welfare brought about by the impugned situation and to his vulnerability in view of his young age.
42. The Court reiterates that, although the object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 32).
43. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions (see *X and Y v. the Netherlands*, § § 23-24 and 27; *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003, and *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII).
44. The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

45. The Court considers that, while this case might not attain the seriousness of *X and Y v. the Netherlands*, where a breach of Article 8 arose from the lack of an effective criminal sanction for the rape of a handicapped girl, it cannot be treated as trivial. The act was criminal, involved a minor and made him a target for approaches by paedophiles (see, also, paragraph 41 above in this connection).
46. The Government conceded that at the time the operator of the server could not be ordered to provide information identifying the offender. They argued that protection was provided by the mere existence of the criminal offence of malicious misrepresentation and by the possibility of bringing criminal charges or an action for damages against the server operator. As to the former, the Court notes that the existence of an offence has limited deterrent effects if there is no means to identify the actual offender and to bring him to justice. Here, the Court notes that it has not excluded the possibility that the State's positive obligations under Article 8 to safeguard the individual's physical or moral integrity may extend to questions relating to the effectiveness of a criminal investigation even where the criminal liability of agents of the State is not at issue (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 128). For the Court, States have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person, including attempted offences, and to reinforce the deterrent effect of criminalisation by applying criminal-law provisions in practice through effective investigation and prosecution (see, *mutatis mutandis*, *M.C. v. Bulgaria*, cited above, § 153). Where the physical and moral welfare of a child is threatened such injunction assumes even greater importance. The Court recalls in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 64, *Reports* 1996-IV).
47. As to the Government's argument that the applicant had the possibility to obtain damages from a third party, namely the service provider, the Court considers that it was not sufficient in the circumstances of this case. It is plain that both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require the availability of a remedy enabling the actual offender to be identified and brought to justice, in the instant case the person who placed the advertisement in the applicant's name, and the victim to obtain financial reparation from him.
48. The Court accepts that in view of the difficulties involved in policing modern societies, a positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities or, as in this case, the legislator. Another relevant consideration is the need to ensure that powers to control, prevent and investigate crime are exercised in a manner which fully respects the due process and other guarantees which legitimately place restraints on crime investigation and bringing offenders to justice, including the guarantees contained in Articles 8 and 10 of the Convention, guarantees which offenders themselves can rely on. The Court is sensitive to the Government's argument that any legislative shortcoming should be seen in its social context at the time. The Court notes at the same time that the relevant incident took place in 1999, that is, at a time when it was well-known that the Internet, precisely because of its anonymous character, could be used for criminal purposes (see paragraphs 22 and 24 above). Also the widespread problem of child sexual abuse had become well-known over the preceding decade. Therefore, it cannot be said that the respondent Government did not have the opportunity to put in place a system to protect child victims from being exposed as targets for paedophilic approaches via the Internet.
49. The Court considers that practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement. In the instant case such protection was not afforded. An effective investigation could never be launched because of an overriding requirement of confidentiality. Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention

of disorder or crime or the protection of the rights and freedoms of others. Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not however in place at the material time, with the result that Finland's positive obligation with respect to the applicant could not be discharged. This deficiency was later addressed. However, the mechanisms introduced by the Exercise of Freedom of Expression in Mass Media Act (see paragraph 21 above) came too late for the applicant.

50. The Court finds that there has been a violation of Article 8 in the present case.
51. Having regard to the finding relating to Article 8, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 13 (see, among other authorities, *Sallinen and Others v. Finland*, no. 50882/99 50882/99, § § 102 and 110, 27 September 2005, and *Copland v. the United Kingdom*, no. 62617/00 62617/00, § § 50-51, ECHR 2007-...).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. Under the head of non-pecuniary damage the applicant claimed 3,500 euros (EUR) for suffering.
54. The Government submitted that the award should not exceed EUR 2,500.
55. The Court finds it established that the applicant must have suffered non-pecuniary damage. It considers that sufficient just satisfaction would not be provided solely by the finding of a violation and that compensation has thus to

be awarded. Deciding on an equitable basis, it awards the applicant EUR 3,000 under this head.

B. Costs and expenses

56. The applicant claimed EUR 2,500 for costs incurred during the national proceedings and the proceedings before the Court.
57. The Government questioned whether the applicant had furnished the requisite documentation.
58. The Court notes that no documentation as required by Rule 60 of the Rules of Court has been submitted. These claims must therefore be rejected.

C. Default interest

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

**FOR THESE REASONS, THE COURT
UNANIMOUSLY**

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds that there is no need to examine the complaint under Article 13 of the Convention;
3. Holds
 - a. that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - b. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 December 2008, pursuant to Rule 77 § § 2 and 3 of the Rules of Court.

Lawrence Early, *Registrar*

Nicolas Bratza, *President*

ECHR

ECJ

FOURTH SECTION

**CASE OF TIMES
NEWSPAPERS LTD (NOS.
1 AND 2) v THE UNITED
KINGDOM**

(Applications 3002/03 and 23676/03)

JUDGMENT

STRASBOURG
10 March 2009

FINAL
10/06/2009

INTERNET, FREEDOM OF EXPRESSION, INTERNET PUBLICATION RULE, NEWS, ARCHIVE, REPUTATION, DEFAMATION, PUBLIC KNOWLEDGE

IN THE CASE OF TIMES NEWSPAPERS LTD (NOS. 1 AND 2) V. THE UNITED KINGDOM,

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

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 17 February 2009, Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 3002/03 and 23676/03) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Times Newspapers Ltd on 28 October 2002 and 28 July 2003 respectively.
2. The applicant was represented by Reynolds Porter Chamberlain, a law firm in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.
3. The applicant alleged that the rule under United Kingdom law whereby each time material is downloaded from the Internet a new cause of action in libel proceedings accrued ("the Internet publication rule") constituted an unjustifiable and disproportionate restriction on its right to freedom of expression.
4. On 11 October 2005 the Court declared inadmissible part of the application and communicated the remainder of the application to

the Government. It also decided to examine the merits of this part of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Times Newspaper Ltd, is the proprietor and publisher of *The Times* newspaper. The applicant is registered in England.

A. The two articles in *The Times*

6. On 8 September 1999 *The Times* published a report in the printed version of the newspaper headlined "Second Russian Link to Money Laundering". This report stated:

"British and American investigators are examining the role of an alleged second Russian mafia boss over possible involvement in money-laundering through the Bank of New York.

Investigators are understood to be looking at links to [G.L.: his name was set out in full in the original article], whose company, Nordex has been described by the CIA as an 'organisation associated with Russian criminal activity'.

[G.L.]'s name surfaced in earlier money-laundering investigations which may have links to the Bank of New York affair, in which millions of dollars of Russian money are alleged to have been laundered.

The Russian-born businessman came to the attention of European and American investigators in the early Nineties. They suspected Nordex of using its former international base in Vienna as a front for a large-scale money-laundering operation. His name also figured in a British police report in 1995, known as *Operation Ivan*, which looked at the extent of the influence of the Russian mob in London.

[G.L.] has repeatedly denied any wrong-doing or links to criminal activity.

Nordex, which has since moved out of Vienna, is also alleged to have been involved in the smuggling of nuclear weapons and by the mid-1990s reportedly controlled about 60 businesses in the former Soviet Union and another 40 companies in the West.

The Times has learnt that these included between eight and ten off-shore companies in British jurisdictions, including the Channel

Islands and the Isle of Man.

They were administered through a chartered accountant in central London whose offices and home were raided in 1996 by officers from the City of London Police.

The companies were suspected of being used to help launder money from Russia, which was then channelled through European banks. No charges were ever filed against the accountant.

At about the same time a Yugoslav associate said to have been a frontman for [G.L.] was stopped and questioned after arriving at a London airport. No charges were filed against him.

The British investigation into Nordex is believed to have failed because of the difficulty of establishing that the money funnelled through off-shore companies controlled by Nordex was linked to criminal activities.

[G.L.] is alleged to be a former business associate of Viktor Chernomyrdin, the former Russian Prime Minister, and in 1995 his name hit the headlines after it emerged that he had been photographed with President Clinton at a Democrat fund-raising event in 1993.

He is also alleged to have had business dealings with Semyon Mogilevich, the Hungarian-based mafia figure at the centre of the Bank of New York investigation."

7. On 14 October 1999 *The Times* published a second article entitled "Trader linked to mafia boss, wife claims". This report stated:

"A Russian businessman under investigation by Swiss authorities pursuing allegations of money-laundering was a friend of [G.L.], a suspected mafia boss, the businessman's wife claims.

Lev Chernoi, the aluminium magnate under Swiss investigation, was given access to staff and a chauffeur by [G.L.] when he moved to Israel, according to Lyudmila Chernoi, Mr Chernoi's estranged wife ...

If Mrs Chernoi's allegation about a connection between her husband and [G.L.] is true, it will raise further questions about Mr Chernoi. In 1996 the CIA described Nordex, a company operated by [G.L.] and alleged to have been used to launder money and smuggle nuclear weapons, as an 'organisation associated with Russian criminal activity'.

In 1996 [G.L.] triggered a row in America after a photograph was published of him with Presi-

dent Clinton in 1993. [G.L.] has denied any wrongdoing."

8. Both articles were uploaded onto the applicant's website on the same day as they were published in its newspaper.

B. The commencement of proceedings

9. On 6 December 1999 G.L. brought proceedings for libel in respect of the two articles printed in the newspaper against the applicant, its editor and the two journalists under whose by-lines the articles appeared, ("the first action"). The defendants did not dispute that the articles were potentially defamatory and did not seek to prove that the allegations were true. Instead, they relied solely on the defence of qualified privilege, contending that the allegations were of such a kind and such seriousness that they had a duty to publish the information and the public had a corresponding right to know.
10. While the first action was underway, the articles remained on the applicant's website, where they were accessible to Internet users as part of the applicant's archive of past issues. On 6 December 2000, G.L. brought a second action for libel in relation to the continuing Internet publication of the articles ("the second action"). Initially, the defendants' only defence to the second action was one of qualified privilege. The two actions were consolidated and set down for a split trial on issues of liability and then quantum.
11. On 23 December 2000, the applicant added the following preface to both articles in the Internet archive:
- "This article is subject to High Court libel litigation between [G.L.] and Times Newspapers. It should not be reproduced or relied on without reference to Times Newspapers Legal Department."

C. The Internet publications proceedings

12. In or around March 2001 the defendants applied to re-amend their defence in the second action in order "to contend that as a matter of law the only actionable publication of a newspaper article on the Internet is that which occurs when the article is first posted on the Internet" ("the single publication rule"). They argued that, as a result, the second action was time-barred by section 4A of the Limitation Act 1980.
13. On 19 March 2001 the High Court refused permission to re-amend the defence, relying in

particular on the common law rule set out in *Duke of Brunswick v Harmer* (see paragraph 20 below) that each publication of a defamation gives rise to a separate cause of action. The court held that, in the context of the Internet, this meant that a new cause of action accrued every time the defamatory material was accessed (“the Internet publication rule”).

14. On 20 March 2001 the High Court found that the defendants had no reasonable grounds for contending that after 21 February 2000 (the date on which the defendants lodged their defence in the first action) they remained under a duty to publish the articles on the Internet. As a result, the court struck out the defence of qualified privilege in relation to the second action. On 27 March 2001, judgment was entered for G.L. in the second action, with damages to be assessed. By this time the applicant had removed the articles from its website.

D. The Court of Appeal

15. The defendants appealed against the High Court’s order of 19 March 2001 rejecting the single publication rule. They argued that the Internet publication rule breached Article 10, pointing out that as a result of the rule newspapers which maintained Internet archives were exposed to ceaseless liability for re-publication of the defamatory material. The defendants argued that this would inevitably have a chilling effect on the willingness of newspapers to provide Internet archives and would thus limit their freedom of expression.
16. In its judgment of 5 December 2001, the Court of Appeal, per Simon Brown LJ, dismissed the appeal against the order in the second action, stating:

“We do not accept that the rule in the *Duke of Brunswick* imposes a restriction on the readiness to maintain and provide access to archives that amounts to a disproportionate restriction on freedom of expression. We accept that the maintenance of archives, whether in hard copy or on the Internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material. Nor do we believe that the law of defamation need inhibit the responsible maintenance of archives. Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth

will normally remove any sting from the material.”

17. On 30 April 2002 the House of Lords refused leave to appeal. The parties subsequently settled the action and the applicant agreed to pay G.L. a sum of money in full and final settlement of claims and costs arising in both actions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Limitation Act 1980

18. Section 2 of the Limitation Act 1980 (“the 1980 Act”) sets out a general limitation period of six years in tort actions. Section 4A of the 1980 Act qualifies this limitation period as regards defamation actions and provides as follows:

“The time limit under section 2 of this Act shall not apply to an action for—

(a) libel or slander,

(b) slander of title, slander of goods or other malicious falsehood,

but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.”

19. Section 32A of the 1980 Act provides:

“(1) It if appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—

(i) the date on which any such facts did become known to him, and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely—

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.”

B. The Internet publication rule

20. *Duke of Brunswick v Harmer* [1849] 14 QB 154 lays down a common law rule of some significance. On 19 September 1830 an article was published in the *Weekly Dispatch*. The limitation period for libel was, at that time, six years. The article defamed the Duke of Brunswick. Seventeen years after its publication an agent of the Duke purchased a back number containing the article from the *Weekly Dispatch's* office. Another copy was obtained from the British Museum. The Duke sued on those two publications. The defendant contended that the cause of action was time-barred, relying on the original publication date. The court held that the delivery of a copy of the newspaper to the plaintiff's agent constituted a separate publication in respect of which suit could be brought.

21. In *Godfrey v Demon Internet Limited* [2001] QB 201 the respondent brought an action in defamation against the appellants who were Internet service providers. They had received and stored on their news server an article, defamatory of the respondent, which had been posted by an unknown person using another service provider. The judge stated:

“In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus every time one of the defendants' customers accesses 'soc culture thai' and sees that posting defamatory of the plaintiff there is a publication to that customer.”

C. The defence of qualified privilege

22. The leading case on the defence of qualified privilege is *Reynolds v Times Newspapers*

[2001] 2 AC 127. That case established that qualified privilege is an absolute defence to libel proceedings. In the leading judgment before the House of Lords, Lord Nicholls of Birkenhead explained the defence as follows:

“The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication. Lord Atkinson's dictum, in *Adam v Ward* [1917] A.C. 309, 334, is much quoted:

‘a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential’.”

D. Press Complaints Commission Code of Conduct

23. The Press Complaints Commission has adopted a code of conduct which is regularly reviewed and amended as required. Paragraph 1 of the current Code of Conduct reads as follows:

“1. Accuracy

i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.

ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published.

iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.”

E. The US single publication rule

24. Unlike the United Kingdom court, the courts of the United States of America have chosen to apply the “single publication rule”. In the case of *Gregoire v GP Putnam's Sons* (1948) 81 N.E.2d 45 a book originally put on sale in 1941 was still being sold in 1946 following several reprints. The New York Court of Appeals considered the rule in *Duke of Brunswick v Harmer*, but concluded that it was formulated “in an era

which long antedated the modern process of mass publication” and was therefore not suited to modern conditions. Instead, the court held that the limitation period started to run in 1941, when the book was first put on sale. The court pointed out that

“Under [the rule in *Duke of Brunswick v Harmer*] the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public. Such a rule would thwart the purpose of the legislature.”

25. The single publication rule was subsequently applied to a website publication in *Firth v State of New York* (2002) NY int 88. In that case, a report published at a press conference on 16 December 1996 was placed on the internet the same day. A claim was filed over a year later. The New York Court of Appeals held that the limitation period started when the report was first uploaded onto the website and did not begin anew each time the website version of the report was accessed by a user. The court observed that:

“The policies impelling the original adoption of the single publication rule support its application to the posting of ... the report ... on the website ... These policies are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet ... Thus a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet which is, of course, its greatest beneficial promise.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complains that the Internet publication rule constitutes an unjustifiable and disproportionate restriction of its right to freedom of expression as provided in Article 10 of the Convention, which reads, insofar as relevant, as follows:

“1. Everyone has the right to freedom of ex-

pression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ...”

A. Admissibility

27. The Court has consistently emphasised that Article 10 guarantees not only the right to impart information but also the right of the public to receive it (see *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59(b), Series A no. 216; *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I). In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10.
28. The Court concludes that the applicant’s complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

1. *The parties’ observations*

(a) *The applicant*

29. The applicant contended that the Internet publication rule restricted its ability to maintain a publicly accessible Internet archive. It pointed to the “chilling effect” that the rule had upon freedom of expression, which it said was aggravated by the fact that it had not actively sought to disseminate the information contained in its Internet archive. The applicant submitted that Article 10 required the adoption of a single publication rule.
30. The applicant contested the finding of the

Court of Appeal that the maintenance of archives constituted an insignificant aspect of freedom of expression. The applicant pointed to the importance of the integrity and availability of historical records to an open and democratic society.

31. The applicant argued that since the defence of qualified privilege was a complete defence to the libel claim, it was under no obligation to publish a qualification in respect of the relevant articles until the litigation had been resolved. It pointed out that the Code of Practice of the Press Complaints Commission obliged newspapers to post a notice or qualification where a publication had been the subject of a judgment or settlement in favour of the complainant. Any other approach would require a large number of articles to be qualified. Attempts to limit qualification to those articles which were potentially libellous would be difficult: because the libellous nature of a publication may change over time, the applicant would be required to keep the entirety of its Internet archive under review. The applicant pointed out that approximately 500 items were uploaded onto its Internet archive every day.
32. The applicant argued that it was open to the Court to consider the general principle which arose, notwithstanding the specific facts of the case. Although the applicant accepted that G.L.'s rights were also engaged, it considered that a single publication rule would not constitute an excessive restriction on the right of effective access to the court.

(b) The Government

33. The Government relied on the conclusions in the domestic proceedings that the journalists had not demonstrated the requisite standard of responsibility in respect of the two articles. They further relied on the fact that no qualification was added to the articles on the applicant's website until 23 December 2000, over 12 months after the original libel proceedings were initiated.
34. Although the Government accepted that maintaining archives had a social utility, they considered that this was not an aspect of the exercise of freedom of expression which was of central or weighty importance, archive material being "stale news". In the present case, the Government argued that there was no evidence that the applicant had been prevented or deterred from maintaining its online archive. Furthermore, the steps required of the appli-

cant to remove the sting from its archive material were not onerous.

35. As regards the applicant's claim of ceaseless liability, the Government observed that no question of ceaseless liability arose in the present case. The Government pointed out that the second action was contemporaneous with the first action and did not raise stale allegations many years after the event. In any case, even under a single publication rule, (1) the continued publication of articles which the applicant knew to be defamatory, which were not qualified in any way and which were not defended as true would constitute a separate actionable tort under English law; and (2) if accompanied by a statutory discretion along the lines of section 32A of the 1980 Act, the court may well have exercised that discretion to allow G.L. to bring the second action, having regard to the circumstances.
36. The Government highlighted that the present case also engaged the Article 8 and Article 6 rights of G.L. In the choice between the single publication rule and the Internet publication rule, these competing interests should be balanced. They pointed to the fact that there was no consistency of approach to this issue in other jurisdictions and concluded that, on the facts of this case, the application of the Internet publication rule was a permissible and proportionate restriction on the applicant's right to freedom of expression and did not violate Article 10.

2. The Court's assessment

37. The Court notes that judgment was entered against the applicants in the second action. Furthermore, the applicant subsequently agreed to pay a sum of money in settlement of G.L.'s claims and costs in both actions. The Court therefore considers that the second action constituted an interference with the applicant's right to freedom of expression. Such interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to attain such aim or aims.

(a) "Prescribed by law"

38. The applicant does not contest the lawfulness of the interference, which derived from the application of the rule set out in *Duke of Brunswick v Harmer* as developed in the case of *Godfrey v Demon Internet Limited*. The

Court sees no reason to hold that the interference was not lawful and therefore concludes that the interference with the applicant's right freedom of expression was "prescribed by law" within the meaning of Article 10 § 2.

(b) Legitimate aim

39. The Internet publication rule is aimed at protecting the rights and reputation of others. It has not been disputed, and the Court also agrees, that the interference has a legitimate aim.

(c) "Necessary in a democratic society"

i General principles

40. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and in that context the safeguards guaranteed to the press are particularly important. Whilst the press must not overstep the boundaries set, *inter alia*, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas but the public also has a right to receive them. In this way, the press fulfils its vital role as a "public watchdog" (*Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).
41. The Court observes that the most careful of scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III). The Court further recalls that particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive (see *Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05, § 31, 27 November 2007).
42. However, the Court reiterates that Article 10 does not guarantee a wholly unrestricted freedom of expression to the press, even with respect to press coverage of matters of serious public concern. When exercising its right to freedom of expression, the press must act in a manner consistent with its duties and responsibilities, as required by Article 10 § 2. These duties and responsibilities assume particular significance when, as in the present case, information imparted by the press is likely to have

a serious impact on the reputation and rights of private individuals. Furthermore, the protection afforded by Article 10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with responsible journalism (*Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I and *Bladet Tromsø and Stensaas*, cited above, § 65).

43. 43. Finally, it should be recalled that in assessing whether the interference was justified, it is not the role of the Court to substitute its views for those of the national authorities but to re-view the case as a whole, in the light of Article 10, and consider whether the decision taken by national authorities fell within the margin of appreciation allowed to the member States in this area (*Handyside v. the United Kingdom*, 7 December 1976, § 50, Series A no. 24).

ii Application of the principles to the present case

44. The applicants maintain that they are exposed to litigation, without limit in time, on account of the adoption of the Internet publication rule instead of the single publication rule.
45. The Court agrees at the outset with the applicant's submissions as to the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The Court therefore considers that, while the primary function of the press in a democracy is to act as a "public watchdog", it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported. However, the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.
46. The Court further observes that the introduction of limitation periods for libel actions is intended to ensure that those who are defamed move quickly to protect their reputations in

order that newspapers sued for libel are able to defend claims unhindered by the passage of time and the loss of notes and fading of memories that such passage of time inevitably entails. In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § § 54-55, *Reports of Judgments and Decisions* 1996-IV).

47. On the facts of the present case, the Court considers it significant that, although libel proceedings in respect of the two articles were initiated in December 1999, the applicant did not add any qualification to the articles in its Internet archive until December 2000. The Court recalls the conclusion of the Court of Appeal that the attachment of a notice to archive copies of material which it is known may be defamatory would “normally remove any sting from the material”. To the extent that the applicant maintains that such an obligation is excessive, the Court observes that the Internet archive in question is managed by the applicant itself. It is also noteworthy that the Court of Appeal did not suggest that potentially defamatory articles should be removed from archives altogether. In the circumstances, the Court, like the Court of Appeal, does not consider that the requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, constitutes a disproportionate interference with the right to freedom of expression. The Court further notes that the brief notice which was eventually attached to the archive would appear to undermine the applicant’s argument that any qualification would be difficult to formulate.
48. Having regard to this conclusion, it is not necessary for the Court to consider in detail the broader chilling effect allegedly created by the application of the Internet publication rule in the present case. The Court nonetheless observes that the two libel actions brought against the applicant concerned the same two

articles. The first action was brought some two to three months after the publication of the articles and well within the one-year limitation period. The second action was brought a year later, some 14 or 15 months after the initial publication of the articles. At the time the second action was filed, the legal proceedings in respect of the first action were still underway. There is no suggestion that the applicant was prejudiced in mounting its defence to the libel proceedings in respect of the Internet publication due to the passage of time. In these circumstances, the problems linked to ceaseless liability for libel do not arise. The Court would, however, emphasise that while an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.

49. The foregoing considerations are sufficient to enable the Court to conclude that in the present case, the finding by the domestic courts in the second action that the applicant had libelled the claimant by the continued publication on the Internet of the two articles was a justified and proportionate restriction on the applicant’s right to freedom of expression.
50. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. **Declares the remainder of the application admissible;**
2. **Holds that there has been no violation of Article 10 of the Convention.**

Done in English, and notified in writing on 10 March 2009, pursuant to Rule 77 § § 2 and 3 of the Rules of Court.

Lawrence Early, Registrar
Lech Garlicki, President

ECHR

ECJ

FOURTH SECTION

CASE OF LIBERTY AND OTHERS v THE UNITED KINGDOM

(Application no. 58243/00)

JUDGMENT

STRASBOURG

1 July 2008

FINAL

01/10/2008

INTERCEPTION, COMMUNICATIONS, CORRESPONDENCE, PRIVATE LIFE, DISCRETION, MONITORING, MISUSE OF POWER

IN THE CASE OF LIBERTY AND OTHERS V. THE UNITED KINGDOM,

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

Lech Garlicki, *President*,

Nicolas Bratza,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 10 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 58243/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Liberty, British Irish Rights Watch and the Irish Council for Civil Liberties, a British and two Irish civil liberties' organisations based in London and Dublin respectively, on 9 September 1999.
2. The applicants were represented by Mr A. Gask, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.
3. On 25 June 2002 the Court decided to communicate the application to the Government, and several rounds of observations were received from the parties. On 22 March 2005 the Court adjourned the case until linked proceedings before the Investigatory Powers Tribunal had concluded (see paragraphs 11-15 below). On 27 February 2006 the Court resumed its examination and, under the provisions of Article 29

§ 3 of the Convention, decided to examine the merits of the application at the same time as its admissibility. Further observations were, therefore, sought from the parties.

4. The applicants requested a hearing but the Court decided that it would not be necessary.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. *The alleged interception of communications*
5. The applicants alleged that in the 1990s the Ministry of Defence operated an Electronic Test Facility ("ETF") at Capenhurst, Cheshire, which was built to intercept 10,000 simultaneous telephone channels coming from Dublin to London and on to the continent. Between 1990 and 1997 the applicants claimed that the ETF intercepted all public telecommunications, including telephone, facsimile and e-mail communications, carried on microwave radio between the two British Telecom's radio stations (at Clwyd and Chester), a link which also carried much of Ireland's telecommunications traffic. During this period the applicant organisations were in regular telephone contact with each other and also providing, *inter alia*, legal advice to those who sought their assistance. They alleged that many of their communications would have passed between the British Telecom radio stations referred to above and would thus have been intercepted by the ETF.
2. *Complaint to the Interception of Communications Tribunal ("ICT")*
6. On 9 September 1999, having seen a television report on the alleged activities of the ETF, the applicant organisations requested the Interception of Communications Tribunal ("the ICT": see paragraphs 28-30 below) to investigate the lawfulness of any warrants which had been issued in respect of the applicants' communications between England and Wales and Ireland. On 19 October 1999 an official of the ICT confirmed that an investigation would proceed and added:

"... I am directed to advise you that the Tribunal has no way of knowing in advance of an investigation whether a warrant exists in any given case. The Tribunal investigates all com-

plaints in accordance with section 7 of the [Interception of Communications Act 1985: 'the 1985 Act', see paragraphs 16-33 below] establishing whether a relevant warrant or relevant certificate exists or had existed and, if so, whether there has been any contravention of sections 2 to 5. If ... the Tribunal concludes that there has been a contravention of sections 2 to 5, the Tribunal may take steps under sections 7(4), (5) and (6). In any case where there is found to have been no contravention, the Tribunal is not empowered to disclose whether or not authorised interception has taken place. In such instances, complainants are advised only that there has been no contravention of sections 2 to 5 in relation to a relevant warrant or a relevant certificate."

7. By a letter dated 16 December 1999 the ICT confirmed that it had thoroughly investigated the matter and was satisfied that there had been no contravention of sections 2 to 5 of the 1985 Act in relation to the relevant warrant or certificate.
 8. By a letter dated 9 September the applicants complained to the DPP of an unlawful interception, requesting the prosecution of those responsible. The DPP passed the matter to the Metropolitan Police for investigation. By a letter dated 7 October 1999 the police explained that no investigation could be completed until the ICT had investigated and that a police investigation might then follow if it could be shown that an unwarranted interception had taken place or if any of the other conditions set out in section 1(2)-(4) of the 1985 Act had not been met. The applicants pointed out, in their letter of 12 October 1999, that the vague, albeit statutory, response of the ICT would mean that they would not know whether a warrant had been issued or, if it had, whether it had been complied with. They would not, therefore, be in a position to make submissions to the police after the ICT investigation as to whether or not a criminal investigation was warranted. The applicants asked if, and if so how, the police could establish for themselves whether or not a warrant had been issued, so as to decide whether an investigation was required, and how the police would investigate, assuming there had been no warrant.
 9. The DPP responded on 19 October 1999 that the police had to await the ICT decision, and the police responded on 9 November 1999 that the applicants' concerns were receiving the fullest attention, but that they were unable to enter into discussion on matters of internal procedure and inter-departmental investigation.
 10. On 21 December 1999 the applicants wrote to the police pointing out that, having received the decision of the ICT, they still did not know whether or not there had been a warrant or whether there had been unlawful interception. The response, dated 17 January 2000, assured the applicants that police officers were making enquires with the relevant agencies with a view to establishing whether there had been a breach of section 1 of the 1985 Act and identifying the appropriate investigative authority. The police informed the applicants by a letter dated 31 March 2000 that their enquiries continued, and, by a letter dated 13 April 2000, that these enquiries had not revealed an offence contrary to section 1 of the 1985 Act.
- 4. Complaint to the Investigatory Powers Tribunal ("IPT")**
11. On 15 December 2000 the former statutory regime for the interception of communications was replaced by the Regulation of Investigatory Powers Act 2000 (see paragraphs 34-39 below) and a new tribunal, the IPT, was created.
 12. On 13 August 2001 the applicants began proceedings in the IPT against the security and intelligence agencies of the United Kingdom, complaining of interferences with their rights to privacy for their telephone and other communications from 2 October 2000 onwards (*British-Irish Rights Watch and others v. The Security Service and others*, IPT/01/62/CH). The IPT, sitting as its President and Vice-President (a Court of Appeal and a High Court judge), had security clearance and was able to proceed in the light not just of open evidence filed by the defendant services but also confidential evidence, which could not be made public for reasons of national security.
 13. On 9 December 2004 the IPT made a number of preliminary rulings on points of law. Although the applicants had initially formulated a number of claims, by the time of the ruling these had been narrowed down to a single complaint about the lawfulness of the "filtering process", whereby communications between the United Kingdom and an external source, captured under a warrant pursuant to section 8(4) of the 2000 Act (which had replaced section 3(2) of the 1985 Act: see paragraphs 34-

39 below), were sorted and accessed pursuant to secret selection criteria. The question was, therefore, whether “the process of filtering intercepted telephone calls made from the UK to overseas telephones ... breaches Article 8 § 2 [of the Convention] because it is not “in accordance with the law”.

14. The IPT found that the difference between the warrant schemes for interception of internal and external communications was justifiable, because it was more necessary for additional care to be taken with regard to interference with privacy by a Government in relation to domestic telecommunications, given the substantial potential control it exercised in this field; and also because its knowledge of, and control over, external communications was likely to be much less extensive.
15. As to whether the law was sufficiently accessible and foreseeable for the purposes of Article 8 § 2, the IPT observed:

“The selection criteria in relation to accessing a large quantity of as yet unexamined material obtained pursuant to a s8(4) warrant (as indeed in relation to material obtained in relation to a s8(1) warrant) are those set out in s5(3). The Complainants’ Counsel complains that there is no ‘publicly stated material indicating that a relevant person is satisfied that the [accessing] of a particular individual’s telephone call is proportionate’. But the Respondents submit that there is indeed such publicly stated material, namely the provisions of s6(l) of the Human Rights Act which requires a public authority to act compatibly with Convention rights, and thus, it is submitted, imposes a duty to act proportionately in applying to the material the s5(3) criteria.

To that duty there is added the existence of seven safeguards listed by the Respondents’ Counsel, namely (1) the criminal prohibition on unlawful interception (2) the involvement of the Secretary of State (3) the guiding role of the Joint Intelligence Committee (‘JIC’) (4) the Code of Practice (5) the oversight by the Interception of Communication Commissioner (whose powers are set out in Part IV of the Act) (6) the availability of proceedings before this Tribunal and (7) the oversight by the Intelligence and Security Committee, an all-party body of nine Parliamentarians created by the Intelligence Services Act 1994 ...

It is plain that, although in fact the existence of all these safeguards is publicly known, it is not part of the requirements for accessibility or foreseeability that the precise details of

those safeguards should be published. The Complainants’ Counsel has pointed out that it appears from the Respondents’ evidence that there are in existence additional operating procedures, as would be expected given the requirements that there be the extra safeguards required by s16 of the Act, and the obligation of the Secretary of State to ensure their existence under s15(1)(b). It is not suggested by the Complainants that the nature of those operating procedures be disclosed, but that their existence, i.e. something along the lines of what is in the Respondents’ evidence, should itself be disclosed in the Code of Practice.

We are unpersuaded by this. First, such a statement in the Code of Practice, namely as to the existence of such procedures, would in fact take the matter no further than it already stands by virtue of the words of the statute. But in any event, the existence of such procedures is only one of the substantial number of safeguards which are known to exist. Accessibility and foreseeability are satisfied by the knowledge of the criteria and the knowledge of the existence of those multiple safeguards.

... [F]oreseeability is only expected to a degree that is reasonable in the circumstances, and the circumstances here are those of national security ... In this case the legislation is adequate and the guidelines are clear. Foreseeability does not require that a person who telephones abroad knows that his conversation is going to be intercepted because of the existence of a valid s. 8(4) warrant. ...

The provisions, in this case the right to intercept and access material covered by a s.8(4) warrant, and the criteria by reference to which it is exercised, are in our judgment sufficiently accessible and foreseeable to be in accordance with law. The parameters in which the discretion to conduct interception is carried on, by reference to s. 5(3) and subject to the safeguards referred to, are plain from the face of the statute. In this difficult and perilous area of national security, taking into account both the necessary narrow approach to Article 8(2) and the fact that the burden is placed upon the Respondent, we are satisfied that the balance is properly struck.”

A. Relevant domestic law and practice

1. *The Interception of Communications Act 1985*

16. During the period at issue in this application the relevant legislation was sections 1-10 of the Interception of Communications Act 1985

(“the 1985 Act”), which came into force on 10 April 1986 and was repealed by the Regulation of Investigatory Powers Act 2000 (“the 2000 Act”).

17. Pursuant to section 1 of the 1985 Act, a person who intentionally intercepted a communication in the course of its transmission by post or by means of a public telecommunications system was guilty of an offence. A number of exceptions were made, the relevant one being a communication intercepted pursuant to a warrant issued by the Secretary of State under section 2 of the 1985 Act and in accordance with a certificate issued under section 3(2)(b) of the 1985 Act.

(a) Warrants for interception

i The three grounds for issuing a warrant

18. The Secretary of State’s power to issue a warrant under section 2 of the 1985 Act could be exercised only if he considered the warrant necessary:

“(a) in the interests of national security;

(b) for the purpose of preventing or detecting serious crime; or

(c) for the purpose of safeguarding the economic well-being of the United Kingdom.”

19. The term “serious crime” was defined by section 10(3) of the Act as follows:

“For the purposes of [the 1985 Act], conduct which constitutes or, if it took place in the United Kingdom, would constitute one or more offences shall be regarded as a serious crime if, and only if –

(a) it involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose; or

(b) the offence, or one of the offences, is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.”

20. The scope of the term “national security” was clarified by the Commissioner appointed under the 1985 Act. In his 1986 report he stated (§ 27) that he had adopted the following definition: activities “which threaten the safety or well-being of the State, and which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent

means”.

21. In determining whether a warrant was necessary for one of the three reasons set out in section 2(2) of the 1985 Act, the Secretary of State was under a duty to take into account whether the information which it was considered necessary to acquire could reasonably be acquired by other means (section 2(3)). In addition, warrants to safeguard the economic well-being of the United Kingdom could not be issued unless the information to be acquired related to the acts or intentions of persons outside the British Islands (section 2(4)). A warrant required the person to whom it was addressed to intercept, in the course of their transmission by post or by means of a public telecommunications system, such communications as were described in the warrant.

ii The two types of warrant

22. Two types of warrant were permitted by section 3 of the 1985 Act. The first, a “section 3(1) warrant”, was a warrant that required the interception of:

“(a) such communications as are sent to or from one or more addresses specified in the warrant, being an address or addresses likely to be used for the transmission of communications to or from—
(i) one particular person specified or described in the warrant; or
(ii) one particular set of premises so specified or described; and

(b) such other communications (if any) as it is necessary to intercept in order to intercept communications falling within paragraph (a) above.”

By section 10(1) of the 1985 Act, the word “person” was defined to include any organisation or combination of persons and the word “address” was defined to mean any postal or telecommunications address.

23. The second type of warrant, a “section 3(2) warrant”, was one that required the interception, in the course of transmission by means of a public telecommunications system, of:

“(i) such external communications as are described in the warrant; and

(ii) such other communications (if any) as it is necessary to intercept in order to intercept such external communications as are so described ...”.

24. When he issued a section 3(2) warrant, the

Secretary of State was required to issue also a certificate containing a description of the intercepted material the examination of which he considered necessary in the interests of national security, to prevent or detect serious crime or to safeguard the State's economic well-being (section 3(2)(b)). A section 3(2) warrant could not specify an address in the British Islands for the purpose of including communications sent to or from that address in the certified material unless-

"3(3) (a) the Secretary of State considers that the examination of communications sent to or from that address is necessary for the purpose of preventing or detecting acts of terrorism; and

(b) communications sent to or from that address are included in the certified material only in so far as they are sent within such a period, not exceeding three months, as is specified in the certificate."

25. Section 3(2) warrants could be issued only under the hand of the Secretary of State or a permitted official of high rank with the written authorisation of the Secretary of State. If issued under the hand of the Secretary of State, the warrant was valid for two months; if by another official, it was valid for two days. Only the Secretary of State could renew a warrant. If the Secretary of State considered that a warrant was no longer necessary in the interests of national security, to prevent or detect serious crime or to safeguard the State's economic well-being, he was under a duty to cancel it (section 4).
26. The annual report of the Commissioner for 1986 explained the difference between warrants issued under section 3(1) and under section 3(2):

"There are a number of differences ... But the essential differences may be summarised as follows:

(i) Section 3(2) warrants apply only to external telecommunications;

(ii) whereas section 3(1) warrants only apply to communications to or from one particular person ... or one particular set of premises, Section 3(2) warrants are not so confined; but

(iii) at the time of issuing a Section 3(2) warrant the Secretary of State is obliged to issue a certificate describing the material which it is desired to intercept; and which he regards as necessary to examine for any of the purposes set out in Section 2(2).

So the authority to intercept granted by the Secretary of State under Section 3(2) is limited not so much by reference to the target, as it is under section 3(1), but by reference to the material. It follows that in relation to Section 3(2) warrants, I have had to consider first, whether the warrant applies to external communications only, and, secondly, whether the certified material satisfies the Section 2(2) criteria. ...

There is a further important limitation on Section 3(2) warrants. I have said that the authority granted by the Secretary of State is limited by reference to the material specified in the certificate, rather than the targets named in the warrants. This distinction is further underlined by Section 3(3) which provides that material specified shall *not* include the address in the British Islands for the purpose of including communications sent to or from that address, except in the case of counter-terrorism. So if, for example in a case of subversion the Security Service wishes to intercept external communications to or from a resident of the British Islands, he could not do so under a Section 3(2) warrant by asking for communications sent to or from his address to be included in the certified material. But it would be possible for the Security Service to get indirectly, through a legitimate examination of certified material, what it may not get directly. In such cases it has become the practice to apply for a separate warrant under Section 3(1) known as an overlapping warrant, in addition to the warrant under Section 3(2). There is nothing in the [1985 Act] which requires this to be done. But it is obviously a sound practice, and wholly consistent with the legislative intention underlying Section 3(3). Accordingly I would recommend that where it is desired to intercept communications to or from an individual residing in the British Islands, as a separate target, then in all cases other than counter-terrorism there should be a separate warrant under Section 3(1), even though the communications may already be covered by a warrant under Section 3(3). The point is not without practical importance. For the definition of "relevant warrant" and "relevant certificate" in Section 7(9) of the Act makes it clear that, while the Tribunal has power to investigate warrants issued under section 3(1) and certificates under section 3(2) where an address is specified in the certificate, it has no such power to investigate Section 3(2) warrants, where an address is not so certified."

iii Use and retention of information

27. Section 6 of the 1985 Act was entitled "Safe-guards" and read as follows:

“(1) Where the Secretary of State issues a warrant he shall, unless such arrangements have already been made, make such arrangements as he considers necessary for the purpose of securing-

(a) that the requirements of subsections (2) and (3) below are satisfied in relation to the intercepted material; and

(b) where a certificate is issued in relation to the warrant, that so much of the intercepted material as is not certified by the certificate is not read, looked at or listened to by any person.

(2) The requirements of this subsection are satisfied in relation to any intercepted material if each of the following, namely-

(a) the extent to which the material is disclosed;

(b) the number of persons to whom any of the material is disclosed;

(c) the extent to which the material is copied; and

(d) the number of copies made of any of the material;

is limited to the minimum that is necessary as mentioned in section 2 (2) above.

(3) The requirements of this subsection are satisfied in relation to any intercepted material if each copy made of any of that material is destroyed as soon as its retention is no longer necessary as mentioned in section 2 (2) above.”

(b) The Interception of Communications Tribunal (“ICT”)

28. Section 7 of the 1985 Act provided for a Tribunal to investigate complaints from any person who believed that communications sent by or to him had been intercepted. Its jurisdiction, so far as material, was limited to investigating whether there was or had been a “relevant warrant” or a “relevant certificate” and, where there was or had been, whether there had been any contravention of sections 2-5 of the 1985 Act in relation to that warrant or certificate. Section 7(9) read, in so far as relevant, as follows:

“For the purposes of this section –

(a) a warrant is a relevant warrant in relation to an applicant if –

(i) the applicant is specified or described in the warrant; or

(ii) an address used for the transmission of communications to or from a set of premises in the British Islands where the applicant resides or works is so specified;

(b) a certificate is a relevant certificate in relation to an applicant if and to the extent that an address used as mentioned in paragraph (a) (ii) above is specified in the certificate for the purpose of including communications sent to or from that address in the certified material.”

29. The ICT applied the principles applicable by a court on an application for judicial review. If it found there had been a contravention of the provisions of the Act, it was to give notice of that finding to the applicant, make a report to the Prime Minister and to the Commissioner appointed under the Act and, where it thought fit, make an order quashing the relevant warrant, directing the destruction of the material intercepted and/or directing the Secretary of State to pay compensation. In other cases, the ICT was to give notice to the applicant stating that there had been no contravention of sections 2-5 of the Act.

30. The ICT consisted of five members, each of whom was required to be a qualified lawyer of not less than ten years standing. They held office for a five-year period and could be re-appointed. The decisions of the ICT were not subject to appeal.

(c) The Commissioner

31. Section 8 provided that a Commissioner be appointed by the Prime Minister. He or she was required to be a person who held, or who had held, high judicial office. The Commissioner’s functions included the following:

- to keep under review the carrying out by the Secretary of State of the functions conferred on him by sections 2-5 of the 1985 Act;
- to give to the ICT all such assistance as it might require for the purpose of enabling it to carry out its functions;
- to keep under review the adequacy of the arrangements made under section 6 for safeguarding intercepted material and destroying it where its retention was no longer necessary;
- to report to the Prime Minister if there appeared to have been a contravention of sections 2-5 which had not been reported by the ICT or if the arrangements under sec-

tion 6 were inadequate;

- to make an annual report to the Prime Minister on the exercise of the Commissioner's functions. This report had to be laid before the Houses of Parliament. The Prime Minister had the power to exclude any matter from the report if publication would have been prejudicial to national security, to the prevention or detection of serious crime or to the well-being of the United Kingdom. The report had to state if any matter had been so excluded.
32. In his first report as Commissioner, in 1992, Sir Thomas Bingham MR, as he then was, explained his own role as part of the safeguards inherent in the 1985 Act as follows:

"The third major safeguard is provided by the Commissioner himself. While there is nothing to prevent consultation of the Commissioner before a warrant is issued, it is not the practice to consult him in advance and such consultation on a routine basis would not be practicable. So the Commissioner's view is largely retrospective, to check that warrants have not been issued in contravention of the Act and that appropriate procedures were followed. To that end, I have visited all the warrant issuing departments and agencies named in this report, in most cases more than once, and discussed at some length the background to the warrant applications. I have also discussed the procedure for seeking warrants with officials at various levels in all the initiating bodies and presenting departments. I have inspected a significant number of warrants, some chosen by me at random, some put before me because it was felt that I should see them. Although I have described ... a number of instances in which mistakes were made or mishaps occurred, I have seen no case in which the statutory restrictions were deliberately evaded or corners knowingly cut. A salutary practice has grown up by which the Commissioner's attention is specifically drawn to any case in which an error or contravention of the Act has occurred: I accordingly believe that there has been no such case during 1992 of which I am unaware."

Similar conclusions about the authorities' compliance with the law were drawn by all the Commissioners in their reports during the 1990s.

33. In each of the annual reports made under the 1985 Act the Commissioner stated that in his view the arrangements made under section 6 of the 1985 were adequate and complied with,

without revealing what the arrangements were. In the 1989 Report the Commissioner noted at § 9 that there had been technological advances in the telecommunications field which had "necessitated the making of further arrangements by the Secretary of State for the safeguarding of material under section 6 of the [1985 Act]". The Commissioner stated that he had reviewed the adequacy of the new arrangements. For the year 1990, the Commissioner recorded that, as a result of a new practice of the police disclosing some material to the Security Service, a further change in the section 6 arrangements had been required. The Commissioner said in the 1990 Report that he was "satisfied with the adequacy of the new arrangements" (1990 Report at § 18). In the 1991 Report, the Commissioner stated that there had been some minor changes to the section 6 arrangements and confirmed that he was satisfied with the arrangements as modified (§ 29 of the 1991 Report). In the 1993 Report, the Commissioner said at § 11:

"Some of the written statements of section 6 safeguards which I inspected required to be updated to take account of changes in the public telecommunications market since they had been drafted and approved. Other statements could, as it seemed to me, be improved by more explicit rules governing the circumstances and manner in which, and the extent to which, intercept material could be copied. It also seemed to me that it would be advantageous, where this was not already done, to remind all involved in handling intercept material on a regular basis of the safeguards to which they were subject, securing written acknowledgements that the safeguards had been read and understood. These suggestions appeared to be readily accepted by the bodies concerned. They did not in my view indicate any failure to comply with section 6 of the Act."

In his first year as Commissioner, Lord Nolan reported the following on this issue of section 6 safeguards (1994 Report, § 6):

"Like my predecessors, I have on each of my visits considered and discussed the arrangements made by the Secretary of State under section 6 for the purpose of limiting the dissemination and retention of intercepted material to what is necessary within the meaning of section 2. Each agency has its own set of such arrangements, and there are understandable variations between them. For example, the practical considerations involved in deciding what is necessary in the interests of na-

tional security, or the economic well-being of the United Kingdom (the areas with which the Security Service and the Secret Intelligence Service are almost exclusively concerned) are somewhat different from those involved in the prevention and detection of serious criminal offences (with which the police forces and HM Customs & Excise are almost exclusively concerned). I am satisfied that all of the agendas are operating within the existing approved safeguards under the terms of the arrangements as they stand ...”

2. *The Regulation of Investigatory Powers Act 2000*

34. The 2000 Act came into force on 15 December 2000. The explanatory memorandum described the main purpose of the Act as being to ensure that the relevant investigatory powers were used in accordance with human rights. As to the first, interceptions of communications, the 2000 Act repealed, *inter alia*, sections 1-10 of the 1985 Act and provides for a new regime for the interception of communications.
35. The 2000 Act is designed to cover the purposes for which the relevant investigatory powers may be used, which authorities can use the powers, who should authorise each use of the power, the use that can be made of the material gained, judicial oversight and a means of redress for the individual.
36. A new Investigatory Powers Tribunal (“IPT”) assumed the responsibilities of the former ICT, of the Security Services Tribunal and of the Intelligence Services Tribunal. The Interception of Communications Commissioner continues to review the actions of the Secretary of State as regards warrants and certificates and to review the adequacy of the arrangements made for the execution of those warrants. He is also, as before, to assist the Tribunal. In addition, the Secretary of State is to consult about and to publish codes of practice relating to the exercise and performance of duties in relation to, *inter alia*, interceptions of communications.
37. Section 2(2) of the 2000 Act defines interception as follows:

“For the purposes of this Act, but subject to the following provisions of this section, a person intercepts a communication in the course of its transmission by means of a telecommunications system if, and only if, he –

(a) so modifies or interferes with the system, or its operation,

(b) so monitors transmissions made by means of the system, or

(c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,

as to make some of all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.”

38. Section 5(2) of the 2000 Act provides that the Secretary of State shall not issue an interception warrant unless he believes that the warrant is necessary, *inter alia*, in the interests of national security, for the purpose of preventing or detecting serious crime or for the purpose of safeguarding the economic well-being of the United Kingdom and that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.
39. In addition to the general safeguards specified in section 15 of the Act, section 16 provides additional safeguards in the case of certificated warrants (namely warrants for interception of external communications supported by a certificate). In particular, section 16(1) provides that intercepted material is to be read, looked at or listened to by the persons to whom it becomes available by virtue of the warrant to the extent only that it has been certified as material the examination of which is necessary for one of the above purposes and falls within subsection (2). Intercepted material falls within subsection (2) so far only as it is selected to be read, looked at or listened to otherwise than according to a factor which is referable to an individual who is known to be for the time being in the British Isles and has as its purpose, or one of its purposes, the identification of material in communications sent by that person, or intended for him.
40. In its Ruling of 9 December 2004 (see paragraphs 13-15 above), the IPT set out the following extracts from the Interception of Communications Code of Practice issued pursuant to s. 71 of the 2000 Act (“the Code of Practice”). Subparagraph 4(2) of the Code of Practice deals with the application for a s. 8(1) warrant as follows :

“An application for a warrant is made to the Secretary of State . . . Each application, a copy of which must be retained by the applicant, should contain the following information :

- Background to the operation in question.

- Person or premises to which the application relates (and how the person or premises feature in the operation) .
- Description of the communications to be intercepted, details of communications service provider(s) and an assessment of the feasibility of the interception operation where this is relevant.
- Description of the conduct to be authorised as considered necessary in order to carry out the interception, where appropriate.
- An explanation of why the interception is considered to be necessary under the provisions of section 5(3).
- A consideration of why the conduct is to be authorised by the warrant is proportionate to what is sought to be achieved by that conduct.
- A consideration of any unusual degree of collateral intrusion and why that intrusion is justified in the circumstances. In particular, where the communications in question might affect religious, medical or journalistic confidentiality or legal privilege, this must be specified in the application.
- Where an application is urgent, supporting justification should be provided.
- An assurance that all material intercepted will be handled in accordance with the safeguards required by section 15 of the Act .

The IPT continued:

“Applications for a s. 8(4) warrant are addressed in subparagraph 5 .2 of the Code of Practice :

‘An application for a warrant is made to the Secretary of State ... each application, a copy of which must be retained by the applicant, should contain the following information :

- Background to the operation in question [identical to the first bullet point in 4.2].
- Description of the communications ... [this is materially identical to the third bullet point in 4.1] .
- Description of the conduct to be authorised, which must be restricted to the interception of external communications, or to conduct necessary in order to intercept those external communications, where appropriate [compare the wording of the fourth bullet in 4 .2].
- The certificate that will regulate examination of intercepted material.
- An explanation of why the interception is

considered to be necessary for one or more of the section 5(3) purposes [identical to the fifth bullet point in 4 .2].

- A consideration of why the conduct should be authorised by the warrant is proportionate ... [identical to the sixth bullet point in 4 .2].
- A consideration of any unusual degree of collateral intrusion ... [identical to the seventh bullet point in 4 .2].
- Where an application is urgent ... [identical to the eighth bullet point in 4 .2].
- An assurance that intercepted material will be read, looked at or listened to only so far as it is certified, and it meets the conditions of sections 16(2) -16(6) of the Act.
- An assurance that all material intercepted will be handled in accordance with the safeguards required by sections 15 and 16 of the Act [these last two bullets of course are the equivalent to the last bullet point in 4 .2].

... By subparagraph 4(8), the s. 8(l) warrant instrument should include ‘the name or description of the interception subject or of the set of premises in relation to which the interception is to take place’ and by subparagraph 4(9) there is reference to the schedules required by s. 8(2) of [the 2000 Act]. The equivalent provision in relation to the format of the s. 8(4) warrant in subparagraph 5(9) does not of course identify a particular interception subject or premises, but requires inclusion in the warrant of a ‘description of the communications to be intercepted.’”

THE LAW

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicants complained about the interception of their communications, contrary to Article 8 of the Convention:

“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 freedoms of others.”

A. The parties’ submissions

1. *The applicants*

42. The applicants complained that, between 1990 and 1997, telephone, facsimile, e-mail and data communications between them were intercepted by the Capenhurst facility, including legally privileged and confidential material.
43. Through the statements of Mr Duncan Campbell, a telecommunications expert, they alleged that the process applying to external warrants under section 3(2) of the 1985 Act embodied five stages.

First, a warrant would be issued, specifying an external communications link or links to be physically intercepted. Such warrants covered very broad classes of communications, for example, “all commercial submarine cables having one terminal in the UK and carrying external commercial communications to Europe”. All communications falling within the specified category would be physically intercepted.

Secondly, the Secretary of State would issue a certificate, describing the categories of information which could be extracted from the total volume of communications intercepted under a particular warrant. Certificates were formulated in general terms, and related only to intelligence tasks and priorities; they did not identify specific targets or addresses. They did not need to be more specific than the broad classes of information specified in the 1985 Act, for example, “national security”, “preventing or detecting serious crime” or “safeguarding the economic well-being of the United Kingdom”. The combination of a certificate and a warrant formed a “certified warrant”.

The third stage in the process was filtering. An automated sorting system or search engine, operating under human control, selected communications containing specific search terms or combinations thereof. The search terms would relate to one or more of the certificates issued for the relevant intercepted communications link. Search terms could also be described as “keyword lists”, “technical databases” or “The Dictionary”. Search terms and filtering criteria were not specified in certificates, but were selected and administered by State officials without reference to judicial officials or ministers.

Fourth, a system of rules was in place to promote the “minimisation” of the interference with privacy, namely how to review communications intelligence reports and remove names or material identifying citizens or entities whose details might incidentally have been included in raw material which had otherwise been lawfully intercepted and processed. Where the inclusion of such details in the final report was not proportionate or necessary for the lawful purpose of the warranted interception, it would be removed.

The fifth and final stage in the process was “dissemination”. Information obtained by an interference with the privacy of communications could be disseminated only where the recipients’ purpose(s) in receiving the information was proportionate and necessary in the circumstances. Controls on the dissemination formed a necessary part of Article 8 safeguards.

44. The applicants contended that since the section 3(2) procedure permitted the interception of all communications falling within the large category set out in each warrant, the only protection afforded to those whose communications were intercepted was that the Secretary of State, under section 6(1) of the Act, had to “make such arrangements as he considers necessary for the purpose of securing that ... so much of the intercepted material as is not certified by the certificate is not read, looked at or listened to by any person” unless the requirements of section 6(2) were met. However, the precise nature of these “arrangements” were not, at the relevant time, made known to the public, nor was there any procedure available to permit an individual to satisfy him or herself that the “arrangements” had been followed. The Tribunal did not have jurisdiction to examine such compliance, and although the Commissioner was authorised under section 8 to review the adequacy of the “arrangements” in general, he had no power to review whether they had been met in an individual case.
45. It was plain that the alleged interception of communications constituted an interference with the applicants’ rights under Article 8 § 1. Any such interception, to comply with Article 8 § 2, had to be “in accordance with the law”, and thus have a basis in domestic law that was adequately accessible and formulated with sufficient precision as to be foreseeable. They contended that the United Kingdom legislation breached the requirements of foreseeability. They submitted that it would not compromise

national security to describe the arrangements in place for filtering and disseminating intercepted material, and that detailed information about similar systems had been published by a number of other democratic countries, such as the United States of America, Australia, New Zealand, Canada and Germany. The deficiencies in the English system were highlighted by the Court's decision in *Weber and Saravia v. Germany* (dec.), no. 54934/00 54934/00, 29 June 2006, which noted that the German legislation set out on its face detailed provisions regulating, *inter alia*, the way in which individual communications were to be selected from the pool of material derived from "strategic interception"; disclosure of selected material amongst the various agencies of the German State and the use that each could properly make of the material; and the retention or destruction of the material. The authorities' discretion was further regulated and constrained by the public rulings of the Federal Constitutional Court on the compatibility of the provisions with the Constitution. In contrast, in the United Kingdom at the relevant time no provision was made on the face of the statute for any part of the processes following the initial interception, other than the duty on the Secretary of State to make unspecified "arrangements". The arrangements themselves were unpublished. There was no legal material in the public domain indicating how the authorities' powers to select, disclose, use or retain particular communications were regulated. The authorities' conduct was not "in accordance with the law" because it was unsupported by any predictable legal basis satisfying the accessibility principle.

46. In addition, the applicants denied that the interferences pursued a legitimate aim or were proportionate to any such aim, since the 1985 Act permitted interception of large classes of communications for any purpose, and it was only subsequently that this material was sifted to determine whether it fell within the scope of a section 3(2) warrant.

2. The Government

47. For security reasons, the Government adopted a general policy of neither confirming nor denying allegations made in respect of surveillance activities. For the purposes of this application, however, they were content for the Court to proceed on the hypothetical basis that the applicants could rightly claim that communications sent to or from their offices were

intercepted at the Capenhurst ETF during the relevant period. Indeed, they submitted that, in principle, any person who sent or received any form of telecommunication outside the British Islands during the period in question could have had such a communication physically intercepted under a section 3(2) warrant. However, the Government emphatically denied that any interception was being conducted without the necessary warrants and it was their position that, if interception of the applicants' communications did occur, it would have been lawfully sanctioned by an appropriate warrant under section 3(2) of the 1985 Act.

48. The Government annexed to their first set of Observations, dated 28 November 2002, a statement by Mr Stephen Boys Smith, a senior Home Office official, in which it was claimed:

"... Disclosure of the arrangements would reveal important information about the methods of interception used. It is for this reason that the Government is unable to disclose the full detail of the section 6 arrangements for section 3(2) warrants that were in place during the relevant period. The methods to which the relevant documents relate for the relevant period remain a central part of the methods which continue to be used. Therefore, disclosure of the arrangements, the Government assesses and I believe, would be contrary to the interests of national security. It would enable individuals to adapt their conduct so as to minimise the effectiveness of any interception methods which it might be thought necessary to apply to them.

Further, the manuals and instructions setting out the section 6 safeguards and arrangements are in large part not in a form which would be illuminating or readily comprehensible to anyone who had not also undergone the training I have referred to above or had the benefit of detailed explanations. They are couched in technical language and refer to specific techniques and processes which cannot be understood simply from the face of the documents. They contain detailed instructions, precisely in order to ensure that the section 6 arrangements and section 3(2) requirements were fully understood by staff and were fully effective. Any explanations given by the Government of those techniques and processes would compound the problem, referred to above, of undermining the operational effectiveness of the system and techniques used under the authority of warrants."

The Government stressed, however, that the detailed arrangements were the subject of

independent review by the successive Commissioners, who reported that they operated as robust safeguards for individuals' rights (see paragraphs 31-33 above).

49. The Government annexed to their Further Observations, dated 23 May 2003, a second statement by Mr Boys Smith, in response to Mr Campbell's statement (see paragraph 48 above), which provided more detail, to the extent that was possible without undermining national security, about the "arrangements" made by the Secretary of State under section 6 of the Act. The Government submitted that the Court should proceed on the basis that, in the absence of evidence to the contrary, in the democratic society of the United Kingdom, the relevant ministers, officials and Commissioners properly discharged their statutory duties to ensure that safeguards were in place to comply with all the requirements of section 6. Moreover Mr Boys Smith's statement showed that during the relevant period there was a range of safeguards in place to ensure that the process of selection of material for examination (the stage referred to by the applicants as "filtering") could be carried out only strictly in accordance with the statutory framework and the terms of the warrant and the certificate (that is, could be carried out only when necessary in the interests of national security, for the purpose of preventing or detecting serious crime or for the purpose of safeguarding the economic well-being of the United Kingdom), and could not be abused or operated arbitrarily.
50. According to Mr Boys Smith, all persons involved in the selection process would have had their attention specifically drawn to the safeguards and limits set out in the primary legislation, which were rigorously applied. Secondly, training was provided to all these persons to emphasise the importance of strict adherence to the operating procedures and safeguards in place. Thirdly, throughout the relevant period operating procedures were in place to ensure that it was not possible for any single individual to select and examine material on an arbitrary and uncontrolled basis. Where, as part of his intelligence gathering, an official wished to intercept and select relevant information, he could not effect the interception himself. He would have to take the request for interception and selection to personnel in a different branch of the department, who would then separately activate the technical processes necessary for the interception and selection to be made. The requesting official would have to set out,

in his request, his justification for the selection. Moreover, a record of the request was kept, so that it was possible for others (senior management and the Commissioner) to check back on the official's request, to ensure that it was properly justified. Conversely, it was not possible for the personnel in the branch of the department implementing the technical interception processes to receive the downloaded product of any interception and selection process implemented by them. Therefore, they also could not conduct unauthorised interception and gain access to material themselves. Fourth, there was day-to-day practical supervision of those who conducted the selection processes under section 3(2) warrants ("the requesting officials") by managers working physically in the same room, who could and would where necessary ask the requesting officials at any time to explain and justify what they were doing. The managers also performed quality control functions in relation to the intelligence reports generated by the requesting officials, and routinely reviewed all intelligence reports incorporating intercepted material that were drawn up by requesting officials for dissemination. Fifth, throughout the relevant period, as was explained to all personnel involved in the selection process, the independent Commissioner had an unrestricted right to review the operation of the selection process and to examine material obtained pursuant to it. From the relevant records, it was possible to check on the interception initiated by officials and, if necessary, to call for an explanation. Each of the Commissioners during the relevant period (Lords Lloyd, Bingham and Nolan) exercised his right to review the operation of the selection processes, and each Commissioner declared himself satisfied that the selection processes were being conducted in a manner that was fully consistent with the provisions of the 1985 Act. By this combination of measures there were effective safeguards in place against any risk of individual, combined or institutional misbehaviour or action contrary to the terms of the legislation or warrant. Finally, once the Intelligence Services Act 1994 had come into force on 15 December 1994, it was possible for an aggrieved individual to complain to the Tribunal.

51. As regards the processes described by the applicants as "minimisation" and "dissemination", safeguards in place during the relevant period ensured that access to and retention of the raw intercept material and any intelligence reports

based on such material were kept to the absolute minimum practicable, having regard to the public interest served by the interception system. Relevant information in the material selected and examined was disseminated in the form of intelligence reports, usually compiled by the requesting officials. As part of the safeguards under section 6 of the 1985 Act, there were throughout the relevant period internal regulations governing the manner in which intelligence reports were produced, directed at all individuals engaged in producing intelligence reports based on material selected from communications intercepted under the section 3(2) warrant regime. The regulations stipulated, among other things, that no information should be reported unless it clearly contributed to a stated intelligence requirement conforming to one of the purposes set out in section 2(2) of the 1985 Act. The regulations also dealt specifically with the circumstances in which it was appropriate to name specific individuals or organisations in the intelligence reports. During the relevant period there was in place a comprehensive security regime for handling all types of classified material. Dissemination was restricted to those with a genuine "need to know", and was further limited to persons who had been security vetted and briefed on how to handle it, with a view to ensuring continued confidentiality.

52. The Government refuted the suggestion that, to comply with Article 8 § 2, the safeguards put in place in respect of the intercepted material had themselves to comply with the "in accordance with the law" criteria. In any event, the functions of the Commissioner and the Tribunal were embodied in statutory provisions that were sufficiently certain and accessible, and in assessing whether the "foreseeability" requirements of Article 8 § 2 had been met, it was legitimate to take into account the existence of general safeguards against abuse such as these (the Government relied on *Association for European Integration and Human Rights and Ekimzhiev v. Bulgaria*, no. 62540/00 62540/00, § § 77-94, 28 June 2007 and *Christie v. the United Kingdom*, no. 21482/93, Commission decision of 27 June 1994). Moreover, the 1985 Act provided that interception was criminal except where the Secretary of State had issued a warrant and sections 2 and 3(2) set out in very clear terms that, during the relevant period, any person in the United Kingdom who sent or received any form of telecommunication outside Britain could in principle have

had it intercepted pursuant to such a warrant. The provisions of primary legislation were, therefore, sufficient to provide reasonable notice to individuals to the degree required in this particular context, and provided adequate protection against arbitrary interference. Article 8 § 2 did not require that the nature of the "arrangements" made by the Secretary of State under section 6 of the 1985 Act be set out in legislation (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, § 68), and for security reasons it had not been possible to reveal such information to the public, but the arrangements had been subject to review by the Commissioners, each of whom had found them to be satisfactory (see paragraph 33 above).

53. The Government submitted that the section 3(2) warrant regime was proportionate and "necessary in a democratic society". Democratic States faced a growing threat from terrorism, and as communications networks became more wide-ranging and sophisticated, terrorist organisations had acquired ever greater scope to operate and co-operate on a trans-national level. It would be a gross dereliction of the Government's duty to safeguard national security and the lives and well-being of its population if it failed to take steps to gather intelligence that might allow preventative action to be taken or if it compromised the operational effectiveness of the surveillance methods available to it. Within the United Kingdom the Government had extensive powers and resources to investigate individuals and organisations that might threaten the interests of national security or perpetrate serious crimes, and it was therefore feasible for the domestic interception regime to require individual addresses to be identified before interception could take place. Outside the jurisdiction, however, the ability of the Government to discover the identity and location of individuals and organisations which might represent a threat to national security was drastically reduced and a broader approach was needed. Maintaining operational effectiveness required not simply that the fact of interception be kept as secret as appropriate; it was also necessary to maintain a degree of secrecy as regards the methods by which such interception might be effected, to prevent the loss of important sources of information.
54. The United Kingdom was not the only signatory to the Convention to make use of a surveillance regime involving the interception of volumes of communications data and the

subsequent operation of a process of selection to obtain material for further consideration by government agencies. It was difficult to compare the law and practice of other democratic States (such as the German system of strategic monitoring examined by the Court in the *Weber and Saravia* case cited above), since each country had in place a different set of safeguards. For example, the United Kingdom did not permit intercepted material to be used in court proceedings, whereas many other States did allow this, and there were few, if any, direct equivalents to the independent Commissioner system created by the 1985 Act. Moreover, it was possible that the operational reach of the United Kingdom's system had had to be more extensive, given the high level of terrorist threat directed at the United Kingdom during the period in question.

B. Admissibility

55. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. *Whether there was an interference*

56. Telephone, facsimile and e-mail communications are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (see *Weber and Saravia v. Germany* (dec.), no. 54934/00 54934/00, § 77, 29 June 2006, and the cases cited therein). The Court recalls its findings in previous cases to the effect that the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat necessarily strikes at freedom of communication between users of the telecommunications services and thereby amounts in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them (see *Weber and Saravia*, cited above, § 78).
57. The Court notes that the Government are prepared to proceed, for the purposes of the present application, on the basis that the applicants can claim to be victims of an interference with their communications sent to or from their offices in the United Kingdom and Ireland. In any event, under section 3(2) the 1985

Act, the authorities were authorised to capture communications contained within the scope of a warrant issued by the Secretary of State and to listen to and examine communications falling within the terms of a certificate, also issued by the Secretary of State (see paragraphs 23-24 above). Under section 6 of the 1985 Act arrangements had to be made regulating the disclosure, copying and storage of intercepted material (see paragraph 27 above). The Court considers that the existence of these powers, particularly those permitting the examination, use and storage of intercepted communications constituted an interference with the Article 8 rights of the applicants, since they were persons to whom these powers might have been applied (see *Weber and Saravia*, cited above, § 78-79).

2. *Whether the interference was justified*

58. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see *Weber and Saravia*, cited above, § 80).

3. *Whether the interference was "in accordance with the law"*

(a) General principles

59. The expression "in accordance with the law" under Article 8 § 2 requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him (see, among other authorities, *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A, § 27; *Huvig v. France*, judgment of 24 April 1990, Series A no. 176-B, § 26; *Lambert v. France*, judgment of 24 August 1998, *Reports of Judgments and Decisions* 1998-V, § 23; *Perry v. the United Kingdom*, no. 63737/00 63737/00, § 45, ECHR 2003-IX; *Dumitru Popescu v. Romania* (No. 2), no. 71525/01 71525/01, § 61, 26 April 2007).
60. It is not in dispute that the interference in question had a legal basis in sections 1-10 of the 1985 Act (see paragraphs 16-27 above). The applicants, however, contended that this law was not sufficiently detailed and precise to meet the "foreseeability" requirement of

Article 8(2), given in particular that the nature of the “arrangements” made under section 6(1)(b) was not accessible to the public. The Government responded, relying on paragraph 68 of *Malone* (cited above), that although the scope of the executive’s discretion to carry out surveillance had to be indicated in legislation, “the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law”.

61. The Court observes, first, that the above passage from *Malone* was itself a reference to *Silver and Others*, also cited above, § 88-89. There the Court accepted that administrative Orders and Instructions, which set out the detail of the scheme for screening prisoners’ letters but did not have the force of law, could be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the relevant primary and secondary legislation, but only to “the admittedly limited extent to which those concerned were made sufficiently aware of their contents”. It was only on this basis – that the content of the Orders and Instructions were made known to the prisoners – that the Court was able to reject the applicants’ contention that the conditions and procedures governing interferences with correspondence, and in particular the directives set out in the Orders and Instructions, should be contained in the substantive law itself.
62. More recently, in its admissibility decision in *Weber and Saravia*, cited above, § 93-95, the Court summarised its case-law on the requirement of legal “foreseeability” in this field as follows (and see also *Association for European Integration and Human Rights and Ekimzhiev*, cited above, § 75-77):

“93. foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see, *inter alia*, *Leander v. Sweden*, judgment of 26 August 1987, Series A no. 116], p. 23, § 51). However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident (see, *inter alia*, *Malone*, cited above, p. 32, § 67; *Huvig*, cited above, pp. 54-55, § 29; and *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V). It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually be-

coming more sophisticated (see *Kopp v. Switzerland*, judgment of 25 March 1998, Reports 1998-II, pp. 542-43, § 72, and *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, Reports 1998-V, pp. 1924-25, § 46). The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Malone*, *ibid.*; *Kopp*, cited above, p. 541, § 64; *Huvig*, cited above, pp. 54-55, § 29; and *Valenzuela Contreras*, *ibid.*).

Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Malone*, cited above, pp. 32-33, § 68; *Leander*, cited above, p. 23, § 51; and *Huvig*, cited above, pp. 54-55, § 29).

In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (see, *inter alia*, *Huvig*, cited above, p. 56, § 34; *Amann*, cited above, § 76; *Valenzuela Contreras*, cited above, pp. 1924-25, § 46; and *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003).”

63. It is true that the above requirements were first developed by the Court in connection with measures of surveillance targeted at specific individuals or addresses (the equivalent, within the United Kingdom, of the section 3(1) regime). However, the *Weber and Saravia* case was itself concerned with generalised “strategic monitoring”, rather than the monitoring of individuals (cited above, § 18). The Court does not consider that there is any ground to apply

different principles concerning the accessibility and clarity of the rules governing the interception of individual communications, on the one hand, and more general programmes of surveillance, on the other. The Court's approach to the foreseeability requirement in this field has, therefore, evolved since the Commission considered the United Kingdom's surveillance scheme in its above-cited decision in *Christie v. the United Kingdom*.

(b) Application of the general principles to the present case

64. The Court recalls that section 3(2) of the 1985 Act allowed the executive an extremely broad discretion in respect of the interception of communications passing between the United Kingdom and an external receiver, namely to intercept "such external communications as are described in the warrant". There was no limit to the type of external communications which could be included in a section 3(2) warrant. According to the applicants, warrants covered very broad classes of communications, for example, "all commercial submarine cables having one terminal in the UK and carrying external commercial communications to Europe", and all communications falling within the specified category would be physically intercepted (see paragraph 43 above). In their observations to the Court, the Government accepted that, in principle, any person who sent or received any form of telecommunication outside the British Islands during the period in question could have had such a communication intercepted under a section 3(2) warrant (see paragraph 47 above). The legal discretion granted to the executive for the physical capture of external communications was, therefore, virtually unfettered.
65. Moreover, the 1985 Act also conferred a wide discretion on the State authorities as regards which communications, out of the total volume of those physically captured, were listened to or read. At the time of issuing a section 3(2) interception warrant, the Secretary of State was required to issue a certificate containing a description of the intercepted material which he considered should be examined. Again, according to the applicants, certificates were formulated in general terms and related only to intelligence tasks and priorities, such as, for example, "national security", "preventing or detecting serious crime" or "safeguarding the economic well-being of the United Kingdom" (see paragraph 43 above). On the face of the 1985 Act, only external communications emanating from a particular address in the United Kingdom could not be included in a certificate for examination unless the Secretary of State considered it necessary for the prevention or detection of acts of terrorism (see paragraphs 23-24 above). Otherwise, the legislation provided that material could be contained in a certificate, and thus listened to or read, if the Secretary of State considered this was required in the interests of national security, the prevention of serious crime or the protection of the United Kingdom's economy.
66. Under section 6 of the 1985 Act, the Secretary of State, when issuing a warrant for the interception of external communications, was called upon to "make such arrangements as he consider[ed] necessary" to ensure that material not covered by the certificate was not examined and that material that was certified as requiring examination was disclosed and reproduced only to the extent necessary. The applicants contend that material was selected for examination by an electronic search engine, and that search terms, falling within the broad categories covered by the certificates, were selected and operated by officials (see paragraph 43 above). According to the Government (see paragraphs 48-51 above), there were at the relevant time internal regulations, manuals and instructions applying to the processes of selection for examination, dissemination and storage of intercepted material, which provided a safeguard against abuse of power. The Court observes, however, that details of these "arrangements" made under section 6 were not contained in legislation or otherwise made available to the public.
67. The fact that the Commissioner in his annual reports concluded that the Secretary of State's "arrangements" had been complied with (see paragraphs 32-33 above), while an important safeguard against abuse of power, did not contribute towards the accessibility and clarity of the scheme, since he was not able to reveal what the "arrangements" were. In this connection the Court recalls its above case-law to the effect that the procedures to be followed for examining, using and storing intercepted material, *inter alia*, should be set out in a form which is open to public scrutiny and knowledge.
68. The Court notes the Government's concern that the publication of information regarding the arrangements made by the Secretary of

State for the examination, use, storage, communication and destruction of intercepted material during the period in question might have damaged the efficacy of the intelligence-gathering system or given rise to a security risk. However, it observes that the German authorities considered it safe to include in the G10 Act, as examined in *Weber and Saravia* (cited above), express provisions about the treatment of material derived from strategic interception as applied to non-German telephone connections. In particular, the G10 Act stated that the Federal Intelligence Service was authorised to carry out monitoring of communications only with the aid of search terms which served, and were suitable for, the investigation of the dangers described in the monitoring order and which search terms had to be listed in the monitoring order (op. cit., § 32). Moreover, the rules on storing and destroying data obtained through strategic monitoring were set out in detail in section 3(6) and (7) and section 7(4) of the amended G10 Act (see *Weber and Saravia*, cited above, § 100). The authorities storing the data had to verify every six months whether those data were still necessary to achieve the purposes for which they had been obtained by or transmitted to them. If that was not the case, they had to be destroyed and deleted from the files or, at the very least, access to them had to be blocked; the destruction had to be recorded in minutes and, in the cases envisaged in section 3(6) and section 7(4), had to be supervised by a staff member qualified to hold judicial office. The G10 Act further set out detailed provisions governing the transmission, retention and use of data obtained through the interception of external communications (op. cit., §§ 33-50). In the United Kingdom, extensive extracts from the Code of Practice issued under section 71 of the 2000 Act are now in the public domain (see paragraph 40 above), which suggests that it is possible for a State to make public certain details about the operation of a scheme of external surveillance without compromising national security.

69. In conclusion, the Court does not consider that the domestic law at the relevant time indicated with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it did not, as required by the Court's case-law, set out in a form accessible to the public any indication of the procedure to be followed for

selecting for examination, sharing, storing and destroying intercepted material. The interference with the applicants' rights under Article 8 was not, therefore, "in accordance with the law".

70. It follows that there has been a violation of Article 8 in this case.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

71. The applicants also complained under Article 13, which provides:

"Everyone whose rights and freedoms as set forth in [the] 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."

They submitted that Article 13 required the provision of a domestic remedy allowing the competent national authority to deal with the substance of the Convention complaint and to grant relief. The 1985 Act, however, provided no remedy for an interference where there had been a breach of the section 6 "arrangements" in a particular case.

A. Admissibility

72. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

73. However, in the light of its above finding that the system for interception of external communications under the 1985 Act was not formulated with sufficient clarity to give the individual adequate protection against arbitrary interference, the Court does not consider that it is necessary to examine separately the complaint under Article 13.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only par-

tial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

75. The applicant submitted that the application related to allegations of unlawful interception of communications over a period of approximately seven years (1990-1997), and claimed EUR 3,000 each, making a total of EUR 9,000 in respect of non-pecuniary damage.
76. The Government referred to a number of other cases involving covert surveillance where the Court held that the finding of a violation was sufficient just satisfaction (*Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V; *Armstrong v. the United Kingdom*, no. 48521/99, 16 July 2002; *Taylor-Sabori v. the United Kingdom*, no. 47114/99, 22 October 2002; *Hewitson v. the United Kingdom*, no. 50015/99, 29 May 2003; *Chalkley v. the United Kingdom*, no. 63831/00, 12 June 2003) and submitted that no financial compensation for non-pecuniary damage would be necessary in the present case.
77. In the circumstances of this case, the Court considers that the finding of violation constitutes sufficient just satisfaction for any non-pecuniary damage caused to the applicants.

B. Costs and expenses

78. The applicant also claimed GBP 7,596, excluding value added tax (“VAT”) for the costs and expenses incurred before the Court.
79. The Government noted that counsel had acted throughout on a *pro bono* basis, and submitted that the GBP 180 hourly rate charged by Liberty was excessive. They proposed that GBP 120 per hour would be more reasonable, giving a total of GBP 5,064.
80. The Court awards EUR 7,500 plus any VAT that may be chargeable.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the application admissible;
2. Holds that there has been a violation of Article 8 of the Convention;
3. Holds that there is no need to examine the complaint under Article 13 of the Convention;
4. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. Dismisses the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 1 July 2008, pursuant to Rule 77 § § 2 and 3 of the Rules of Court.

Lawrence Early, *Registrar*
Lech Garlicki, *President*

ECHR

ECJ

GRAND CHAMBER

CASE OF S. AND MARPER v THE UNITED KINGDOM

(Applications nos. 30562/04 and 30566/04)

JUDGMENT

STRASBOURG

4 December 2008

PRIVATE LIFE, FINGERPRINTS, COMPUTER, DNA, INVESTIGATION, PROFILING, FAMILY, SENSITIVE DATA

IN THE CASE OF S. AND MARPER V. THE UNITED KINGDOM,

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

Jean-Paul Costa, *President*,

Christos Rozakis,

Nicolas Bratza,

Peer Lorenzen,

Françoise Tulkens,

Josep Casadevall,

Giovanni Bonello,

Corneliu Bîrsan,

Nina Vajić,

Anatoly Kovler,

Stanislav Pavlovski,

Egbert Myjer,

Danutė Jočienė,

Ján Šikuta,

Mark Villiger,

Päivi Hirvelä,

Ledi Bianku, *judges*,

and **Michael O'Boyle**, *Deputy Registrar*,

Having deliberated in private on 27 February 2008 and on 12 November 2008,

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

PROCEDURE

1. The case originated in two applications (nos. 30562/04 and 30566/04) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr S. ("the first applicant") and Mr Michael Marper ("the second applicant"), on 16 August 2004. The President of the Grand Chamber acceded to the first applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants, who were granted legal aid, were represented by Mr P. Mahy of Messrs Howells, a solicitor practicing in Sheffield. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office.
3. The applicants complained under Articles 8 and 14 that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued.
4. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 January 2007 they were declared admissible by a Chamber of that Section composed of the following judges: Josep Casadevall, President, Nicolas Bratza, Giovanni Bonello, Kristaq Traja, Stanislav Pavlovski, Ján Šikuta, Päivi Hirvelä, and also of Lawrence Early, Section Registrar.
5. On 10 July 2007 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither party having objected to relinquishment (Article 30 of the Convention and Rule 72).
6. The composition of the Grand Chamber was determined according to the provisions of Article 27 § § 2 and 3 of the Convention and Rule 24 of the Rules of Court.
7. The applicants and the Government each filed written memorials on the merits. In addition, third-party submissions were received from Ms Anna Fairclough on behalf of Liberty (the National Council for Civil Liberties) and from Covington and Burling LLP on behalf of Privacy International, who had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). Both parties replied to Liberty's submissions and the Government also replied to the comments by Privacy International (Rule 44 § 5).
8. A hearing took place in public in the Human Rights Building, Strasbourg, on 27 February 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs **E. Willmott**, *Agent*,
Mr **Rabinder Singh QC**,
Mr **J. Strachan**, *Counsel*,
Mr **N. Fussell**,

Ms P. McFarlane,
Mr M. Prior,
Mr S. Bramble,
Ms E. Rees,
Mr S. Sen, *Advisers*,
Mr D. Gourley,
Mr D. Loveday, *Observers*;

(b) for the applicants

Mr S. Cragg,
Mr A. Suterwalla, *Counsel*,
Mr P. Mahy, *Solicitor*.

The Court heard addresses by Mr S. Cragg and Mr Rabinder Singh QC as well as their answers to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1989 and 1963 respectively and live in Sheffield.
10. The first applicant, Mr S., was arrested on 19 January 2001 at the age of eleven and charged with attempted robbery. His fingerprints and DNA samples¹ were taken. He was acquitted on 14 June 2001.
11. The second applicant, Mr Michael Marper, was arrested on 13 March 2001 and charged with harassment of his partner. His fingerprints and DNA samples were taken. Before a pre-trial review took place, he and his partner had become reconciled, and the charge was not pressed. On 11 June 2001, the Crown Prosecution Service served a notice of discontinuance on the applicant's solicitors, and on 14 June the case was formally discontinued.
12. Both applicants asked for their fingerprints and DNA samples to be destroyed, but in both cases the police refused. The applicants applied for judicial review of the police decisions not to destroy the fingerprints and samples. On 22 March 2002 the Administrative Court (Rose LJ and Leveson J) rejected the application [[2002] EWHC 478 (Admin)].
13. On 12 September 2002 the Court of Appeal upheld the decision of the Administrative Court by a majority of two (Lord Woolf CJ and Waller LJ) to one (Sedley LJ) [[2003] EWCA Civ 1275]. As regards the necessity of retaining DNA samples, Lord Justice Waller stated:

"... [F]ingerprints and DNA *profiles* reveal only limited personal information. The physical samples potentially contain very much greater and more personal and detailed information. The anxiety is that science may one day enable analysis of samples to go so far as to obtain information in relation to an individual's propensity to commit certain crime and be used for that purpose within the language of the present section [Section 82 of the Criminal Justice and Police Act 2001]. It might also be said that the law might be changed in order to allow the samples to be used for purposes other than those identified by the section. It might also be said that while samples are retained there is even now a risk that they will be used in a way that the law does not allow. So, it is said, the aims could be achieved in a less restrictive manner... Why cannot the aim be achieved by retention of the profiles without retention of the samples?"

The answer to [these] points is as I see it as follows. First the retention of samples permits (a) the checking of the integrity and future utility of the DNA database system; (b) a reanalysis for the upgrading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) reanalysis and thus an ability to extract other DNA markers and thus offer benefits in terms of speed, sensitivity and cost of searches of the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors. It is these benefits which must be balanced against the risks identified by Liberty. In relation to those risks, the position in any event is first that any change in the law will have to be itself Convention compliant; second any change in practice would have to be Convention compliant; and third unlawfulness must not be assumed. In my view thus the risks identified are not great, and such as they are they are outweighed by the benefits in achieving the aim of prosecuting and preventing crime."

14. Lord Justice Sedley considered that the power of a Chief Constable to destroy data which he would ordinarily retain had to be exercised in every case, however rare such cases might be, where he or she was satisfied on conscientious consideration that the individual was free of any taint of suspicion. He also noted that the difference between the retention of samples and DNA profiles was that the retention of samples would enable more information to be derived than had previously been possible.
15. On 22 July 2004 the House of Lords dismissed

an appeal by the applicants. Lord Steyn, giving the lead judgment, noted the legislative history of section 64 (1A) of the Police and Criminal Evidence Act 1984 ("the PACE"), in particular the way in which it had been introduced by Parliament following public disquiet about the previous law, which had provided that where a person was not prosecuted or was acquitted of offences, the sample had to be destroyed and the information could not be used. In two cases, compelling DNA evidence linking one suspect to a rape and another to a murder had not been able to be used, as at the time the matches were made both defendants had either been acquitted or a decision made not to proceed for the offences for which the profiles had been obtained: as a result it had not been possible to convict either suspect.

16. Lord Steyn noted that the value of retained fingerprints and samples taken from suspects was considerable. He gave the example of a case in 1999, in which DNA information from the perpetrator of a crime was matched with that of "I" in a search of the national database. The sample from "I" should have been destroyed, but had not been. "I" had pleaded guilty to rape and was sentenced. If the sample had not been wrongly detained, the offender might have escaped detection.
17. Lord Steyn also referred to statistical evidence from which it appeared that almost 6,000 DNA profiles had been linked with crime-scene stain profiles which would have been destroyed under the former provisions. The offences involved included 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries and 56 cases involving the supply of controlled drugs. On the basis of the existing records, the Home Office statistics estimated that there was a 40% chance that a crime-scene sample would be matched immediately with an individual's profile on the database. This showed that the fingerprints and samples which could now be retained had in the previous three years played a major role in the detection and prosecution of serious crime.
18. Lord Steyn also noted that the PACE dealt separately with the taking of fingerprints and samples, their retention and their use.
19. As to the Convention analysis, Lord Steyn inclined to the view that the mere retention of fingerprints and DNA samples did not constitute an interference with the right to respect for private life but stated that, if he were wrong

in that view, he regarded any interference as very modest indeed. Questions of whether in the future retained samples could be misused were not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime. If future scientific developments required it, judicial decisions could be made, when the need occurred, to ensure compatibility with the Convention. The provision limiting the permissible use of retained material to "*purposes related to the prevention or detection of crime ...*" did not broaden the permitted use unduly, because it was limited by its context.

20. If the need to justify the modest interference with private life arose, Lord Steyn agreed with Lord Justice Sedley in the Court of Appeal that the purposes of retention – the prevention of crime and the protection of the right of others to be free from crime – were "provided for by law", as required by Article 8.
21. As to the justification for any interference, the applicants had argued that the retention of fingerprints and DNA samples created suspicion in respect of persons who had been acquitted. Counsel for the Home Secretary had contended that the aim of the retention had nothing to do with the past, that is, with the offence of which a person was acquitted, but that it was to assist in the investigation of offences in the future. The applicants would only be affected by the retention of the DNA samples if their profiles matched those found at the scene of a future crime. Lord Steyn saw five factors which led to the conclusion that the interference was proportionate to the aim: (i) the fingerprints and samples were kept only for the limited purpose of the detection, investigation and prosecution of crime; (ii) the fingerprints and samples were not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints would not be made public; (iv) a person was not identifiable from the retained material to the untutored eye, and (v) the resultant expansion of the database by the retention conferred enormous advantages in the fight against serious crime.
22. In reply to the contention that the same legislative aim could be obtained by less intrusive means, namely by a case-by-case consideration of whether or not to retain fingerprints and samples, Lord Steyn referred to Lord Justice Waller's comments in the Court of Appeal that "[i]f justification for retention is in any degree to be by reference to the view of the

police on the degree of innocence, then persons who have been acquitted and have their samples retained can justifiably say this stigmatises or discriminates against me – I am part of a pool of acquitted persons presumed to be innocent, but I am treated as though I was not. It is not in fact in any way stigmatising someone who has been acquitted to say simply that samples lawfully obtained are retained as the norm, and it is in the public interest in its fight against crime for the police to have as large a database as possible”.

23. Lord Steyn did not accept that the difference between samples and DNA profiles affected the position.
24. The House of Lords further rejected the applicants' complaint that the retention of their fingerprints and samples subjected them to discriminatory treatment in breach of Article 14 of the Convention when compared to the general body of persons who had not had their fingerprints and samples taken by the police in the course of a criminal investigation. Lord Steyn held that, even assuming that the retention of fingerprints and samples fell within the ambit of Article 8 so as to trigger the application of Article 14, the difference of treatment relied on by the applicants was not one based on “status” for the purposes of Article 14: the difference simply reflected the historical fact, unrelated to any personal characteristic, that the authorities already held the fingerprints and samples of the individuals concerned which had been lawfully taken. The applicants and their suggested comparators could not in any event be said to be in an analogous situation. Even if, contrary to his view, it was necessary to consider the justification for any difference in treatment, Lord Steyn held that such objective justification had been established: first, the element of legitimate aim was plainly present, as the increase in the database of fingerprints and samples promoted the public interest by the detection and prosecution of serious crime and by exculpating the innocent; secondly, the requirement of proportionality was satisfied, section 64 (1A) of the PACE objectively representing a measured and proportionate response to the legislative aim of dealing with serious crime.
25. Baroness Hale of Richmond disagreed with the majority considering that the retention of both fingerprint and DNA data constituted an interference by the State in a person's right to respect for his private life and thus required

justification under the Convention. In her opinion, this was an aspect of what had been called informational privacy and there could be little, if anything, more private to the individual than the knowledge of his genetic make-up. She further considered that the difference between fingerprint and DNA data became more important when it came to justify their retention as the justifications for each of these might be very different. She agreed with the majority that such justifications had been readily established in the applicants' cases.

II. RELEVANT DOMESTIC LAW AND MATERIALS

A. England and Wales

1. *Police and Criminal Evidence Act 1984*

26. The Police and Criminal Evidence Act 1984 (the PACE) contains powers for the taking of fingerprints (principally section 61) and samples (principally section 63). By section 61, fingerprints may only be taken without consent if an officer of at least the rank of superintendent authorises the taking, or if the person has been charged with a recordable offence or has been informed that he will be reported for such an offence. Before fingerprints are taken, the person must be informed that the prints may be the subject of a speculative search, and the fact of the informing must be recorded as soon as possible. The reason for the taking of the fingerprints is recorded in the custody record. Parallel provisions relate to the taking of samples (section 63).
27. As to the retention of such fingerprints and samples (and the records thereof), section 64 (1A) of the PACE was substituted by Section 82 of the Criminal Justice and Police Act 2001. It provides as follows:

“Where - (a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution. ...

(3) If - (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not

suspected of having committed the offence, they must except as provided in the following provisions of this Section be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3AA) Samples and fingerprints are not required to be destroyed under subsection (3) above if (a) they were taken for the purposes of the investigation of an offence of which a person has been convicted; and (b) a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation."

28. Section 64 in its earlier form had included a requirement that if the person from whom the fingerprints or samples were taken in connection with the investigation was acquitted of that offence, the fingerprints and samples, subject to certain exceptions, were to be destroyed "as soon as practicable after the conclusion of the proceedings".
29. The subsequent use of materials retained under section 64 (1A) is not regulated by statute, other than the limitation on use contained in that provision. In *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, the House of Lords had to consider whether it was permissible to use in evidence a sample which should have been destroyed under the then text of section 64 the PACE. The House considered that the prohibition on the use of an unlawfully retained sample "for the purposes of any investigation" did not amount to a mandatory exclusion of evidence obtained as a result of a failure to comply with the prohibition, but left the question of admissibility to the discretion of the trial judge.

2. Data Protection Act 1998

30. The Data Protection Act was adopted on 16 July 1998 to give effect to the Directive 95/46/EC of the European Parliament and of the Council dated 24 October 1995 (see paragraph 50 below). Under the Data Protection Act "personal data" means data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual (section 1). "Sensitive personal data" means personal data consisting, *inter alia*, of information as to the racial or ethnic origin of the data

subject, the commission or alleged commission by him of any offence, or any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings (section 2).

31. The Act stipulates that the processing of personal data is subject to eight data protection principles listed in Schedule 1. Under the first principle personal data shall be processed fairly and lawfully and, in particular shall not be processed unless – (a) at least one of the conditions in Schedule 2 is met, and (b) in case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. Schedule 2 contains a detailed list of conditions, and provides *inter alia* that the processing of any personal data is necessary for the administration of justice or for the exercise of any other functions of a public nature exercised in the public interest by any person (§ 5(a) and (d)). Schedule 3 contains a more detailed list of conditions, including that the processing of sensitive personal data is necessary for the purpose of, or in connection with, any legal proceedings (§ 6(a)), or for the administration of justice (§ 7(a)), and is carried out with appropriate safeguards for the rights and freedoms of data subjects (§ 4(b)). Section 29 notably provides that personal data processed for the prevention or detection of crime are exempt from the first principle except to the extent to which it requires compliance with the conditions in Schedules 2 and 3. The fifth principle stipulates that personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
32. The Information Commissioner created pursuant to the Act (as amended) has an independent duty to promote the following of good practice by data controllers and has power to make orders ("enforcement notices") in this respect (section 40). The Act makes it a criminal offence not to comply with an enforcement notice (section 47) or to obtain or disclose personal data or information contained therein without the consent of the data controller (section 55). Section 13 affords a right to claim damages in the domestic courts in respect of contraventions of the Act.
3. *Retention Guidelines for Nominal Records on the Police National Computer 2006*
33. A set of guidelines for the retention of fingerprint and DNA information is contained in the

Retention Guidelines for Nominal Records on the Police National Computer 2006 drawn up by the Association of Chief Police Officers in England and Wales. The Guidelines are based on a format of restricting access to the Police National Computer (PNC) data, rather than the deletion of that data. They recognise that their introduction may thus have implications for the business of the non-police agencies with which the police currently share PNC data.

34. The Guidelines set various degrees of access to the information contained on the PNC through a process of “stepping down” access. Access to information concerning persons who have not been convicted of an offence is automatically “stepped down” so that this information is only open to inspection by the police. Access to information about convicted persons is likewise “stepped down” after the expiry of certain periods of time ranging from 5 to 35 years, depending on the gravity of the offence, the age of the suspect and the sentence imposed. For certain convictions the access will never be “stepped down”.
35. Chief Police Officers are the Data Controllers of all PNC records created by their force. They have the discretion in exceptional circumstances to authorise the deletion of any conviction, penalty notice for disorder, acquittal or arrest histories “owned” by them. An “exceptional case procedure” to assist Chief Officers in relation to the exercise of this discretion is set out in Appendix 2. It is suggested that exceptional cases are rare by definition and include those where the original arrest or sampling was unlawful or where it is established beyond doubt that no offence existed. Before deciding whether a case is exceptional, the Chief Officer is instructed to seek advice from the DNA and Fingerprint Retention Project.

B. Scotland

36. Under the 1995 Criminal Procedure Act of Scotland, as subsequently amended, the DNA samples and resulting profiles must be destroyed if the individual is not convicted or is granted an absolute discharge. A recent qualification provides that biological samples and profiles may be retained for three years, if the arrestee is suspected of certain sexual or violent offences even if a person is not convicted (section 83 of the 2006 Act, adding section 18A to the 1995 Act). Thereafter, samples and information are required to be destroyed unless a Chief Consta-

ble applies to a Sheriff for a two-year extension.

C. Northern Ireland

37. The Police and Criminal Evidence Order of Northern Ireland 1989 was amended in 2001 in the same way as the PACE applicable in England and Wales. The relevant provisions currently governing the retention of fingerprint and DNA data in Northern Ireland are identical to those in force in England and Wales (see paragraph 27 above).

D. Nuffield Council on Bioethics' report2

38. According to a recent report by the Nuffield Council on Bioethics, the retention of fingerprints, DNA profiles and biological samples is generally more controversial than the taking of such bioinformation, and the retention of biological samples raises greater ethical concerns than digitised DNA profiles and fingerprints, given the differences in the level of information that could be revealed. The report referred in particular to the lack of satisfactory empirical evidence to justify the present practice of retaining indefinitely fingerprints, samples and DNA profiles from all those arrested for a recordable offence, irrespective of whether they were subsequently charged or convicted. The report voiced particular concerns at the policy of permanently retaining the bioinformation of minors, having regard to the requirements of the 1989 UN Convention on the Rights of the Child.
39. The report also expressed concerns at the increasing use of the DNA data for familial searching, inferring ethnicity and non-operational research. Familial searching is the process of comparing a DNA profile from a crime scene with profiles stored on the national database, and prioritising them in terms of 'closeness' to a match. This allowed identifying possible genetic relatives of an offender. Familial searching might thus lead to revealing previously unknown or concealed genetic relationships. The report considered the use of the DNA data base in searching for relatives as particularly sensitive.
40. The particular combination of alleles3 in a DNA profile can furthermore be used to assess the most likely ethnic origin of the donor. Ethnic inferring through DNA profiles was possible as the individual “ethnic appearance” was systematically recorded on the data base: when taking biological samples, police officers routinely classified suspects into one of seven “ethnic

appearance” categories. Ethnicity tests on the data base might thus provide inferences for use during a police investigation in order for example to help reduce a ‘suspect pool’ and to inform police priorities. The report noted that social factors and policing practices lead to a disproportionate number of people from black and ethnic minority groups being stopped, searched and arrested by the police, and hence having their DNA profiles recorded; it therefore voiced concerns that inferring ethnic identity from biological samples might reinforce racist views of propensity to criminality.

III. RELEVANT NATIONAL AND INTERNATIONAL MATERIAL

A. Council of Europe texts

41. The Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data (“the Data Protection Convention”), which entered into force for the United Kingdom on 1 December 1987, defines “personal data” as any information relating to an identified or identifiable individual (“data subject”). The Convention provides *inter alia*:

“Article 5 – Quality of data

Personal data undergoing automatic processing shall be: ...

b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c. adequate, relevant and not excessive in relation to the purposes for which they are stored;

...

e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

Article 6 – Special categories of data

Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. (...)

Article 7 – Data security

Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or

unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.”

42. Recommendation No. R(87)15 regulating the use of personal data in the police sector (adopted on 17 September 1987) states, *inter alia*:

“Principle 2 – Collection of data

2.1 The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation. ...

Principle 3 – Storage of data

3.1. As far as possible, the storage of personal data for police purposes should be limited to accurate data and to such data as are necessary to allow police bodies to perform their lawful tasks within the framework of national law and their obligations arising from international law...

Principle 7 – Length of storage and updating of data

7.1. Measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored.

For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data.”

43. Recommendation No. R(92)1 on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (adopted on 10 February 1992) states, *inter alia*:

“3. Use of samples and information derived therefrom

Samples collected for DNA analysis and the information derived from such analysis for the purpose of the investigation and prosecution of criminal offences must not be used for other purposes. ...

Samples taken for DNA analysis and the information so derived may be needed for research and statistical purposes. Such uses are acceptable provided the identity of the individual cannot be ascertained. Names or other iden-

tifying references must therefore be removed prior to their use for these purposes.

4. Taking of samples for DNA analysis

The taking of samples for DNA analysis should only be carried out in circumstances determined by the domestic law; it being understood that in some states this may necessitate specific authorisation from a judicial authority...

8. Storage of samples and data

Samples or other body tissue taken from individuals for DNA analysis should not be kept after the rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected.

Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for the purposes for which it was used. The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law.

Samples and other body tissues, or the information derived from them, may be stored for longer periods:

- when the person so requests; or
- when the sample cannot be attributed to an individual, for example when it is found at the scene of a crime;

Where the security of the state is involved, the domestic law of the member state may permit retention of the samples, the results of DNA analysis and the information so derived even though the individual concerned has not been charged or convicted of an offence. In such cases strict storage periods should be defined by domestic law. ..."

44. The Explanatory Memorandum to the Recommendation stated, as regards item 8:

"47. The working party was well aware that the drafting of Recommendation 8 was a delicate matter, involving different protected interests of a very difficult nature. It was necessary to strike the right balance between these interests. Both the European Convention on Human Rights and the Data Protection Convention provide exceptions for the interests of the suppression of criminal offences and the protection of the rights and freedoms of third par-

ties. However, the exceptions are only allowed to the extent that they are compatible with what is necessary in a democratic society. ...

49. Since the primary aim of the collection of samples and the carrying out of DNA analysis on such samples is the identification of offenders and the exoneration of suspected offenders, the data should be deleted once persons have been cleared of suspicion. The issue then arises as to how long the DNA findings and the samples on which they were based can be stored in the case of a finding of guilt.

50. The general rule should be that the data are deleted when they are no longer necessary for the purposes for which they were collected and used. This would in general be the case when a final decision has been rendered as to the culpability of the offender. By 'final decision' the CAHBI thought that this would normally, under domestic law, refer to a judicial decision. However, the working party recognised that there was a need to set up data bases in certain cases and for specific categories of offences which could be considered to constitute circumstances warranting another solution, because of the seriousness of the offences. The working party came to this conclusion after a thorough analysis of the relevant provisions in the European Convention on Human Rights, the Data Protection Convention and other legal instruments drafted within the framework of the Council of Europe. In addition, the working party took into consideration that all member states keep a criminal record and that such record may be used for the purposes of the criminal justice system... It took into account that such an exception would be permissible under certain strict conditions:

- when there has been a conviction;
- when the conviction concerns a serious criminal offence against the life, integrity and security of a person;
- the storage period is limited strictly;
- the storage is defined and regulated by law;
- the storage is subject to control by Parliament or an independent supervisory body..."

B. Law and practice in the Council of Europe member States

45. According to the information provided by the parties or otherwise available to the Court, a majority of the Council of Europe member States allow the compulsory taking of fingerprints and cellular samples in the context of

criminal proceedings. At least 20 member States make provision for the taking of DNA information and storing it on national data bases or in other forms (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland⁴, Italy⁵, Latvia, Luxembourg, the Netherlands, Norway, Poland, Spain, Sweden and Switzerland). This number is steadily increasing.

46. In most of these countries (including Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden), the taking of DNA information in the context of criminal proceedings is not systematic but limited to some specific circumstances and/or to more serious crimes, notably those punishable by certain terms of imprisonment.
47. The United Kingdom is the only member State expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued. Five States (Belgium, Hungary, Ireland, Italy and Sweden) require such information to be destroyed *ex officio* upon acquittal or the discontinuance of the criminal proceedings. Ten other States apply the same general rule with certain very limited exceptions: Germany, Luxembourg and the Netherlands allow such information to be retained where suspicions remain about the person or if further investigations are needed in a separate case; Austria permits its retention where there is a risk that the suspect will commit a dangerous offence and Poland does likewise in relation to certain serious crimes; Norway and Spain allow the retention of profiles if the defendant is acquitted for lack of criminal accountability; Finland and Denmark allow retention for 1 and 10 years respectively in the event of an acquittal and Switzerland for 1 year when proceedings have been discontinued. In France DNA profiles can be retained for 25 years after an acquittal or discharge; during this period the public prosecutor may order their earlier deletion, either on his or her own motion or upon request, if their retention has ceased to be required for the purposes of identification in connection with a criminal investigation. Estonia and Latvia also appear to allow the retention of DNA profiles of suspects for certain periods after acquittal.
48. The retention of DNA profiles of convicted persons is allowed, as a general rule, for limited

periods of time after the conviction or after the convicted person's death. The United Kingdom thus also appears to be the only member State expressly to allow the systematic and indefinite retention of both profiles and samples of convicted persons.

49. Complaint mechanisms before data-protection monitoring bodies and/or before courts are available in most of the member States with regard to decisions to take cellular samples or retain samples or DNA profiles.

C. European Union

50. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides that the object of national laws on the processing of personal data is notably to protect the right to privacy as recognised both in Article 8 of the European Convention on Human Rights and in the general principles of Community law. The Directive sets out a number of principles in order to give substance to and amplify those contained in the Data Protection Convention of the Council of Europe. It allows Member States to adopt legislative measures to restrict the scope of certain obligations and rights provided for in the Directive when such a restriction constitutes notably a necessary measure for the prevention, investigation, detection and prosecution of criminal offences (Article 13).
51. The Prüm Convention on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, which was signed by several members of the European Union on 27 May 2005, sets out rules for the supply of fingerprinting and DNA data to other Contracting Parties and their automated checking against their relevant data bases. The Convention provides *inter alia*:

"Article 35 – Purpose

2. ... The Contracting Party administering the file may process the data supplied (...) solely where this is necessary for the purposes of comparison, providing automated replies to searches or recording... The supplied data shall be deleted immediately following data comparison or automated replies to searches unless further processing is necessary for the purposes mentioned [above]."

52. Article 34 guarantees a level of protection of personal data at least equal to that resulting

from the Data Protection Convention and requires the Contracting Parties to take into account Recommendation R (87) 15 of the Committee of Ministers of the Council of Europe.

53. The Council framework decision of 24 June 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters states *inter alia*:

“Article 5

Establishment of time-limits for erasure and review

Appropriate time-limits shall be established for the erasure of personal data or for a periodic review of the need for the storage of the data. Procedural measures shall ensure that these time-limits are observed.”

D. Case-law in other jurisdictions

54. In the case of *R v. RC* [[2005] 3 S.C.R. 99, 2005 SCC 61] the Supreme Court of Canada considered the issue of retaining a juvenile first-time offender's DNA sample on the national data bank. The court upheld the decision by a trial judge who had found, in the light of the principles and objects of youth criminal justice legislation, that the impact of the DNA retention would be grossly disproportionate. In his opinion, Fish J. observed:

“Of more concern, however, is the impact of an order on an individual's informational privacy interests. In *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293, the Court found that s. 8 of the Charter protected the 'biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state'. An individual's DNA contains the 'highest level of personal and private information': *S.A.B.*, at para. 48. Unlike a fingerprint, it is capable of revealing the most intimate details of a person's biological makeup.... The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy.”

E. UN Convention on the Rights of the Child of 1989

55. Article 40 of the UN Convention on the Rights of the Child of 20 November 1989 states the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and

worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

IV. THIRD PARTIES' SUBMISSIONS

56. The National Council for Civil Liberties (“Liberty”) submitted case-law and scientific material highlighting, *inter alia*, the highly sensitive nature of cellular samples and DNA profiles and the impact on private life arising from their retention by the authorities.
57. Privacy International referred to certain core data-protection rules and principles developed by the Council of Europe and insisted on their high relevance for the interpretation of the proportionality requirement enshrined in Article 8 of the Convention. It emphasised in particular the “strict periods” recommended by Recommendation R (92) 1 for the storage of cellular samples and DNA profiles. It further pointed out a disproportionate representation on the United Kingdom national DNA data base of certain groups of population, notably youth, and the unfairness that situation might create. The use of data for familial testing and additional research purposes was also of concern. Privacy International also provided a summary of comparative data on the law and practice of different countries with regard to DNA storage and stressed the numerous restrictions and safeguards which existed in that respect.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

58. The applicants complained under Article 8 of the Convention about the retention of their fingerprints, cellular samples and DNA profiles pursuant to section 64 (1A) of the Police and Criminal Evidence Act 1984 (“the PACE”). Article 8 provides, so far as relevant, as follows:

“1. Everyone has the right to respect for his private ... life ...

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 ... for the

prevention of disorder or crime..."

A. Existence of an interference with private life

59. The Court will first consider whether the retention by the authorities of the applicants' fingerprints, DNA profiles and cellular samples constitutes an interference in their private life.

1. *The parties' submissions*

(a) **The applicants**

60. The applicants submitted that the retention of their fingerprints, cellular samples and DNA profiles interfered with their right to respect for private life as they were crucially linked to their individual identity and concerned a type of personal information that they were entitled to keep within their control. They recalled that the initial taking of such bio-information had consistently been held to engage Article 8 and submitted that their retention was more controversial given the wealth of private information that became permanently available to others and thus came out of the control of the person concerned. They stressed in particular the social stigma and psychological implications provoked by such retention in the case of children, which made the interference with the right to private life all the more pressing in respect of the first applicant.

61. They considered that the Convention organs' case-law supported this contention, as did a recent domestic decision of the Information Tribunal (*Chief Constables of West Yorkshire, South Yorkshire and North Wales Police v. the Information Commissioner*, [2005] UK IT EA 2005 0010 (12 October 2005), 173). The latter decision relied on the speech of Baroness Hale of Richmond in the House of Lords (see paragraph 25 above) and followed in substance her finding when deciding a similar question about the application of Article 8 to the retention of conviction data.

62. They further emphasised that retention of cellular samples involved an even greater degree of interference with Article 8 rights as they contained full genetic information about a person including genetic information about his or her relatives. It was of no significance whether information was actually extracted from the samples or caused a detriment in a particular case as an individual was entitled to a guarantee that such information which fundamentally belonged to him would remain private and not

be communicated or accessible without his permission.

(b) **The Government**

63. The Government accepted that fingerprints, DNA profiles and samples were "personal data" within the meaning of the Data Protection Act in the hands of those who can identify the individual. They considered, however, that the mere retention of fingerprints, DNA profiles and samples for the limited use permitted under section 64 of the PACE did not fall within the ambit of the right to respect for private life under Article 8 § 1 of the Convention. Unlike the initial taking of this data, their retention did not interfere with the physical and psychological integrity of the persons; nor did it breach their right to personal development, to establish and develop relationships with other human beings or the right to self-determination.

64. The Government submitted that the applicants' real concerns related to fears about the future uses of stored samples, to anticipated methods of analysis of DNA material and to potential intervention with the private life of individuals through active surveillance. It emphasised in this connection that the permitted extent of the use of the material was clearly and expressly limited by the legislation, the technological processes of DNA profiling and the nature of the DNA profile extracted.

65. The profile was merely a sequence of numbers which provided a means of identifying a person against bodily tissue, containing no materially intrusive information about an individual or his personality. The DNA database was a collection of such profiles which could be searched using material from a crime scene and a person would be identified only if and to the extent that a match was obtained against the sample. Familial searching through partial matches only occurred in very rare cases and was subject to very strict controls. Fingerprints, DNA profiles and samples were neither susceptible to any subjective commentary nor provided any information about a person's activities and thus presented no risk to affect the perception of an individual or affect his or her reputation. Even if such retention were capable of falling within the ambit of Article 8 § 1 the extremely limited nature of any adverse effects rendered the retention not sufficiently serious to constitute an interference.

2. The Court's assessment

(a) General principles

66. The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX). It can therefore embrace multiple aspects of the person's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I with further references, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see *mutatis mutandis Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280-B; and *Ünal Tekeli v. Turkey*, no. 29865/96, § 42, ECHR 2004-X (extracts)). Information about the person's health is an important element of private life (see *Z. v. Finland*, 25 February 1997, § 71, *Reports of Judgments and Decisions* 1997-I). The Court furthermore considers that an individual's ethnic identity must be regarded as another such element (see in particular Article 6 of the Data Protection Convention quoted in paragraph 41 above, which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). The concept of private life moreover includes elements relating to a person's right to their image (*Sciacca v. Italy*, no. 50774/99 50774/99, § 29, ECHR 2005-I).
67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, *mutatis mutandis*, *Friedl*, cited above, § § 49-51, and *Peck v. the United Kingdom*, cited above, § 59).
- ### (b) Application of the principles to the present case
68. The Court notes at the outset that all three categories of the personal information retained by the authorities in the present cases, namely fingerprints, DNA profiles and cellular samples, constitute personal data within the meaning of the Data Protection Convention as they relate to identified or identifiable individuals. The Government accepted that all three categories are "personal data" within the meaning of the Data Protection Act 1998 in the hands of those who are able to identify the individual.
69. The Convention organs have already considered in various circumstances questions relating to the retention of such personal data by the authorities in the context of criminal proceedings. As regards the nature and scope of the information contained in each of these three categories of data, the Court has distinguished in the past between the retention of fingerprints and the retention of cellular samples and DNA profiles in view of the stronger potential for future use of the personal information contained in the latter (see *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-...). The Court considers it appropriate to examine separately the question of interference with the applicants' right to respect for their private lives by the retention of their cellular samples and DNA profiles on the one hand, and of their fingerprints on the other.
- i Cellular samples and DNA profiles
70. In *Van der Velden*, the Court considered that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material was sufficiently intrusive to disclose interference with the right to respect for private life (see *Van der Velden* cited above). The Government criticised that conclusion on the ground that it speculated on the theoretical future use of

samples and that there was no such interference at present.

71. The Court maintains its view that an individual's concern about the possible future use of private information retained by the authorities is legitimate and relevant to a determination of the issue of whether there has been an interference. Indeed, bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today. Accordingly, the Court does not find any sufficient reason to depart from its finding in the *Van der Velden* case.
72. Legitimate concerns about the conceivable use of cellular material in the future are not, however, the only element to be taken into account in the determination of the present issue. In addition to the highly personal nature of cellular samples, the Court notes that they contain much sensitive information about an individual, including information about his or her health. Moreover, samples contain a unique genetic code of great relevance to both the individual and his relatives. In this respect the Court concurs with the opinion expressed by Baroness Hale in the House of Lords (see paragraph 25 above).
73. Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion (see *Amann* cited above, § 69).
74. As regards DNA profiles themselves, the Court notes that they contain a more limited amount of personal information extracted from cellular samples in a coded form. The Government submitted that a DNA profile is nothing more than a sequence of numbers or a bar-code containing information of a purely objective and irrefutable character and that the identification of a subject only occurs in case of a match with another profile in the database. They also submitted that, being in coded form, computer technology is required to render the information intelligible and that only a limited

number of persons would be able to interpret the data in question.

75. The Court observes, nonetheless, that the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification. The Court notes in this regard that the Government accepted that DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. They also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect. In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals (see paragraph 39 above) is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect (see *Amann* cited above, § 69). This conclusion is similarly not affected by the fact that, since the information is in coded form, it is intelligible only with the use of computer technology and capable of being interpreted only by a limited number of persons.
76. The Court further notes that it is not disputed by the Government that the processing of DNA profiles allows the authorities to assess the likely ethnic origin of the donor and that such techniques are in fact used in police investigations (see paragraph 40 above). The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life. This conclusion is consistent with the principle laid down in the Data Protection Convention and reflected in the Data Protection Act that both list personal data revealing ethnic origin among the special categories of sensitive data attracting a heightened level of protection (see paragraphs 30-31 and 41 above).
77. In view of the foregoing, the Court concludes that the retention of both cellular samples and DNA profiles discloses an interference with the applicants' right to respect for their private lives, within the meaning of Article 8 § 1 of the

Convention.

ii *Fingerprints*

78. It is common ground that fingerprints do not contain as much information as either cellular samples or DNA profiles. The issue of alleged interference with the right to respect for private life caused by their retention by the authorities has already been considered by the Convention organs.
79. In *McVeigh*, the Commission first examined the issue of the taking and retention of fingerprints as part of a series of investigative measures. It accepted that at least some of the measures disclosed an interference with the applicants' private life, while leaving open the question of whether the retention of fingerprints alone would amount to such interference (*McVeigh, O'Neill and Evans* (no. 8022/77, 8025/77 and 8027/77, Report of the Commission of 18 March 1981, DR 25, p.15, § 224).
80. In *Kinnunen*, the Commission considered that fingerprints and photographs retained following the applicant's arrest did not constitute an interference with his private life as they did not contain any subjective appreciations which called for refutation. The Commission noted, however, that the data at issue had been destroyed nine years later at the applicant's request (*Kinnunen v. Finland*, no. 24950/94, Commission decision of 15 May 1996).
81. Having regard to these findings and the questions raised in the present case, the Court considers it appropriate to review this issue. It notes at the outset that the applicants' fingerprint records constitute their personal data (see paragraph 68 above) which contain certain external identification features much in the same way as, for example, personal photographs or voice samples.
82. In *Friedl*, the Commission considered that the retention of anonymous photographs that have been taken at a public demonstration did not interfere with the right to respect for private life. In so deciding, it attached special weight to the fact that the photographs concerned had not been entered in a data-processing system and that the authorities had taken no steps to identify the persons photographed by means of data processing (see *Friedl* cited above, § 49-51).
83. In *P.G. and J.H.*, the Court considered that the recording of data and the systematic or permanent nature of the record could give rise to private-life considerations even though the data in question may have been available in the public domain or otherwise. The Court noted that a permanent record of a person's voice for further analysis was of direct relevance to identifying that person when considered in conjunction with other personal data. It accordingly regarded the recording of the applicants' voices for such further analysis as amounting to interference with their right to respect for their private lives (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98 44787/98, § 59-60, ECHR 2001-IX).
84. The Court is of the view that the general approach taken by the Convention organs in respect of photographs and voice samples should also be followed in respect of fingerprints. The Government distinguished the latter by arguing that they constituted neutral, objective and irrefutable material and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint. While true, this consideration cannot alter the fact that fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant.
85. The Court accordingly considers that the retention of fingerprints on the authorities' records in connection with an identified or identifiable individual may in itself give rise, notwithstanding their objective and irrefutable character, to important private-life concerns.
86. In the instant case, the Court notes furthermore that the applicants' fingerprints were initially taken in criminal proceedings and subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes. It is accepted in this regard that, because of the information they contain, the retention of cellular samples and DNA profiles has a more important impact on private life than the retention of fingerprints. However, the Court, like Baroness Hale (see paragraph 25 above), considers that, while it may be necessary to distinguish between the taking, use and storage of fingerprints, on the one hand, and samples and profiles, on the other, in determining the question of justifica-

tion, the retention of fingerprints constitutes an interference with the right to respect for private life.

B. Justification for the interference

1. *The parties' submissions*

(a) The applicants

87. The applicants argued that the retention of fingerprints, cellular samples and DNA profiles was not justified under the second paragraph of Article 8. The Government were given a very wide remit to use samples and DNA profiles notably for "purposes related to the prevention or detection of crime", "the investigation of an offence" or "the conduct of a prosecution". These purposes were vague and open to abuse as they might in particular lead to the collation of detailed personal information outside the immediate context of the investigation of a particular offence. The applicants further submitted that there were insufficient procedural safeguards against misuse or abuse of the information. Records on the PNC were not only accessible to the police, but also to 56 non-police bodies, including Government agencies and departments, private groups such as British Telecom and the Association of British Insurers, and even certain employers. Furthermore, the PNC was linked to the Europe-wide "Schengen Information System". Consequently, their case involved a very substantial and controversial interference with the right to private life, as notably illustrated by ongoing public debate and disagreement about the subject in the United Kingdom. Contrary to the assertion of the Government, the applicants concluded that the issue of the retention of this material was of great individual concern and the State had a narrow margin of appreciation in this field.

88. The applicants contended that the indefinite retention of fingerprints, cellular samples and DNA profiles of unconvicted persons could not be regarded as "necessary in a democratic society" for the purpose of preventing crime. In particular, there was no justification at all for the retention of cellular samples following the original generation of the DNA profile; nor had the efficacy of the profiles' retention been convincingly demonstrated since the high number of DNA matches relied upon by the Government was not shown to have led to successful prosecutions. Likewise, in most of the specific examples provided by the Government the successful prosecution had not been contin-

gent on the retention of the records and in certain others the successful outcome could have been achieved through more limited retention in time and scope.

89. The applicants further submitted that the retention was disproportionate because of its blanket nature irrespective of the offences involved, the unlimited period, the failure to take account of the applicants' circumstances and the lack of an independent decision-making process or scrutiny when considering whether or not to order retention. They further considered the retention regime to be inconsistent with the Council of Europe's guidance on the subject. They emphasised, finally, that retention of the records cast suspicion on persons who had been acquitted or discharged of crimes, thus implying that they were not wholly innocent. The retention thus resulted in stigma which was particularly detrimental to children as in the case of S. and to members of certain ethnic groups over-represented on the database.

(b) The Government

90. The Government submitted that any interference resulting from the retention of the applicants' fingerprints, cellular samples and DNA profiles was justified under the second paragraph of Article 8. It was in accordance with the law as expressly provided for, and governed by section 64 of the PACE, which set out detailed powers and restrictions on the taking of fingerprints and samples and clearly stated that they would be retained by the authorities regardless of the outcome of the proceedings in respect of which they were taken. The exercise of the discretion to retain fingerprints and samples was also, in any event, subject to the normal principles of law regulating discretionary power and to judicial review.

91. The Government further stated that the interference was necessary and proportionate for the legitimate purpose of the prevention of disorder or crime and/or the protection of the rights and freedoms of others. It was of vital importance that law enforcement agencies took full advantage of available techniques of modern technology and forensic science in the prevention, investigation and detection of crime for the interests of society generally. They submitted that the retained material was of inestimable value in the fight against crime and terrorism and the detection of the guilty and provided statistics in support of this view.

They emphasised that the benefits to the criminal-justice system were enormous, not only permitting the detection of the guilty but also eliminating the innocent from inquiries and correcting and preventing miscarriages of justice.

92. As at 30 September 2005, the National DNA database held 181,000 profiles from individuals who would have been entitled to have those profiles destroyed before the 2001 amendments. 8,251 of those were subsequently linked with crime-scene stains which involved 13,079 offences, including 109 murders, 55 attempted murders, 116 rapes, 67 sexual offences, 105 aggravated burglaries and 126 offences of the supply of controlled drugs.
93. The Government also submitted specific examples of use of DNA material for successful investigation and prosecution in some eighteen specific cases. In ten of these cases the DNA profiles of suspects matched some earlier unrelated crime-scene stains retained on the database, thus allowing successful prosecution for those earlier crimes. In another case, two suspects arrested for rape were eliminated from the investigation as their DNA profiles did not match the crime-scene stain. In two other cases the retention of DNA profiles of the persons found guilty of certain minor offences (disorder and theft) led to establishing their involvement in other crimes committed later. In one case the retention of a suspect's DNA profile following an alleged immigration offence helped his extradition to the United Kingdom a year later when he was identified by one of his victims as having committed rape and murder. Finally, in four cases DNA profiles retained from four persons suspected but not convicted of certain offences (possession of offensive weapons, violent disorder and assault) matched the crime-scene stains collected from victims of rape up to two years later.
94. The Government contended that the retention of fingerprints, cellular samples and DNA profiles could not be regarded as excessive since they were kept for specific limited statutory purposes and stored securely and subject to the safeguards identified. Their retention was neither warranted by any degree of suspicion of the applicants' involvement in a crime or propensity to crime nor directed at retaining records in respect of investigated alleged offences in the past. The records were retained because the police had already been lawfully in possession of them, and their retention would

assist in the future prevention and detection of crime in general by increasing the size of the database. Retention resulted in no stigma and produced no practical consequence for the applicants unless the records matched a crime-scene profile. A fair balance was thus struck between individual rights and the general interest of the community and fell within the State's margin of appreciation.

2. *The Court's assessment*

(a) *In accordance with the law*

95. The Court recalls its well established case-law that the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see *Malone v. the United Kingdom*, 2 August 1984, § § 66-68, Series A no. 82; *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; and *Amann* cited above, § 56).
96. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (*Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, with further references).
97. The Court notes that section 64 of the PACE provides that the fingerprints or samples taken from a person in connection with the investigation of an offence may be retained after they have fulfilled the purposes for which they were taken (see paragraph 27 above). The Court agrees with the Government that the retention of the applicants' fingerprint and DNA records had a clear basis in the domestic law. There is also clear evidence that these records are retained in practice save in exceptional circumstances. The fact that chief police officers have power to destroy them in such rare cases does

not make the law insufficiently certain from the point of view of the Convention.

98. As regards the conditions attached to and arrangements for the storing and use of this personal information, section 64 is far less precise. It provides that retained samples and fingerprints must not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.
99. The Court agrees with the applicants that at least the first of these purposes is worded in rather general terms and may give rise to extensive interpretation. It reiterates that it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness (see, *mutatis mutandis*, *Kruslin v. France*, 24 April 1990, § 33 and 35, Series A no. 176-A; *Rotaru*, cited above, § 57-59; *Weber and Saravia v. Germany* (dec.), no. 54934/00 54934/00, ECHR 2006-...; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00 62540/00, § 75-77, 28 June 2007; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 62-63, 1 July 2008). The Court notes, however, that these questions are in this case closely related to the broader issue of whether the interference was necessary in a democratic society. In view of its analysis in paragraphs 105-126 below, the Court does not find it necessary to decide whether the wording of section 64 meets the “quality of law” requirements within the meaning of Article 8 § 2 of the Convention.

(b) Legitimate aim

100. The Court agrees with the Government that the retention of fingerprint and DNA information pursues the legitimate purpose of the detection, and therefore, prevention of crime. While the original taking of this information pursues the aim of linking a particular person to the particular crime of which he or she is suspected, its retention pursues the broader purpose of assisting in the identification of future offenders.

(c) Necessary in a democratic society

i General principles

101. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient”. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, 18 January 2001, with further references).
102. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights (see *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004, with further references). Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-...). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see *Dickson v. the United Kingdom* [GC], no. 44362/04 44362/04, § 78, ECHR 2007-...).
103. The protection of personal data is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see, *mutatis mutandis*, *Z*, cited above, § 95). The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved

in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored (see Article 5 of the Data Protection Convention and the preamble thereto and Principle 7 of Recommendation R(87)15 of the Committee of Ministers regulating the use of personal data in the police sector). The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse (see notably Article 7 of the Data Protection Convention). The above considerations are especially valid as regards the protection of special categories of more sensitive data (see Article 6 of the Data Protection Convention) and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see Recommendation No. R(92)1 of the Committee of Ministers on the use of analysis of DNA within the framework of the criminal justice system).

104. The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime (see Article 9 of the Data Protection Convention). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned (see, *mutatis mutandis*, Z. cited above, § 96).

ii *Application of these principles to the present case*

105. The Court finds it to be beyond dispute that the fight against crime, and in particular against organised crime and terrorism, which is one of the challenges faced by today's European societies, depends to a great extent on the use of modern scientific techniques of investigation and identification. The techniques of DNA analysis were acknowledged by the Council of Europe more than fifteen years ago as offering advantages to the criminal-justice system (see Recommendation R(92)1 of the Committee of Ministers, paragraphs 43-44 above). Nor is it disputed that the member States have since that time made rapid and marked progress in using DNA information in the determination of innocence or guilt.

106. However, while it recognises the importance of such information in the detection of crime,

the Court must delimit the scope of its examination. The question is not whether the retention of fingerprints, cellular samples and DNA profiles may in general be regarded as justified under the Convention. The only issue to be considered by the Court is whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified under Article 8, paragraph 2 of the Convention.

107. The Court will consider this issue with due regard to the relevant instruments of the Council of Europe and the law and practice of the other Contracting States. The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage (see paragraphs 41-44 above). These principles appear to have been consistently applied by the Contracting States in the police sector in accordance with the Data Protection Convention and subsequent Recommendations of the Committee of Ministers (see paragraphs 45-49 above).

108. As regards, more particularly, cellular samples, most of the Contracting States allow these materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity. In the great majority of the Contracting States with functioning DNA databases, samples and DNA profiles derived from those samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. A restricted number of exceptions to this principle are allowed by some Contracting States (see paragraphs 47-48 above).

109. The current position of Scotland, as a part of the United Kingdom itself, is of particular significance in this regard. As noted above (see paragraph 36), the Scottish Parliament voted to allow retention of the DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and even then, for three years only, with the possibility of an extension to keep the DNA sample and data for a further two years with the consent of a sheriff.

110. This position is notably consistent with Committee of Ministers' Recommendation R(92)1, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined stor-

age periods for data, even in more serious cases (see paragraphs 43-44 above). Against this background, England, Wales and Northern Ireland appear to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.

111. The Government lay emphasis on the fact that the United Kingdom is in the vanguard of the development of the use of DNA samples in the detection of crime and that other States have not yet achieved the same maturity in terms of the size and resources of DNA databases. It is argued that the comparative analysis of the law and practice in other States with less advanced systems is accordingly of limited importance.

112. The Court cannot, however, disregard the fact that, notwithstanding the advantages provided by comprehensive extension of the DNA database, other Contracting States have chosen to set limits on the retention and use of such data with a view to achieving a proper balance with the competing interests of preserving respect for private life. The Court observes that the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. In the Court's view, the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere. The Court considers that any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard.

113. In the present case, the applicants' fingerprints and cellular samples were taken and DNA profiles obtained in the context of criminal proceedings brought on suspicion of attempted robbery in the case of the first applicant and harassment of his partner in the case of the second applicant. The data were retained on the basis of legislation allowing for their indefinite retention, despite the acquittal of the former and the discontinuance of the criminal proceedings against the latter.

114. The Court must consider whether the perma-

nent retention of fingerprint and DNA data of all suspected but unconvicted people is based on relevant and sufficient reasons.

115. Although the power to retain fingerprints, cellular samples and DNA profiles of unconvicted persons has only existed in England and Wales since 2001, the Government argue that their retention has been shown to be indispensable in the fight against crime. Certainly, the statistical and other evidence, which was before the House of Lords and is included in the material supplied by the Government (see paragraph 92 above) appears impressive, indicating that DNA profiles that would have been previously destroyed were linked with crime-scene stains in a high number of cases.

116. The applicants, however, assert that the statistics are misleading, a view supported in the Nuffield Report. It is true, as pointed out by the applicants, that the figures do not reveal the extent to which this "link" with crime scenes resulted in convictions of the persons concerned or the number of convictions that were contingent on the retention of the samples of unconvicted persons. Nor do they demonstrate that the high number of successful matches with crime-scene stains was only made possible through indefinite retention of DNA records of all such persons. At the same time, in the majority of the specific cases quoted by the Government (see paragraph 93 above), the DNA records taken from the suspects produced successful matches only with earlier crime-scene stains retained on the data base. Yet such matches could have been made even in the absence of the present scheme, which permits the indefinite retention of DNA records of all suspected but unconvicted persons.

117. While neither the statistics nor the examples provided by the Government in themselves establish that the successful identification and prosecution of offenders could not have been achieved without the permanent and indiscriminate retention of the fingerprint and DNA records of all persons in the applicants' position, the Court accepts that the extension of the database has nonetheless contributed to the detection and prevention of crime.

118. The question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests.

119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of

retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed (see paragraph 35 above); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

120. The Court acknowledges that the level of interference with the applicants' right to private life may be different for each of the three different categories of personal data retained. The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein. However, such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny regardless of these differences.
121. The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The Court is unable to accept this argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data (see paragraph 67 above).
122. Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent

includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal (see *Asan Rushiti v. Austria*, no. 28389/95, § 31, 21 March 2000, with further references). It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed.

123. The Government argue that the power of retention applies to all fingerprints and samples taken from a person in connection with the investigation of an offence and does not depend on innocence or guilt. It is further submitted that the fingerprints and samples have been lawfully taken and that their retention is not related to the fact that they were originally suspected of committing a crime, the sole reason for their retention being to increase the size and, therefore, the use of the database in the identification of offenders in the future. The Court, however, finds this argument difficult to reconcile with the obligation imposed by section 64(3) of the PACE to destroy the fingerprints and samples of volunteers at their request, despite the similar value of the material in increasing the size and utility of the database. Weighty reasons would have to be put forward by the Government before the Court could regard as justified such a difference in treatment of the applicants' private data compared to that of other unconvicted people.
124. The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of Article 40 of the UN Convention on the Rights of the Child of 1989, the special position of minors in the criminal-justice sphere and has noted in particular the need for the protection of their privacy at criminal trials (see *T. v. the United Kingdom* [GC], no. 24724/94, §§ 75 and 85, 16 December 1999). In the same way, the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council as

to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities, who have not been convicted of any crime (see paragraphs 38-40 above).

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data.

126. Accordingly, there has been a violation of Article 8 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 8 OF THE CONVENTION

127. The applicants submitted that they had been subjected to discriminatory treatment as compared to others in an analogous situation, namely other unconvicted persons whose samples had still to be destroyed under the legislation. This treatment related to their status and fell within the ambit of Article 14, which had always been liberally interpreted. For the reasons set out in their submissions under Article 8, there was no reasonable or objective justification for the treatment, nor any legitimate aim or reasonable relationship of proportionality to the purported aim of crime prevention, in particular as regards the samples which played no role in crime detection or prevention. It was an entirely improper and prejudicial differentiation to retain materials of persons who should be presumed to be innocent.

128. The Government submitted that as Article 8 was not engaged Article 14 of the Conven-

tion was not applicable. Even if it were, there was no difference of treatment as all those in an analogous situation to the applicants were treated the same and the applicants could not compare themselves with those who had not had samples taken by the police or those who consented to give samples voluntarily. In any event, any difference in treatment complained of was not based on "status" or a personal characteristic but on historical fact. If there was any difference in treatment, it was objectively justified and within the State's margin of appreciation.

129. The Court refers to its conclusion above that the retention of the applicants' fingerprints, cellular samples and DNA profiles was in violation of Article 8 of the Convention. In the light of the reasoning that has led to this conclusion, the Court considers that it is not necessary to examine separately the applicants' complaint under Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

131. The applicants requested the Court to award them just satisfaction for non-pecuniary damage and for costs and expenses.

A. Non-pecuniary damage

132. The applicants claimed compensation for non-pecuniary damage in the sum of GBP 5,000 each for distress and anxiety caused by the knowledge that intimate information about each of them had been unjustifiably retained by the State, and in relation to anxiety and stress caused by the need to pursue this matter through the courts.

133. The Government, referring to the Court's case-law (in particular, *Amann v. Switzerland*, cited above), submitted that a finding of a violation would in itself constitute just satisfaction for both applicants and distinguished the present case from those cases where violations had been found as a result of the use or disclosure of the personal information (in particular, *Ro-*

taru v. Romania, cited above).

134. The Court recalls that it has found that the retention of the applicants' fingerprint and DNA data violates their rights under Article 8. In accordance with Article 46 of the Convention, it will be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 120, ECHR 2002-VI). In these circumstances, the Court considers that the finding of a violation, with the consequences which will ensue for the future, may be regarded as constituting sufficient just satisfaction in this respect. The Court accordingly rejects the applicants' claim for non-pecuniary damage.

B. Costs and expenses

135. The applicants also requested the Court to award GBP 52,066.25 for costs and expenses incurred before the Court and attached detailed documentation in support of their claim. These included the costs of the solicitor (GBP 15,083.12) and the fees of three counsel (GBP 21,267.50, GBP 2,937.50 and GBP 12,778.13 respectively). The hourly rates charged by the lawyers were as follows: GBP 140 in respect of the applicants' solicitor (increased to GBP 183 as from June 2007) and GBP 150, GBP 250 and GBP 125 respectively in respect of the three counsel.

136. The Government qualified the applicants' claim as entirely unreasonable. They submitted in particular that the rates charged by the lawyers were excessive and should be reduced to no more than two-thirds of the level claimed. They also argued that no award should be made in respect of the applicants' decision to instruct a fourth lawyer at a late stage of the proceedings as it had led to the duplication of work. The Government concluded that any cost award should be limited to GBP 15,000 and in any event, to no more than GBP 20,000.

137. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Roche v. the United Kingdom* [GC],

no. 32555/96 32555/96, § 182, ECHR 2005-X).

138. On the one hand, the present applications were of some complexity as they required examination in a Chamber and in the Grand Chamber, including several rounds of observations and an oral hearing. The application also raised important legal issues and questions of principle requiring a large amount of work. It notably required an in-depth examination of the current debate on the issue of retention of fingerprint and DNA records in the United Kingdom and a comprehensive comparative research of the law and practice of other Contracting States and of the relevant texts and documents of the Council of Europe.

139. On the other hand, the Court considers that the overall sum of GBP 52,066.25 claimed by the applicants is excessive as to quantum. In particular, the Court agrees with the Government that the appointment of the fourth lawyer in the later stages of the proceedings may have led to a certain amount of duplication of work.

140. Making its assessment on an equitable basis and in the light of its practice in comparable cases, the Court awards the sum of EUR 42,000 in respect of costs and expenses, less the amount of EUR 2,613.07 already paid by the Council of Europe in legal aid.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds that it is not necessary to examine separately the complaint under Article 14 of the Convention;
3. Holds that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;
4. Holds
 - (a) that the respondent State is to pay the applicants, within three months, EUR 42,000

(forty two thousand euros) in respect of costs and expenses (inclusive of any VAT which may be chargeable to the applicants), to be converted into pounds sterling at the rate applicable at the date of settlement, less EUR 2,613.07 already paid to the applicants in respect of legal aid;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 December 2008.

Michael O'Boyle, *Deputy Registrar*

Jean-Paul Costa, *President*

ECHR

ECJ

FOURTH SECTION

CASE OF MEGADAT.COM SRL v MOLDOVA

(Application no. 21151/04)

JUDGMENT

STRASBOURG

8 April 2008

FINAL

08/07/2008

INTERNET PROVIDER, LICENSE, INTERNET CAFÉ, POSSESSIONS, PROPORTIONALITY, GOVERNMENTAL CONTROL, COMMUNICATIONS INFRASTRUCTURE

IN THE CASE OF MEGADAT.COM SRL V. MOLDOVA,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 18 March 2008,

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

PROCEDURE

- The case originated in an application (no. 21151/04) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Megadat.com SRL ("the applicant company"), a company incorporated in the Republic of Moldova, on 8 June 2004.
- The applicant was represented by Ms J. Hanganu, a lawyer practising in Chişinău. The Moldovan Government ("the Government") were represented by Mr V. Grosu, their Agent.
- The applicant alleged, in particular, that the closure of the company constituted a breach of its rights under Article 1 of Protocol No. 1 to the Convention and that it had been discriminated against contrary to Article 14 of the Convention taken together with Article 1 of Protocol No.1.
- On 5 December 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.
- Judge Pavlovski, the judge elected in respect of Moldova, withdrew from sitting in the case (Rule 28 of the Rules of Court) before it had been notified to the Government. On 8 February 2007, the Government, pursuant to Rule 29 § 1 (a), informed the Court that they were content to appoint in his stead another elected judge and left the choice of appointee to the President of the Chamber. On 18 September 2007, the President appointed Judge Šikuta to sit in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

- The applicant, Megadat.com SRL, is a company incorporated in the Republic of Moldova.
 - Background to the case*
- At the time of the events the applicant company was the largest internet provider in Moldova. According to it, it held approximately seventy percent of the market of internet services. While agreeing that the applicant company was the largest internet provider in the country, the Government disputed the ratio of its market share without, however, presenting any alternative figures.
- The applicant company had two licences issued by the National Regulatory Agency for Telecommunications and Informatics ("ANRTI") for providing internet and fixed telephony services. The licences were valid until 18 April 2007 and 16 May 2007 respectively and the address 55, Armenească Street was indicated in them as the applicant company's official address.
- The company had three offices in Chişinău. On 11 November 2002 its headquarters was moved from its Armenească street office to its Ştefan cel Mare street office. The change of address of the headquarters was registered with the State Registration Chamber and the Tax Authority was informed. However, the applicant company failed to request ANRTI to modify the address in the text of its licences.
- On 20 May 2003 the applicant company requested a third licence from ANRTI indicating in its request the new address of its headquarters. ANRTI issued the new licence citing the old address in it, without giving any reasons for not indicating the new address.

2. *The invalidation of the applicant company's licences*

11. On 17 September 2003 ANRTI held a meeting. According to the minutes of the meeting, it found that ninety-one companies in the field of telecommunications, including the applicant company, had failed to pay a yearly regulatory fee and/or to present information about changes of address within the prescribed time-limits. ANRTI decided to invite those companies to eliminate the irregularities within ten days and to warn them that their licences might be suspended in case of non-compliance.
12. On unspecified dates the ninety-one companies, including the applicant company, were sent letters asking them to comply within ten days of the date of receipt of the letter. They were also warned that their licences might be suspended in case of non-compliance in accordance with section 3.4 of the ANRTI Regulations. The applicant company was sent such a letter on 24 September 2003.
13. Following ANRTI's letters, only thirty-two companies, including the applicant company, complied with the request.
14. On 29 and 30 September 2003 the applicant company lodged documents with ANRTI indicating its new address, together with a request to modify its licences accordingly, and paid the regulatory fee.
15. On Friday 3 October 2003 ANRTI informed the applicant company that it had some questions concerning the documents submitted by it. In particular it had a question concerning the lease of the applicant company's new headquarters and about the name of the applicant company. ANRTI informed the applicant company that the processing of its request concerning the amendment of the licences would be suspended until it had submitted the requested information.
16. On Monday 6 October 2003 ANRTI held a meeting at which it adopted a decision concerning the applicant company. In particular it reiterated the content of section 15 of the Law on Licensing and of section 3.5.7 of the ANRTI Regulations, according to which licences which had not been modified within ten days should be declared invalid. ANRTI found that those provisions were applicable to the applicant company's case, and that its licences were therefore not valid.
17. On the same date ANRTI wrote to the Prosecutor General's Office, the Tax Authority, the Centre for Fighting Economic Crime and Corruption and the Ministry of Internal Affairs that the applicant company had modified its address on 16 November 2002 but had failed to request ANRTI to make the corresponding change in its licences. In such conditions, the applicant company had traded for eleven months with an invalid licence. ANRTI requested the authorities to verify whether the applicant company should be sanctioned in accordance with the law.
18. On 9 October 2003 ANRTI amended the Regulations concerning the issuing of licences in order to provide that an entity whose licence was withdrawn could re-apply for a new licence only after six months.
19. On 21 October 2003 ANRTI held a meeting at which it found that fifty-nine of the ninety-one companies which it had warned, in accordance with its decision of 17 September 2003, had failed to comply with the warning. It decided to suspend their licences for three months and to warn them that in case of non-compliance during the period of suspension, their licences would be withdrawn. It appears from the documents submitted by the parties that the applicant company was the only one to have its licence invalidated.

3. *The court proceedings between Megadat.com and ANRTI*

20. On 24 October 2003 the applicant company brought an administrative action against ANRTI arguing, *inter alia*, that the measure applied to it was illegal and disproportionate because the applicant company had always had three different offices in Chişinău of which ANRTI had always been aware. The change of address had only occurred because the applicant company's headquarters had transferred from one of those offices to another. The tax authority had been informed promptly about that change and thus the change of address had not led to a failure to pay taxes or to a drop in the quality of services provided by the applicant company. Moreover, ANRTI's decision of 6 October 2003 had been adopted in breach of procedure, because the applicant company had not been invited to the meeting and ANRTI had disregarded its own instructions given to the applicant company on 3 October 2003.
21. On 25 November 2003 the Court of Appeal ordered a stay of the execution of ANRTI's deci-

sion of 6 October 2003. It also set 16 December 2003 as the date of the first hearing in the case. Later, at the request of ANRTI, that date was changed to 2 December 2003.

22. On 1 December 2003 the representative of the applicant company lodged a request for adjournment of the hearing of 2 December on the ground that he was involved in a pre-arranged hearing at another court on the same date and at the same time.
23. On 2 December 2003 the Court of Appeal held a hearing in the absence of the representative of the applicant company and dismissed the latter's action. The court considered, *inter alia*, that since the applicant company had failed to inform ANRTI about the change of address, the provisions of section 3.5.7 of the ANRTI Regulations were applicable.
24. The applicant company appealed against the decision arguing, *inter alia*, that it had not been given a chance to participate in the hearing before the first-instance court. It submitted that, according to the Code of Civil Procedure, the court had the right to strike the case out of the list of cases if it considered that the applicant had failed to appear without a plausible justification, but not to examine the case in its absence. It also submitted that by declaring the licences invalid, ANRTI had breached its own decision of 17 September 2003. It was ANRTI's usual practice to request information concerning changes of address and to sanction companies which did not comply by suspending their licences. The applicant company drew attention to two other decisions of that kind dated 12 June 2003 and 17 July 2003. In this case, however, the applicant company had fully complied with ANRTI's decision of 17 September 2003 by submitting information about the new address within the prescribed time-limit. Notwithstanding, ANRTI had asked for supplementary information on Friday 3 October 2003 and without waiting for it to be provided by the applicant company, had decided to declare the licences invalid on Monday 6 October 2003.

The applicant company also argued that ANRTI's decision of 6 October 2003 had been adopted in serious breach of procedure because the applicant company had not been informed three days in advance about the meeting of 6 October 2003 and had not been invited to it.

Lastly, the applicant company argued that AN-

RTI's decision to declare its licences invalid was discriminatory since the other ninety companies listed in ANRTI's decision of 17 September 2003 had not been subjected to such a severe measure.

25. On 3 March 2004 the Supreme Court of Justice dismissed the applicant company's appeal and found, *inter alia*, that it had been summoned to the hearing of 2 December 2003 and that its request for adjournment could not create an obligation on the part of the Court of Appeal to adjourn the hearing. Moreover, the decision of 6 October 2003 was legal since the applicant company admitted to having changed its address, and according to section 3.5.7 of the ANRTI Regulations a failure to request a modification of an address in a licence led to its invalidity. The Supreme Court did not refer to the applicant company's submissions about its discriminatory treatment, ANRTI's usual practice of requesting information about changes of address and ANRTI's breaching of its own decision of 17 September 2003.
26. One of the members of the panel of the Supreme Court, Judge D. Visterniceanu, disagreed with the opinion of the majority and wrote a dissenting opinion. He submitted, *inter alia*, that the first-instance court had failed to address all the submissions made by the applicant company and had illegally examined the case in its absence. Moreover, only one provision of the ANRTI Regulations had been applied, whereas it was necessary to examine the case in a broader light and to apply all the relevant legislation. Finally, ANRTI's decision of 6 October 2003 contravened its decision of 17 September 2003. Judge Visterniceanu considered that the Supreme Court should have quashed the judgment of the first-instance court and remitted the case for a fresh re-examination.

4. *The applicant company's attempts to save its business and the repercussions of the invalidation of its licences*

27. In the meantime, the applicant company has transferred all of its contracts with clients to a company which was part of the same group, Megadat.com International, which had valid licences. However, the State-owned monopoly in telecommunications, Moldtelecom, refused to sign contracts with the latter company and made it impossible for it to continue working.
28. On 16 March 2004 ANRTI and Moldtelecom informed the applicant company's clients that

on 17 March their internet connection would be shut down and offered them internet services from Moldtelecom without any connection charge.

29. On 17 March 2004 Moldtelecom carried out the disconnection of the applicant company and of Megadat.com International from the internet and all of their equipment on the Moldtelecom premises was disconnected from the power supply.
30. In July 2004 the licences of Megadat.com International were withdrawn by ANRTI.
31. As a result of the above, the applicant company and Megadat.com International were forced to close down the business and sell all of their assets. One week later, the applicant company's chairman, Mr Eduard Muşuc, was arrested for peacefully demonstrating against his company's closure.
32. Following ANRTI's letter of 6 October 2003 (see paragraph 17 above) the Tax Authorities imposed a fine on the applicant company for having operated for eleven months without a valid licence and the CFEC initiated an investigation as a result of which all the accounting documents of the applicant company were seized.

5. International reactions

33. On 18 March 2004 the Embassies of the United States of America, the United Kingdom, France, Germany, Poland, Romania and Hungary, as well as the Council of Europe, the IMF and World Bank missions in Moldova issued a joint declaration expressing concern over the events surrounding the closure of the applicant company. The declaration stated, *inter alia*, the following: "Alleged contraventions of registration procedures do not appear to justify a decision to put a stop to the functioning of a commercial company. ... We urge Moldtelecom and the relevant authorities to reconsider this question. This seems all the more important in view of the commitment of the public authorities of Moldova to European norms and values."

II. RELEVANT DOMESTIC LAW AND PRACTICE

34. Section 3.4 of the ANRTI Regulations provides that in the event of non-compliance by a licence beneficiary with the conditions set out in the licence, the licence can be suspended for a period of three months. When ANRTI finds

such non-compliance, it warns the licence beneficiary and gives it a deadline for remedying the problem. If the problem is not remedied within that period, ANRTI may suspend the licence for a period of three months.

35. On 12 June 2003 ANRTI warned several companies about their failure to pay regulatory fees and/or to inform it about their changes of address. The companies were given ten days to remedy the breaches. Since some of them did not comply, on 17 July 2003, ANRTI decided to suspend their licences for three months.
36. The relevant provisions of the ANRTI Regulations concerning modification of licences at the time of the events were similar to the provisions of section 15 of the Law on Licensing and read as follows:

3.5.1 A licence should be modified when the name of the beneficiary company or other information contained in the licence has changed;

3.5.2 When reasons for modifying a licence become apparent, the beneficiary shall apply to ANRTI for its modification within ten days;

...

3.5.7 A licence which has not been modified within the prescribed time-limit is not valid.

37. On 9 October 2003 the following provision was added to the Regulations:

3.8.6 Former beneficiaries, whose licences were withdrawn... can re-apply for new licences only after a period of six months counted from the day of withdrawal.

38. On 24 September 2004 section 3.5.7 of the Regulations was amended in the following way:

3.5.7 In the event that a licence was not modified within the prescribed time-limit, the Commission has the right to apply administrative sanctions or to withdraw the licence partially or totally.

THE LAW

39. The applicant company argued that the invalidation of its licences had violated its right guaranteed under Article 1 of Protocol No. 1 to the Convention, which provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in

the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

40. The applicant company further submitted that it had been the victim of discrimination on account of the authorities' decision to invalidate its licences, since they had treated differently ninety other companies which were in a similar situation. It relied on Article 14 of the Convention, which provides:

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

I. ADMISSIBILITY OF THE COMPLAINTS

41. In its initial application, the applicant company also submitted a complaint under Article 6 of the Convention. However, in its observations on admissibility and merits it asked the Court not to proceed with the examination of this complaint. The Court finds no reason to examine it.
42. At the same time, the Court considers that the rest of the applicant company's complaints raise questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and no other grounds for declaring them inadmissible have been established. The Court therefore declares this part of the application admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

A. The submissions of the parties

43. The applicant company argued that the licenc-

es for running its business constituted a possession for the purposes of Article 1 of Protocol No. 1 and that ANRTI's decision of 6 October 2003 amounted to an interference with its right to property.

44. According to the applicant company, the measure applied to it had not been lawful because ANRTI had breached its own decision of 17 September 2003. In particular, on 17 September 2003 ANRTI had decided to institute a ten-day time-limit for the ninety-one companies concerned in order to allow them, *inter alia*, to present information about the change of their addresses. However, even though the applicant company had complied with the time-limit and presented all the necessary information, ANRTI had decided to disregard its own decision and to invalidate its licences.
45. Referring to the general interest served by the interference, the applicant company submitted that it agreed that in general terms the State was justified in its intention to secure to its inhabitants rapid and efficient telecommunications services at a reasonable cost. Therefore, the applicant company agreed that it could be said that the interference served a general interest.
46. In the applicant company's opinion, the measure had not been proportionate to the allegedly protected general interest. According to it, the invalidation of the licences had had extremely serious consequences which had finally resulted in the closure of its business. Moreover, the company had started to be persecuted by the Centre for Fighting Economic Crime and Corruption and the tax authorities. Due to the concerted efforts of the State authorities and Moldtelecom, all the companies from the Megadat.com group had been prevented from taking over the business and all of the clients were abusively taken from it by Moldtelecom. As a result of that, the goodwill and the value of the company had suffered serious repercussions.
47. The applicant company accepted that it had breached the regulations in so far as its obligation to inform ANRTI within ten days of its change of address was concerned. However, that had been a very minor breach which had not had any adverse consequences. In particular, the address had only been changed from one of its offices to another and the Registration Chamber and the Tax Authorities had been informed immediately. Accordingly, such

- a minor technical breach could not justify a sanction of such severity.
48. The fact that the sanction was disproportionate was also proved by the subsequent amendment of section 3.5.7 of the ANRTI regulations (see paragraph 38 above) which took place one year after the invalidation of the applicant company's licences.
 49. Moreover, the authorities had done everything they could in order to prevent the applicant company from obtaining new licences. In particular, they had modified the ANRTI Regulations so that it would not be able to apply for new licences sooner than after six months (see paragraph 37 above).
 50. In reply to the Government's submission that it was open to it to apply for a new licence (see paragraph 58 below), the applicant sent the Court minutes of the ANRTI meetings, according to which company S.'s licence to run an internet café had been invalidated on 8 December 2003 and its application for a new licence had been rejected by ANRTI on 26 December 2003 on the basis of section 3.8.6 of the Regulations. It was only on 8 June 2004 that company S.'s application for a new licence had been upheld.
 51. In the light of the above, the applicant company expressed the view that the conduct of the authorities showed that they had not been motivated by any genuine policy considerations.
 52. In its submissions concerning the alleged violation of Article 14, the applicant company also pointed to the fact that none of the ninety-one companies which had been warned by ANRTI on 24 September 2003 were treated in the same way.
 53. The applicant disputed the Government's submission that its situation was different from that of the other ninety companies (see paragraph 59 below) and argued that while ANRTI did not specify in the minutes of its meetings the precise irregularities committed by each company in the list of ninety-one companies, it was clear that at least two of those companies had their licences suspended on 21 October 2003 on account of their failure to present information about the change of their addresses. The applicant sent the Court a copy of a document originating from ANRTI which supported the above submission and the authenticity of which had not been contested by the Government.
 54. Referring to the Government's submissions concerning companies A. N. and S. (see paragraph 60 below), the applicant company disagreed, and, relying on official documents from ANRTI, argued that while being part of the group of ninety-one companies, contrary to its own situation company A. had not complied with ANRTI's warning. Nevertheless, its licence had been invalidated on the basis of section 3.5.7 of the ANRTI regulations only on 13 August 2004.
- As to company N. the applicant submitted that its licence had been suspended along with those of fifty-nine other companies on 21 October 2003 (see paragraph 19 above) for failure to comply with ANRTI's warning. The three-month suspension had been lifted on 25 May 2004.
- Referring to company S., the applicant company argued that it had not been in a similar situation to them either. In the first place, it had not been on the list of ninety-one companies warned by ANRTI. Secondly, the Government had not submitted any information to show whether it had been warned in the same manner as Megadat.com and whether it had been given a ten-day time limit with which it had complied. Moreover, company S. had been running an internet café, which was not comparable to the business run by the applicant company.
55. The Government did not dispute the fact that the licences constituted a possession within the meaning of Article 1 of Protocol No. 1. Nor did they expressly disagree with the applicant concerning the existence of an interference with its right to property. However, they expressed the view that nobody had withdrawn the applicant's licences; rather the licences had become invalid by the effect of the law a long time before 6 October 2003. According to them, the licences would have become invalid without ANRTI's involvement, at the moment when the ten-day time limit provided for by section 3.5.2 of the Regulations had expired, that is, some ten or eleven months before the decision of 6 October 2003. At the same time, the Government argued that ANRTI had drawn the applicant company's attention to this irregularity and asked it to remedy it by letters of 11 July 2003 and 22 August 2003. They did not submit, however, copies of those letters.
 56. The Government argued that the measure had

been in accordance with section 3.5.7 of the ANRTI Regulations, which stated in very clear terms that failure to apply for modification of the address in a licence within ten days of the date of such modification gave rise to the invalidation of the licence.

57. They further argued that the company had been providing internet services to a large number of users and that its clients had to enjoy a good quality service. The lack of provision of adequate and timely information to clients gave reason to suspect the existence of illegal acts. Section 3.5.7 of the ANRTI Regulations was designed in the general interest to contribute to the reduction and elimination of violations of the law by companies operating in the field of internet services. The measure applied by ANRTI was in the general interest because ANRTI had to know where to contact the applicant company if a client lodged a complaint against it.
58. The Government argued that it was open to the applicant company to apply for a new licence. According to them the new section 3.8.6 only referred to situations where a licence had been withdrawn but not invalidated. They submitted the example of company S., which, according to them, being in exactly the same situation as the applicant company, had obtained a new licence within one month.
59. According to the Government, the situation of the applicant company had been different from that of the other ninety companies which had been warned by ANRTI on 24 September 2003. According to the Government, the other companies had been warned on account of other irregularities, namely failure to present to ANRTI annual reports and failure to pay regulatory taxes.
60. In support of their submission that the applicant company had not been discriminated against, the Government relied on the example of companies A., N. and S., which, according to them, were in a similar situation, and whose licences had also been invalidated by ANRTI.
61. The Government invoked for the first time before the Court new reasons to explain why the applicant company's licence had been invalidated. In particular, they argued that one of the reasons for the invalidation was the fact that the applicant company had failed to inform ANRTI in due time why it had changed its name

by adding the letters I.M. in front of it.

B. The Court's assessment

1. *Whether the applicant company had "possessions" for the purpose of Article 1 of Protocol No. 1 to the Convention*
62. It is undisputed between the parties that the applicant company's licences constituted a possession for the purposes of Article 1 of Protocol No. 1 to the Convention.
63. The Court notes that, according to its case-law, the termination of a licence to run a business amounts to an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1 to the Convention (see *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, § 53, and *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007). The Court must therefore determine whether the measure applied to the applicant company by ANRTI amounted to an interference with its property rights.
2. *Whether there has been an interference with the applicant company's possessions and determination of the relevant rule under Article 1 of Protocol No. 1*
64. The Government did not expressly argue that there was no interference with the applicant company's possessions; however, they submitted that ANRTI's decision was a mere finding of a fact which had come into existence long before and emphasised the distinction between withdrawal and invalidation of licences (see paragraph 55 above). Insofar as these submissions are to be interpreted as meaning that ANRTI's decision of 6 October 2003 did not interfere with the possessions of the applicant company for the purposes of Article 1 of Protocol No. 1, the Court is unable to accept this view. The Court notes in the first place that before 6 October 2003 the applicant company had been operating unhindered. Moreover, it is clear from the parties' submissions that ANRTI was well aware long before 6 October 2003 of the applicant company's failure to request a modification of the address in the text of its licences. ANRTI was informed by the applicant company about the change of address in May 2003 (see paragraph 10 above) and the latter even requested a new licence with the new address in it. For unknown reasons, ANRTI did not consider it necessary to invalidate the applicant company's existing licences at that time and even issued it with a new one. Moreover,

the Government implicitly admitted that ANRTI was well aware of the situation by submitting that in July 2003 it had drawn the applicant company's attention to the irregularity and urged it to remedy it (see paragraph 55 above). In such circumstances, the Court cannot but note that ANRTI's decision of 6 October 2003 had the immediate and intended effect of preventing the applicant company from continuing to operate its business and of terminating its existing licences. The fact that the domestic authorities decided to attribute retroactive effect to ANRTI's decision of 6 October 2003 does not change that. Accordingly, the Court considers that ANRTI's decision of 6 October 2003 had an effect identical to a termination of valid licences and thus constituted an interference with the applicant company's right to the peaceful enjoyment of its possessions for the purposes of Article 1 of Protocol No. 1 to the Convention.

65. Although the applicant company could not carry on its business, it retained economic rights in the form of its premises and its property assets. In these circumstances, as in the *Bimer* case, the termination of the licences is to be seen not as a deprivation of possessions for the purposes of the second sentence of Article 1 of Protocol No. 1 but as a measure of control of use of property which falls to be examined under the second paragraph of that Article.
66. In order to comply with the requirements of the second paragraph, it must be shown that the measure constituting the control of use was lawful, that it was "in accordance with the general interest", and that there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Bimer*, cited above, § 52).

3. Lawfulness and aim of the interference

67. In so far as the lawfulness of the measure is concerned, the Court notes that this issue is disputed between the parties. While apparently agreeing that section 3.5.7 of the ANRTI Regulations was accessible and foreseeable, the applicant argued that the measure had been contrary to ANRTI's decision of 17 September 2003, by which it had been given a ten-day time-limit to remedy the situation. In the Court's view, this is a factor which is relevant to the assessment of the proportionality of the measure. Therefore, it will leave the question of lawfulness open and focus on the proportion-

ality of the measure.

As regards the legitimate aim served by the interference, in the light of the findings below, the Court has doubts as to whether the measures taken against the applicant company by the Moldovan authorities pursued any public interest aim. However, for the purposes of the present case, the Court will leave this question open too and will proceed to examine the question of proportionality.

4. Proportionality of the interference

68. The Court will consider at the outset the nature and the seriousness of the breach committed by the applicant company. Without underestimating the importance of State control in the field of internet communications, the Court cannot but note that the Government were only able to cite theoretical and abstract negative consequences of the applicant company's failure to comply with the procedural requirement. They could not indicate any concrete detriment caused by the applicant company's omission to have its address modified in the text of its licences. Indeed, it is common ground that ANRTI was well aware of the applicant company's change of address and it had no difficulty in contacting Megadat.com on 24 September 2003 (see paragraph 12 above). Moreover, it is similarly undisputed that the applicant company kept its old address and any attempt to contact it at that address would have certainly been successful. Immediately after changing address, the applicant company informed the State Registration Chamber and the Tax Authorities (see paragraph 9 above). Accordingly, the company could not be suspected of any intention to evade taxation in connection with its failure to notify its change of address to ANRTI. Nor had it been shown that any of the company's clients had problems in contacting the company due to the change of address. It is also important to note that the applicant company did in fact inform ANRTI about its change of address in May 2003 and even requested a third licence using its new address. For reasons which ANRTI did not spell out at the time, the new licence was issued with the old address on it.
69. Against this background, the Court notes that the measure applied to the applicant company was of such severity that the company, which used to be the largest in Moldova in the field of internet communications, had to wind up its business and sell all of its assets within months.

Not only did the measure have consequences for the future, but it was also applied retrospectively, thus prompting sanctions and investigations by various State authorities, such as the Tax Authorities and the Centre for Fighting Economic Crime and Corruption (see paragraph 32 above).

70. The Court must also have regard to the conduct of ANRTI in its dealings with the applicant company. It notes in this connection that the applicant company had operated at all times, notwithstanding the technical flaw in its licences, with the acquiescence of ANRTI. It recalls that ANRTI had been apprised of the change of address in May 2003, at the time of the applicant company's application for a third licence. Without giving reasons, ANRTI failed to take note of the change of address and issued the applicant company with a new licence indicating the old address in it. Had ANRTI considered that the defect in the licence was a matter of public concern, it could have intervened at that stage. However, it failed to do so.
71. The Court further notes that in ANRTI's letter of 17 September 2003 the applicant company was clearly led to believe that it could continue to operate provided it complied with the instructions contained therein within ten days. In these circumstances it can only be concluded that the applicant company, by submitting an application for the amendment of its licences within the time-limit, could reasonably expect that it would not incur any prejudice. Despite the encouragement given by it to the applicant company, ANRTI invalidated its licences on 6 October 2003 (see, *mutatis mutandis*, *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, § 51 and *Stretch v. the United Kingdom*, no. 44277/98 44277/98, § 34, 24 June 2003).
72. The Court recalls in this connection that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency (see *Beyeler v. Italy* [GC], no. 33202/96 33202/96, § 120, ECHR 2000-I). It cannot be said that the conduct of ANRTI complied with these principles.
73. The Court has also given due consideration to the procedural safeguards available to the applicant company to defend its interests. It notes in the first place that the applicant company was not given an opportunity to appear and explain its position before ANRTI. Procedural

safeguards also appear to have failed at the stage of the court proceedings. While the case was not one which required special expediency under the domestic law, the Court of Appeal appears to have acted with particular diligence in that respect. After setting the date of the first hearing, the Court of Appeal acceded to ANRTI's request to speed up the proceedings and advanced the hearing by two weeks (see paragraph 21 above). Not only did the Court of Appeal decide the case in the applicant company's absence, but it failed to provide reasons for dismissing the latter's request for adjournment. The Court recalls in this connection that the matter to be examined by the Court of Appeal affected the applicant company's economic survival (see paragraph 69 above).

74. Moreover, the domestic courts did not give due consideration to some of the major arguments raised by the applicant company in its defence, such as the lack of procedural safeguards before the ANRTI and the alleged discriminatory treatment. The examination carried out by the courts appears to have been very formalistic and limited to ascertaining whether the applicant company had failed to inform ANRTI about the change of its address. No balancing exercise appears to have been carried out between the general issue at stake and the sanction applied to the applicant company.
75. The Court further notes the applicant company's allegation that it was the only one from the list of ninety-one companies to which such a severe measure was applied. The Government disputed this allegation and made two conflicting submissions. Firstly, they argued that the other ninety companies concerned had committed other, less serious irregularities, such as, *inter alia*, failure to present to ANRTI annual reports (see paragraph 59 above). Secondly, they argued that at least three other companies were in a similar position and were treated in a similar manner to the applicant company.
76. Having examined both submissions made by the Government, the Court cannot accept them. As regards the first one, it finds it inconsistent with the minutes of ANRTI's meeting of 17 September 2003, in which it was clearly stated that the companies concerned had failed to pay a yearly regulatory fee and/or to present information about changes of address within the prescribed time-limits (see paragraph 11 above). The minutes do not contain reference to irregularities such as failure to present annual reports. Moreover, this submission was

made for the first time by the Government in the proceedings before the Court, and must therefore be treated with caution especially in the absence of any form of substantiation (see, *mutatis mutandis*, *Sarban v. Moldova*, no. 3456/05, § 82, 4 October 2005). No such submissions appear to have been made by ANRTI during the domestic proceedings despite the applicant company's clear and explicit contention about alleged discriminatory treatment (see paragraph 24 above). Regrettably, the Supreme Court of Justice disregarded the applicant company's complaints about discrimination, apparently treating them as irrelevant.

77. As regards the Government's second submission, the Court has examined the parties' statements (see paragraphs 54 and 60 above) and the evidence adduced by them, and finds that the Government have failed to show that there were other companies in an analogous situation which were treated in the same manner as the applicant company.
78. The Court also notes that the above findings do not appear to be inconsistent with the previous practice of ANRTI as it appears from the minutes of its meetings of 12 June and 17 July 2003, when several companies had their licences suspended for failure to comply with section 3.5.2 of its Regulations (see paragraph 35 above). The Government did not contest the existence of such a practice.
79. The arbitrariness of the proceedings, the discriminatory treatment of the applicant company and the disproportionately harsh measure applied to it lead the Court to conclude that it has not been shown that the authorities followed any genuine and consistent policy considerations when invalidating the applicant company's licences. Notwithstanding the margin of appreciation afforded to the State, a fair balance was not preserved in the present case and the applicant company was required to bear an individual and excessive burden, in violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

80. The applicant company also complained that by invalidating its licences the authorities had

subjected it to discrimination in comparison to other companies in an analogous situation. As this complaint relates to the same matters as those considered under Article 1 of Protocol No. 1, the Court does not consider it necessary to examine it separately.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

82. The applicant company submitted that since its documents were seized by the Centre for Fighting Economic Crime and Corruption, it was unable to present any observations concerning the pecuniary damage sustained. Accordingly, it asked the Court to reserve the question of just satisfaction.
83. The Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Moldovan Government and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the application admissible;
2. Holds that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. Holds that it is not necessary to examine separately the applicant's complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;
4. Holds
 - (a) that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
 - (b) reserves the said question;
 - (c) invites the Moldovan Government and the

applicant company to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;

- (d) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and notified in writing on 8 April 2008, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Lawrence Early, *Registrar*

Nicolas Bratza, *President*

ECHR

ECJ

SECOND SECTION

CASE OF RAMANAUSKAS v LITHUANIA

(Application no. 74420/01)

JUDGMENT

STRASBOURG
5 February 2008

INVESTIGATION, INCITEMENT TO CRIME, SPECIAL INVESTIGATIVE TECHNIQUES, FAIR TRIAL, UNDERCOVER

IN THE CASE OF RAMANAUSKAS V. LITHUANIA,

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

Nicolas Bratza, *President*,

Jean-Paul Costa, *appointed to sit in respect of Lithuania*,

Christos Rozakis,

Boštjan M. Zupančič,

Peer Lorenzen,

Françoise Tulkens,

Ireneu Cabral Barreto,

Rıza Türmen,

Corneliu Bîrsan,

András Baka,

Mindia Ugrekhelidze,

Antonella Mularoni,

Stanislav Pavlovski,

Elisabet Fura-Sandström,

Khanlar Hajiyev,

Dean Spielmann,

Renate Jaeger, *judges*,

and **Michael O'Boyle**, *Deputy Registrar*,

Having deliberated in private on 28 March and 12 December 2007,

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

PROCEDURE

1. The case originated in an application (no. 74420/01) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Kęstas Ramanauskas ("the applicant"), on 17 August 2001.
2. The applicant, who was granted legal aid, was represented by Mr R. Girdžiūšas, a lawyer practising in Kaunas. The Lithuanian Government ("the Government") were represented by their

Agent, Ms E. Baltutytė.

3. The applicant alleged, in particular, that he had been the victim of entrapment and that he had been denied the opportunity to examine a key witness in criminal proceedings against him.
4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Danutė Jočienė, the judge elected in respect of Lithuania, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Jean-Paul Costa, the judge elected in respect of France, to sit in her place (Article 27 § 2 of the Convention and Rule 29 § 1).
5. On 26 April 2005 the application was declared partly admissible by a Chamber of the Second Section composed of the following judges: András Baka, Jean-Paul Costa, Rıza Türmen, Karel Jungwiert, Mindia Ugrekhelidze, Antonella Mularoni, Elisabet Fura-Sandström, and also Stanley Naismith, Deputy Section Registrar. On 19 September 2006 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).
6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 § 2 and 3 of the Convention and Rule 24.
7. The applicant and the Government each filed written observations on the merits.
8. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 March 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms E. Baltutytė, *Agent*,
Ms S. Balčiūnienė, *Adviser*;

(b) *for the applicant*

Ms A. Vosyliūtė, *Counsel*,
Mr K. Ramanauskas, *Applicant*.

The Court heard addresses by Ms Baltutytė and Ms Vosyliūtė.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, Mr Kęstas Ramanauskas, is a Lithuanian national who was born in 1966 and lives in Kaišiadorys.
10. He formerly worked as a prosecutor in the Kaišiadorys region.
11. The applicant submitted that in late 1998 and early 1999 he had been approached by AZ, a person previously unknown to him, through VS, a private acquaintance. AZ had asked him to secure the acquittal of a third person and had offered him a bribe of 3,000 United States dollars (USD) in return. The applicant had initially refused but had later agreed after AZ had reiterated the offer a number of times.
12. The Government submitted that VS and AZ had approached the applicant and negotiated the bribe with him on their own private initiative, without having first informed the authorities. They alleged that AZ had suspected the applicant of having accepted bribes in the past.
13. On an unspecified date AZ, who was in fact an officer of a special anti-corruption police unit of the Ministry of the Interior (*Specialiuju tyrimu tarnyba* – “the STT”), informed his employers that the applicant had agreed to accept a bribe.
14. On 26 January 1999 the STT applied to the Deputy Prosecutor General, requesting authorisation to use a criminal conduct simulation model (“the model” – see paragraph 32 below). The request stated:

“Senior Commissar [GM], Head of the Operational Activities Division of the [STT], having had access to information concerning [the applicant’s] criminal conduct, has established that [the applicant] takes bribes since he has agreed to assist a defendant, [MN], in return for payment.

In implementing the criminal conduct simulation model, which is intended to establish, record and put an end to [the applicant’s] unlawful acts, an STT official [AZ] would hand over 12,000 litai, in foreign currency if required.

Implementation of [the model] would require [AZ] to simulate criminal acts punishable under Articles 284 and 329 of the [Criminal Code].

With reference to section 11 of the Operational Activities Act ..., the undersigned requests the Deputy Prosecutor General to authorise the criminal conduct simulation model for a period of one year.

This request is based on the information obtained during the preliminary inquiry.”

15. On 26 January 1999 the STT sent a letter to the Deputy Prosecutor General outlining the model as follows:

“[STT] officials have collected operational information attesting that [the applicant] takes bribes.

In implementing the criminal conduct simulation model, which is intended to establish, record and put an end to [the applicant’s] unlawful acts, an STT official [AZ] would simulate the offences of offering a bribe and breaching currency and securities regulations.

In view of the above, and in accordance with section 11 of the Operational Activities Act, I hereby request you to authorise the criminal conduct simulation model and thus to exempt [AZ] from criminal responsibility for the offences under Articles 284 and 329 of the [Criminal Code] which are intended to be simulated.

[The model] would be implemented by STT officials on the basis of a separate operational action plan.

Implementation of [the model] would be financed by STT resources.”

16. On 27 January 1999 the Deputy Prosecutor General gave the required authorisation by countersigning and placing his official seal on the letter in question. This document constituted the final version of the model.
17. On 28 January 1999 the applicant accepted USD 1,500 from AZ.
18. On 11 February 1999 AZ gave the applicant a further USD 1,000.
19. On the same date the Prosecutor General instituted a criminal investigation in respect of the applicant for accepting a bribe, an offence punishable under Article 282 of the Criminal Code in force at that time.
20. On 17 March 1999 the Prosecutor General dismissed the applicant from his post as a prosecutor on grounds relating to corruption. Referring to the relevant provisions of the Prosecuting Authorities Act, the Prosecutor General stated that the applicant had been dismissed

for a disciplinary offence and activities discrediting the prosecuting authorities.

21. On an unspecified date the pre-trial investigation was concluded and the case was referred to the Kaunas Regional Court. During the trial the applicant pleaded guilty but alleged that he had succumbed to undue pressure from AZ in committing the offence.
22. On 18 July 2000 the Deputy Prosecutor General authorised a judge of the Kaunas Regional Court to disclose the details of how the model had been implemented "provided that this [did] not harm the interests" of the individuals and authorities involved in the operation.
23. On 29 August 2000 the Kaunas Regional Court convicted the applicant of accepting a bribe of USD 2,500 from AZ, in breach of Article 282 of the Criminal Code then in force, and sentenced him to 19 months and six days' imprisonment. The court also ordered the confiscation of his property in the amount of 625 Lithuanian litai (LTL). It found it established, firstly, that AZ had given the applicant the bribe during their meetings on 28 January and 11 February 1999, in return for a promise that the applicant would intervene favourably in a criminal case against a third person and, secondly, that AZ had entered into contact and negotiated with the applicant through VS.
24. The court's conclusions were mainly based on the evidence given by AZ and on secret recordings of his conversations with the applicant. The court had also examined AP, a prosecutor working in the same regional office as the applicant, whose evidence had not gone beyond confirmation that the applicant had dealt with the criminal case against the third person (MN) indicated by AZ. VS was not summoned to give evidence at the trial as his place of residence was unknown, but a statement by him, which had been recorded by the pre-trial investigators, was read out in court. However, the Kaunas Regional Court did not take it into account in determining the applicant's guilt. The court's judgment did not contain any discussion of the authorisation and implementation of the model.
25. On 26 October 2000 the Court of Appeal upheld the judgment on an appeal by the applicant, finding that there had been no incitement and that the authorities had not put any active pressure on the applicant to commit the offence.

26. On 23 November 2000 the applicant lodged a cassation appeal. Relying in particular on the Constitutional Court's decision of 8 May 2000 (see paragraph 34 below), he argued that there were no statutory provisions allowing the authorities to incite or provoke a person to commit an offence. In that connection, he submitted that on several occasions he had unsuccessfully requested the first-instance and appeal courts to consider the influence exerted by AZ and VS on his predisposition to commit the offence. He further complained that the lower courts had not taken into account the fact that AZ was a police officer and not a private individual. He argued that AZ had incited him to accept the bribe. Furthermore, he stated that the authorities had had no valid reason to initiate an undercover operation in his case and that they had overstepped the limits of their ordinary investigative powers by inducing him to commit an offence. He also submitted that VS had not been examined during the trial.
27. On 27 February 2001 the Supreme Court dismissed the applicant's cassation appeal in a decision which included the following passages:

"There is no evidence in the case file that [the applicant's] free will was denied or otherwise constrained in such a way that he could not avoid acting illegally. [AZ] neither ordered [the applicant] to intervene in favour of the person offering the bribe, nor did he threaten him. He asked him orally for help in securing the discontinuation of proceedings [against the third person] ... K. Ramanauskas understood that the request was unlawful ... [and] the Regional Court was therefore correct in finding him guilty ...

[The applicant] contests the lawfulness of [the model] ..., stating that the case discloses a manifest example of incitement (*kurstymas*) by the officers of the special services to accept the bribe ... [He submits that, by law], authorisation to simulate a criminal act cannot be given in the absence of evidence of the preparation or commission of an offence. Therefore, in his view, such a procedure cannot pursue the aim of inciting a person or persons to commit a crime. If the model were used for that purpose, it would be unlawful [and] the information thereby obtained could not be admitted in evidence ... [The] model cannot be authorised and implemented unless a person has planned or started to commit an offence, evidence of which should be submitted to a prosecutor ... It appears from the case file that [the authorities] were contacted by [VS] and [AZ] after [their initial] meetings with K. Ra-

manauskas, during which he had agreed in principle that he would perform the requested actions for USD 3,000 ... Accordingly, in authorising the use of the model, [the authorities] merely joined a criminal act which was already in progress.

...

The case file contains no evidence that [VS] is an employee of the special services ... [AZ] works at the STT as a police driver ... but this does not mean that he is prohibited from acting in a private capacity. There is no evidence that [VS] and [AZ] negotiated with K. Ramanauskas on police instructions. It has, however, been established that [VS] and [AZ] handed money to him on the police's orders.

The court considers that provocation (*provokacija*) to commit a crime is similar but not equivalent to incitement (*kurstymas*) ... Provocation is a form of incitement consisting in encouraging a person to commit an offence ... entailing his criminal responsibility so that he can then be prosecuted on that account. While such conduct is morally reprehensible, the term 'provocation' is not used either in criminal or procedural law or in the Operational Activities Act of 22 May 1997 ... From a legal standpoint, provocation does not constitute a factor exempting from criminal responsibility a person who has thereby been induced to commit an offence ...

Since the case file contains contradictory evidence as to the conduct of [VS] and [AZ] before the criminal conduct simulation model was authorised, it is difficult to establish who was the instigator (*iniciatorius*) of giving and accepting the bribe, or, in other words, who incited whom to give or accept the bribe. [VS] ... stated that, after he had contacted K. Ramanauskas to ask him to intervene in securing the discontinuation of the criminal case [against the third person], K. Ramanauskas had been the first to say that he could settle the matter for USD 3,000. For his part, [AZ] ... stated that K. Ramanauskas had said that the discontinuation of the case would cost USD 3,000. In his testimony K. Ramanauskas alleged that [VS] had asked him if USD 3,000 would be enough to ensure that the case was discontinued. In these circumstances, it cannot be said with any certainty who was the instigator of the bribery, nor can it be inferred that [VS] and [AZ] incited K. Ramanauskas to accept the bribe. Furthermore, there is no reason to conclude that [VS] and [AZ] provoked the offence committed by K. Ramanauskas in accepting the bribe. It can only be said unequivocally that the initiative (*iniciatyva*) to

apply to K. Ramanauskas in order to have the case [against the third person] discontinued came from [AZ].

However, the court considers that the answer to the question whether a person has actually induced (*palenkė*) or otherwise incited (*sukurstė*) another to offer or accept a bribe is of no consequence as far as the legal classification of [the applicant's] conduct is concerned. Incitement (*kurstymas*) to commit an offence is one of the various forms of complicity. Under the branch of criminal law dealing with complicity, incitement is a form of conspiracy. A person who commits an offence after having been incited to do so incurs the same criminal responsibility as a person who acts of his own volition ... Even assuming that K. Ramanauskas was incited by [VS] and [AZ] to accept a bribe, it must be emphasised that the incitement took the form of an offer, and not of threats or blackmail. He was therefore able to decline (and ought to have declined) the illegal offer ... It follows from the testimony of K. Ramanauskas that he understood the nature of the acts he was being asked to carry out, and accepted [the bribe] of his own free will ...

At the same time it must be noted that it is a specific feature of bribery as an offence that one side is necessarily the instigator (*kurstytojas*) of the offence. A State official soliciting a bribe is an instigator within the meaning of Article 284 [of the Criminal Code then in force – 'the CC'] in that he incites (*kursto*) another to pay him a bribe, in breach of that Article. [A person] offering a bribe to a State official is necessarily an instigator within the meaning of Article 282 of the CC since, by making the offer, he incites the official to accept a bribe, that is, to commit the offence provided for in that Article ... Both the person giving and the person accepting a bribe exercise their free will ... and may therefore choose between possible forms of conduct. A person who intentionally chooses the criminal option while having the possibility of resisting the incitement rightly incurs criminal responsibility, regardless of the outside factors that may have influenced his choice ..."

28. On 27 March 2001 the applicant began serving his prison sentence. He remained in prison until 29 January 2002, when he was released on licence.
29. Furthermore, the prohibition on his working in the legal service was lifted in July 2002. In January 2003 his conviction was expunged.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. The Criminal Code applicable at the material time punished the acts of accepting a bribe (Article 282), offering a bribe (Article 284) and breaching currency and securities regulations (Article 329).
31. Article 18 of the Criminal Code in force at the time and Article 24 of the present Criminal Code (in force since 1 May 2003) provide that incitement is one of the possible forms of complicity in an offence and is punishable alongside other forms of assistance (aiding and abetting, organising, executing) in the commission of an offence. These provisions define an instigator (*kurstytojas*) as a person who induces (*palenkė*) another to commit an offence. The term *kurstymas* (which can also be translated as “incitement” or “instigation”) is normally used in domestic legal doctrine to define the notion of complicity.
32. The Operational Activities Act (*Operatyvinės veiklos įstatymas*) was enacted in 1997 and remained in force until 27 June 2002. Section 2(12) of the Act defined a “criminal conduct simulation model” (*Nusikalstamos veikos imitacijos modelis*) as a set of actions entailing the elements of an offence, authorised with a view to protecting the best interests of the State, society or the individual.

Section 4(2) of the Act authorised the initiation of “operational activities” within the meaning of the Act where:

- (a) the authorities did not know the identity of an individual who was preparing to commit or had committed a serious offence;
- (b) the authorities had obtained “verified preliminary information” about a criminal act;
- (c) the authorities had obtained “verified preliminary information” about a person’s membership of a criminal organisation;
- (d) the authorities suspected activities by foreign secret services; or
- (e) an accused, defendant or convicted person had absconded.

Section 7(2)(3) of the Act provided that the authorities could have recourse to a model only in one of the above scenarios, and then only on condition that the requirements of sections 10 and 11 of the Act were satisfied.

Sections 10 and 11 of the Act empowered the Prosecutor General or his deputy to authorise the use of a criminal conduct simulation model on an application by the police or the investigative authorities. The application for authorisation had to include, among other things, a reference to the limits of the conduct intended to be simulated (that is, the legal characterisation under a specific provision of the Criminal Code of the actions to be taken) and the purpose of the operation, including its interim and ultimate aims.

Section 8(1)(3) of the Act required the authorities to protect persons from active pressure to commit an offence against their own will.

Section 13(3) of the Act afforded the right to contest the lawfulness of evidence obtained by means of special techniques.

33. In the proceedings which gave rise to the case of *Pacevičius and Bagdonas v. Lithuania* (no. 57190/00, struck out of the Court’s list of cases on 23 October 2003), the Court of Appeal gave judgment on 29 April 1999, holding, *inter alia*:

“Section 2 of the Operational Activities Act defines [the criminal conduct simulation model] as a set of actions entailing the elements of an offence, authorised with a view to protecting the best interests of the State, society or the individual. ... The model may be authorised only for operations by [the police] and does not apply to individuals who commit offences.

The request [by the police for authorisation of the model in this case] referred to the aim of the intended operation, namely identification of all persons involved in a [human] trafficking network.

Of course, the [police] officers could not foresee who would take part in this crime ... One of the aims of the [prosecution in] authorising the model was to establish the identities of members of a criminal organisation.”

In a judgment of 12 October 1999 in the same case the Supreme Court held as follows regarding the use of police undercover agents:

“[The applicants] were not aware of the ongoing operation at the time they committed the offence. They were convinced that they were trafficking persons who had illegally crossed the Lithuanian border. As Article 82-1 of the Criminal Code provides that the offence in question is committed where direct intent has been established, [the applicants] error as to the nature of the act they were committing is of no relevance to the legal classification

of their conduct. Since they were convinced that they were trafficking [human beings], their acts fell objectively within the scope of the offence defined in Article 82-1 ... Their conduct was therefore rightly classified as a completed offence. The authorisation given to the authorities [to use the model] served the sole purpose of legitimising the actions of the police officers taking part in the trafficking."

34. On 8 May 2000 the Constitutional Court ruled that the Operational Activities Act was generally compatible with the Constitution. It held in particular that the model constituted a specific form of operational activity using intelligence and other secret measures in order to investigate organised and other serious crime. It emphasised that the use of clandestine measures, as such, was not contrary to the European Convention on Human Rights, or indeed the Constitution, as long as such measures were based on legislation that was clear and foreseeable in effect and were proportionate to the legitimate aims pursued. The Constitutional Court found that the Act provided a clear definition of the scope and procedure for the use of various forms of operational activities, including the model.

Referring in particular to the *Teixeira de Castro v. Portugal* case (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV), the Constitutional Court emphasised that a criminal conduct simulation model could not be used for the purpose of incitement (*kurstoma*) or provocation (*provokuojama*) to commit an offence that had not already been initiated. It further held that this investigative technique did not allow officials to incite the commission of an offence by a person who had abandoned plans to commit the offence. It added that, by authorising and implementing the model, the investigative authorities and their undercover agents were restricted to "joining criminal acts that [had] been initiated but not yet completed". The Constitutional Court emphasised that it was for the courts of ordinary jurisdiction dealing with allegations of incitement or of other forms of abuse of the model to establish in each particular case whether the investigating authorities had gone beyond the limits of the legal framework within which the model had been authorised.

The Constitutional Court also stated that authorisation of the model did not amount to a licence for a police officer or third person acting as an undercover agent to commit a crime but simply legitimised – from the point of view

of domestic law – the acts which the agent might be required to carry out in simulating an offence. The main aim of operational activities, including the model, was to facilitate criminal investigations, and on that account they came within the sphere of competence of both the prosecuting authorities and the courts. Accordingly, the model did not require judicial authorisation but simply authorisation by a prosecutor. The Constitutional Court further noted that secret audio and video recordings of conversations taking place in the context of operational activities under the Act were not subject to judicial authorisation and that this was compatible with the Constitution. Under section 10(1) of the Act, only wiretapping and surveillance techniques using stationary devices required a court order.

III. RELEVANT INTERNATIONAL LAW

35. The Council of Europe's Criminal Law Convention on Corruption (ETS no. 173, 27 January 1999) provides in Article 23 that each party is to adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, to enable it to facilitate the gathering of evidence in this sphere. The explanatory report on the Convention further specifies that "special investigative techniques" may include the use of undercover agents, wiretapping, interception of telecommunications and access to computer systems.
- Article 35 states that the Convention does not affect the rights and undertakings deriving from international multilateral conventions concerning special matters.
36. The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS no. 141, 8 November 1990) provides, in Article 4, that each party should consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto.
37. The use of special investigative techniques, such as controlled deliveries in the context of illicit trafficking in narcotic drugs, is also provided for in Article 73 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, signed in Schengen on 19

June 1990.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

38. The applicant submitted that he had been incited to commit a criminal offence, in breach of his right to a fair trial under Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...”

A. The parties' submissions

1. *The applicant*

39. The applicant submitted that his right to a fair trial had been infringed in that he had been incited to commit an offence that he would never have committed without the intervention of “agents provocateurs”.
40. He argued that the authorities bore responsibility for the conduct of AZ and VS. In its judgment in the instant case the Supreme Court had acknowledged that AZ was in fact an officer of the special anti-corruption police unit of the Ministry of the Interior (STT) and had instigated the offence. The applicant contended that the authorities could not legitimately claim that they had simply “joined” a criminal act instigated by one of their own employees, and asserted that they should accept full responsibility for the acts carried out by AZ before the criminal conduct simulation model had been authorised. In any event, all his meetings with AZ – both before and after the model had been authorised – had taken place on the latter’s initiative, as was attested by the record of AZ’s telephone calls to the applicant. The applicant accordingly submitted that the crime would not have been committed without the authorities’ intervention.
41. The applicant further complained that the domestic courts had failed to give an adequate answer to the question of the authorities’ responsibility for the use of entrapment in inducing him to commit a crime. He submitted that by putting him in contact with AZ, VS had played a crucial role in the model that had led

him to accept the bribe. He asserted that VS was a long-standing informer of the police, as was attested by the fact that the police had authorised him to act as an undercover agent in the case. The applicant inferred from this that the examination of VS would have been crucial in establishing whether he had been incited to commit an offence and that the authorities’ failure to summon VS to appear as a witness had breached the relevant provisions of Article 6. The court had not sought to establish whether VS had collaborated with the judicial authorities. The applicant therefore submitted that he had been denied a fair hearing, in breach of Article 6 § 1 of the Convention.

2. *The Government*

42. The Government submitted that, since the Court was not a “fourth-instance judicial body”, it did not have jurisdiction to deal with the applicant’s complaints, which related mostly to questions of fact and of application of domestic law.
43. They submitted that in any event the authorities had not incited the applicant to commit an offence and that the model forming the subject of his complaints had not infringed his rights under Article 6.
44. In this connection, the Government pointed out that VS and AZ had approached the applicant and negotiated the bribe on their own private initiative, without first having informed the authorities. The use of the model in issue had been authorised subsequently in order to protect the fundamental interests of society, on the basis of the preliminary information submitted by AZ attesting to the applicant’s predisposition to accept a bribe. They asserted that, in authorising and implementing the model complained of by the applicant, the authorities had pursued the sole aim of “joining” an offence which the applicant had planned to commit with VS and AZ, who had acted on their own initiative and “in a private capacity”. The authorities could not be held responsible for any acts that VS and AZ had carried out before the procedure in question had been authorised.
45. The Government added that only AZ had acted as an undercover agent of the authorities, as the model had been authorised on his behalf. They pointed out that, before requesting authorisation, the STT had carefully verified the information submitted by AZ about the applicant’s criminal inclinations and had found it

- to be corroborated by other data already in its possession. The investigating authorities had drawn up a precise action plan for the implementation of the model, clearly defining the nature and scope of the actions they intended to carry out. The Government stated that they were unable to provide the Court with a copy of the action plan or any other data from the STT's file on the applicant since it had been destroyed on the expiry of the five-year period laid down in the Ministry of the Interior's regulations for keeping secret files. However, they assured the Court that in all cases of this kind, the Prosecutor General or his deputy would carefully scrutinise the entire STT file on the suspect before authorising a criminal conduct simulation model.
46. The Government asserted that the offence would in any event have been committed without the intervention of the State authorities, since even before the model had been authorised, the applicant had clearly been predisposed to commit the offence. In support of that argument they observed that after the model had been authorised, the applicant had instantly accepted AZ's oral offer of a bribe and that the authorities had not subjected him to any threats or other forms of undue pressure. The applicant's guilt was aggravated by the fact that, as a law-enforcement official, he was perfectly aware that his actions were illegal. In conclusion, contrary to the position in the *Teixeira de Castro* case (cited above), there had been no incitement to break the law in the instant case.
47. Having regard to all these factors, the Government concluded that the applicant had had a fair trial.
- B. The Court's assessment**
48. The applicant complained of the use of evidence resulting from police incitement in the proceedings against him, in breach of his right to a fair trial.
- 1. General principles**
49. The Court observes at the outset that it is aware of the difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences. To perform this task, they are increasingly required to make use of undercover agents, informers and covert practices, particularly in tackling organised crime and corruption.
50. Furthermore, corruption – including in the judicial sphere – has become a major problem in many countries, as is attested by the Council of Europe's Criminal Law Convention on the subject (see paragraph 35 above). This instrument authorises the use of special investigative techniques, such as undercover agents, that may be necessary for gathering evidence in this area, provided that the rights and undertakings deriving from international multilateral conventions concerning "special matters", for example human rights, are not affected.
51. That being so, the use of special investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits (see paragraph 55 below).
52. In this connection, it should be reiterated that it is the Court's task, in accordance with Article 19, to ensure the observance of the engagements undertaken by the States Parties to the Convention. The admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 50; *Teixeira de Castro*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34; *Sequeira v. Portugal* (dec.), no. 73557/01, ECHR 2003-VI; and *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV). In this context, the Court's task is not to determine whether certain items of evidence were obtained unlawfully, but rather to examine whether such "unlawfulness" resulted in the infringement of another right protected by the Convention.
53. More particularly, the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative

measures in question (see *Khudobin v. Russia*, no. 59696/00, § 135, 26 October 2006, and, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 24-26, § § 52-56). While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (see *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 13-15, § 25).

54. Furthermore, while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see, among other authorities, *Teixeira de Castro*, cited above, pp. 1462-64, § § 35-36 and 39; *Khudobin*, cited above, § 128; and *Vanyan v. Russia*, no. 53203/99, § § 46-47, 15 December 2005).
55. Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Teixeira de Castro*, cited above, p. 1463, § 38, and, by way of contrast, *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII).
56. In the case of *Teixeira de Castro* (cited above, p. 1463, § 38) the Court found that the two police officers concerned had not confined themselves “to investigating Mr Teixeira de Castro’s criminal activity in an essentially passive manner, but [had] exercised an influence such as to incite the commission of the offence”. It held that their actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention it would have been committed (*ibid.*, p. 1464, § 39).

In reaching that conclusion the Court laid stress on a number of factors, in particular the fact that the intervention of the two officers had not taken place as part of an anti-drug-trafficking operation ordered and supervised by a judge and that the national authorities did not appear to have had any good reason to suspect the applicant of being a drug dealer: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug trafficking until he was approached by the police (*ibid.*, p. 1463, § § 37-38).

More specifically, the Court found that there were no objective suspicions that the applicant had been involved in any criminal activity. Nor was there any evidence to support the Government’s argument that the applicant was predisposed to commit offences. On the contrary, he was unknown to the police and had not been in possession of any drugs when the police officers had sought them from him; accordingly, he had only been able to supply them through an acquaintance who had obtained them from a dealer whose identity remained unknown. Although Mr Teixeira de Castro had potentially been predisposed to commit an offence, there was no objective evidence to suggest that he had initiated a criminal act before the police officers’ intervention. The Court therefore rejected the distinction made by the Portuguese Government between the creation of a criminal intent that had previously been absent and the exposure of a latent pre-existing criminal intent.

57. Using the same criteria, in the *Vanyan* judgment (cited above) the Court found a violation of Article 6 § 1 in connection with a test purchase of drugs which it found had constituted incitement. Although the operation in question was carried out by a private individual acting as an undercover agent, it had actually been organised and supervised by the police.
58. In the *Eurofinacom* decision (cited above) the Court, while reaffirming the principles set out above, held that the instigation by police officers of offers of prostitution-related services made to them personally had not in the true sense incited the commission by the applicant company of the offence of living on immoral earnings, since at the time such offers were made the police were already in possession of information suggesting that the applicant company’s data-communications service was being used by prostitutes to contact potential

clients.

59. In the case of *Sequeira* (cited above) the Court found that there had been no police incitement, basing its finding on the following considerations:

“In the present case, it has been established by the domestic courts that A. and C. began to collaborate with the criminal-investigation department at a point when the applicant had already contacted A. with a view to organising the shipment of cocaine to Portugal. Furthermore, from that point on, the activities of A. and C. were supervised by the criminal-investigation department, the prosecution service having been informed of the operation. Finally, the authorities had good reasons for suspecting the applicant of wishing to mount a drug-trafficking operation. These factors establish a clear distinction between the present case and *Teixeira de Castro*, and show that A. and C. cannot be described as *agents provocateurs*. As the domestic courts pointed out, as in *Lüdi [Lüdi v. Switzerland]*, judgment of 15 June 1992, Series A no. 238, their activities did not exceed those of undercover agents.”

60. The Court has also held that where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards (see *Khudobin*, cited above, § § 133-135).
61. Lastly, where the information disclosed by the prosecution authorities does not enable the Court to conclude whether the applicant was subjected to police incitement, it is essential that the Court examine the procedure whereby the plea of incitement was determined in each case in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings and to equality of arms (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 39647/98 and 40461/98, § § 46-48, ECHR 2004-X, and, *mutatis mutandis*, *Jasper v. the United Kingdom* [GC], no. 27052/95, § § 50 and 58, 16 February 2000).

2. Application of these principles in the present case

62. It appears from the evidence in the present

case that a request for authorisation to use a criminal conduct simulation model, together with a request for exemption from criminal responsibility, was made by the STT on 26 January 1999, by which time AZ had already contacted the applicant through VS and the applicant had apparently agreed to seek to have a third person acquitted in return for a bribe of USD 3,000. In the Government's submission, that sequence of events showed that VS and AZ had acted on their own private initiative without having first informed the authorities. By authorising and implementing the model, they argued, the prosecuting authorities had merely put themselves in a position to establish an offence which the applicant had already planned to commit. They had therefore not been guilty of incitement.

63. The Court is unable to accept such reasoning. The national authorities cannot be exempted from their responsibility for the actions of police officers by simply arguing that, although carrying out police duties, the officers were acting “in a private capacity”. It is particularly important that the authorities should assume responsibility as the initial phase of the operation, namely the acts carried out up to 27 January 1999, took place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the use of the model and exempting AZ from all criminal responsibility, the authorities legitimised the preliminary phase *ex post facto* and made use of its results.
64. Moreover, no satisfactory explanation has been provided as to what reasons or personal motives could have led AZ to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he was not prosecuted for his acts during this preliminary phase. On this point, the Government simply referred to the fact that all the relevant documents had been destroyed.
65. It follows that the Lithuanian authorities' responsibility was engaged under the Convention for the actions of AZ and VS prior to the authorisation of the model. To hold otherwise would open the way to abuses and arbitrariness by allowing the applicable principles to be circumvented through the “privatisation” of police incitement.
66. The Court must therefore examine whether the actions complained of by the applicant, which were attributable to the authorities, amounted to incitement prohibited by Article 6.

67. To ascertain whether or not AZ and VS confined themselves to “investigating criminal activity in an essentially passive manner”, the Court must have regard to the following considerations. Firstly, there is no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences. Secondly, as is shown by the recordings of telephone calls, all the meetings between the applicant and AZ took place on the latter’s initiative, a fact that appears to contradict the Government’s argument that the authorities did not subject the applicant to any pressure or threats. On the contrary, through the contact established on the initiative of AZ and VS, the applicant seems to have been subjected to blatant prompting on their part to perform criminal acts, although there was no objective evidence – other than rumours – to suggest that he had been intending to engage in such activity.
68. These considerations are sufficient for the Court to conclude that the actions of the individuals in question went beyond the mere passive investigation of existing criminal activity.
69. Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. It is therefore not sufficient for these purposes, contrary to what the Government maintained, that general safeguards should have been observed, such as equality of arms or the rights of the defence.
70. It falls to the prosecution to prove that there was no incitement, provided that the defendant’s allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention (see the Court’s case-law cited in paragraphs 49-61 above).
71. The Court observes that throughout the proceedings the applicant maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination – as, indeed, the Constitutional Court urged in its judgment of 8 May 2000 – of whether the prosecuting authorities had gone beyond the limits authorised by the

criminal conduct simulation model (see paragraph 14 above), in other words whether or not they had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police’s involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. This was especially important having regard to the fact that VS, who had originally introduced AZ to the applicant and who appears to have played a significant role in the events leading up to the giving of the bribe, was never called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of these points.

72. However, the domestic authorities denied that there had been any police incitement and took no steps at judicial level to carry out a serious examination of the applicant’s allegations to that effect. More specifically, they did not make any attempt to clarify the role played by the protagonists in the present case, including the reasons for AZ’s private initiative in the preliminary phase, despite the fact that the applicant’s conviction was based on the evidence obtained as a result of the police incitement of which he complained.

Indeed, the Supreme Court found that there was no need to exclude such evidence since it corroborated the applicant’s guilt, which he himself had acknowledged. Once his guilt had been established, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant. However, a confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects.

73. In conclusion, while being mindful of the importance and the difficulties of the task of investigating offences, the Court considers, having regard to the foregoing, that the actions of AZ and VS had the effect of inciting the applicant to commit the offence of which he was convicted and that there is no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant’s trial was deprived of the fairness required by Article 6 of the Convention.
74. There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (D) OF THE CONVENTION

75. The applicant further submitted that the principle of equality of arms and the rights of the defence had been infringed in that during the trial neither the courts nor the parties had had the opportunity to examine VS, one of the two undercover agents involved in the case. He alleged a violation of Article 6 § 1 and 3 (d), the second of which provides:

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

A. The parties' submissions

1. *The applicant*

76. The applicant submitted that his defence rights had been infringed in that during the trial neither the courts nor the parties had had the opportunity to examine VS, a key witness. He alleged that this amounted to a breach of Article 6 § 3 (d) of the Convention.

2. *The Government*

77. The Government submitted that this provision did not guarantee, as such, an absolute right to examine every witness a defendant wished to call. They contended that the arguments advanced by the applicant in support of his complaint that VS had not appeared in court were not persuasive, since the trial courts had not based his conviction on the statement by VS. They added that it had been impossible to secure the attendance of VS as his place of residence was unknown. They submitted that, in any event, the applicant had had the opportunity to contest in open court the other items of evidence against him – chiefly the statement by AZ and the recordings of his conversations with the applicant – on which the courts had based their guilty verdict. The proceedings in issue had therefore complied with the adversarial principle and had not breached the Convention provision relied on by the applicant.

B. The Court's assessment

78. The applicant complained that the proceedings against him had been unfair in that it had

been impossible to obtain the examination of VS as a witness against him.

79. The Court considers that the applicant's complaint under this head is indissociable from his complaint under Article 6 § 1 of the Convention in so far as it merely concerns one particular aspect of the conduct of proceedings which the Court has found to have been unfair.
80. In conclusion, having regard to the findings set out in paragraphs 73-74 above, the Court does not consider it necessary to carry out a separate examination under Article 6 § 3 (d) of the Convention of the applicant's complaint that the proceedings were unfair.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

82. The applicant firstly claimed the sum of 123,283.69 Lithuanian litai (LTL – approximately 35,652 euros (EUR)) for loss of earnings during the period from 11 February 1999 to 29 January 2002, on the basis of a gross monthly salary of LTL 3,472.78 (approximately EUR 1,000). He claimed a further sum of LTL 3,524.60 (approximately EUR 1,021) for the costs incurred in the domestic proceedings, including LTL 3,500 for fees (approximately EUR 1,013.67). Lastly, he sought the reimbursement of LTL 625 (approximately EUR 181) in relation to the confiscation of his property and LTL 420 (approximately EUR 121) for translation costs.
83. The applicant also claimed LTL 300,000 (approximately EUR 86,755) in respect of non-pecuniary damage, on account of the media campaign against him, the harm to his reputation and the anxiety experienced during his ten months in detention.
84. While accepting that the applicant had been dismissed by an order of the Prosecutor General adopted on 17 March 1999, the Government asked the Court to take into account the fact that the applicant had himself tendered his

resignation in a letter of 9 March 1999, thereby manifesting his intention to leave his post. Accordingly, the applicant's claim for loss of earnings was unfounded.

In any event, the applicant's claims were excessive, since they were based on gross monthly salary (LTL 3,472.78) whereas his net monthly salary had been LTL 2,400.47.

85. As to the costs incurred in the domestic proceedings, the Government submitted that they should not be refunded.
86. With regard to non-pecuniary damage, the Government observed that the applicant had failed to establish that there was a causal link between the damage alleged and the violation of the Convention. In any event, the sum claimed was excessive.
87. The Court considers that it would be equitable to make an award in respect of damage. The documents in the case file suggest that the applicant would not have been imprisoned or dismissed from his post in the legal service if the incitement in issue had not occurred. His loss of earnings was actual, and the Government did not dispute this.

In quantifying the damage sustained, the Court considers that it should also take into consideration part of the applicant's costs in the national courts to the extent that they were incurred in seeking redress for the violation it has found (see *Dactylidi v. Greece*, no. 52903/99 52903/99, § 61, 27 March 2003, and *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 21, § 66).

Likewise, the Court considers that the applicant indisputably sustained non-pecuniary damage, which cannot be compensated for by the mere finding of a violation.

88. Having regard to the diversity of factors to be taken into consideration for the purposes of calculating the damage and to the nature of the case, the Court considers it appropriate to award, on an equitable basis, an aggregate sum which takes account of the various considerations referred to above (see *mutatis mutandis*, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96 33202/96, § 26, 28 May 2002). It therefore awards the applicant EUR 30,000 in compensation for the damage sustained, including the costs incurred at domestic level, plus any tax that may be chargeable on this

amount.

B. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 § 1 of the Convention;
2. Holds that it is not necessary to examine the complaint under Article 6 § 3 (d) of the Convention;
3. Holds
 - (a) that the respondent State is to pay the applicant, within three months, EUR 30,000 (thirty thousand euros) in respect of damage, plus any tax that may be chargeable, to be converted into Lithuanian litai at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 February 2008.

Michael O'Boyle, *Deputy Registrar*
Nicolas Bratza, *President*

ECHR

ECJ

FOURTH SECTION

CASE OF WIESER AND BICOS BETEILIGUNGEN GMBH v AUSTRIA

(Application no. 74336/01)

JUDGMENT

STRASBOURG
16 October 2007

FINAL
16/01/2008

COMPUTER, SEIZURE, HARD-DISK, CORRESPONDENCE, PRIVATE LIFE, MISUSE OF POWER, DEMOCRACY, ELECTRONIC DATA

IN THE CASE OF WIESER AND BICOS BETEILIGUNGEN GMBH V. AUSTRIA,

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

Sir Nicolas Bratza, *President*,

Mr J. Casadevall,

Mr G. Bonello,

Mrs E. Steiner,

Mr S. Pavlovski,

Mr L. Garlicki,

Ms L. Mijović, *judges*,

and **Mr T.L. Early**, *Section Registrar*,

Having deliberated in private on 25 September 2007,

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

PROCEDURE

1. The case originated in an application (no. 74336/01) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Gottfried Wieser, an Austrian national, and Bicos Beteiligungen GmbH, a limited liability company with its seat in Salzburg ("the applicants"), on 3 August 2001.
2. The applicants were represented by Mrs P. Patzelt, a lawyer practising in Salzburg. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.
3. The applicants alleged that the search and seizure of electronic data in the context of a search of their premises had violated their rights under Article 8 of the Convention.
4. By a decision of 16 May 2006 the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, who was born in 1949, is a lawyer practising in Salzburg. He is the owner and general manager of the second applicant, a holding company which is, *inter alia*, the sole owner of the limited liability company Novamed.
6. On 30 August 2000 the Salzburg Regional Court (*Landesgericht*), upon a request for legal assistance (*Rechtshilfeersuchen*) by the Naples Public Prosecutor's Office, issued a warrant to search the seat of the applicant company and Novamed. Both companies have their seats at the first applicant's law office.
7. The court noted that in the course of pending criminal proceedings concerning, *inter alia*, illegal trade in medicaments against a number of persons and companies in Italy, invoices addressed to Novamed, owned 100% by the applicant company, had been found. It therefore ordered the seizure of all business documents revealing contacts with the suspected persons and companies.

A. The search of the applicants' premises and seizure of documents and data

8. On 10 October 2000 the search of the seat of the applicant company, which is also the first applicant's law office, was carried out by eight to ten officers of the Salzburg Economic Police (*Wirtschaftspolizei*) and data securing experts (*Datensicherungsexperten*) of the Federal Ministry of the Interior.
9. One group of the officers searched the law office for files concerning Novamed or Bicos in the presence of the first applicant and a representative of the Salzburg Bar Association. All documents were shown to the first applicant and the representative of the Bar Association before seizure.
10. Whenever the first applicant objected to an immediate examination of a document seized it was sealed and deposited at the Salzburg Regional Court as required by Article 145 of the Code of Criminal Procedure (*Strafprozeßordnung* – see paragraph 33 below). All seized or sealed documents were listed in a search report which was signed by the applicant and the officers who had carried out the search.

11. Simultaneously, another group of officers examined the first applicant's computer facilities and copied several files to disks. According to his statement before the Independent Administrative Panel (see paragraph 25 below) the IT specialist who normally serviced the computer facilities was called upon to provide some technical assistance but left again after about half an hour. The representative of the Bar Association was informed about the search of the computer facilities and was also temporarily present. When the officers had terminated the search of the computer facilities, they left without having drawn up a search report and, apparently, also without informing the first applicant about the results of the search.
 12. Later the same day the police officers involved in the search of the applicants' electronic data drew up a data securing report (*Datensicherungsbericht*). Apart from a number of technical details concerning the first applicant's computer facilities, the report states that no complete copy of the server was made. The search was carried out using the names of the companies involved and the names of the suspects in the Italian proceedings. A folder named Novamed containing ninety files was found plus one further file containing one of the search items. All the data were copied to disks. In addition, the deleted items were retrieved and numerous files which corresponded to the search items were found and also copied to disks.
 13. On 13 October 2000 the investigating judge opened the sealed documents in the presence of the first applicant. Some documents were copied and added to the file while others were returned to the first applicant on the ground that their use would impinge on the first applicant's duty of professional secrecy.
 14. The disks containing the secured data were transmitted to the Economic Police where all the files were printed out. Both the disks and print-outs were then handed over to the investigating judge.
- B. The applicants' complaint to the Review Chamber**
15. On 28 November 2000 the first applicant, and on 11 December 2000 the applicant company, lodged complaints with the Review Chamber (*Ratskammer*) of the Salzburg Regional Court.
 16. They submitted that the first applicant was the owner and manager of the applicant company but also the lawyer of a number of companies in which the latter held shares. They complained that the search of their premises and the seizure of electronic data had infringed the first applicant's right and duty of professional secrecy under section 9 of the Lawyers Act (*Rechtsanwaltsordnung*) in conjunction with Article 152 of the Code of Criminal Procedure as some officers had proceeded unobserved to examine and subsequently copy electronic data. The applicants submitted that the data contained the same information as the documents which had been examined in the presence of the first applicant. However, with regard to the electronic data, the first applicant had not been given an opportunity to object and have the disks sealed.
 17. They further submitted that the search report did not mention that part of the search, nor did it mention which electronic data had been copied and seized. Furthermore, the search report had only been signed by three of the officers, but did not mention the names of all the officers who had been present at the search, omitting in particular the names of the data securing experts of the Federal Ministry for the Interior.
 18. On 31 January 2001 the Review Chamber dismissed the applicants' complaints.
 19. It observed that the first applicant's computer data had been searched with the aid of particular search criteria. Files which corresponded to these search criteria had been copied to disks which had been seized.
 20. However, there was no ground for holding that this seizure circumvented Article 152 of the Code of Criminal Procedure: the search of the first applicant's law office concerned exclusively documents which the first applicant had in his possession as an organ of Novamed and Bicos, and therefore did not concern a lawyer-client relationship.
 21. It further observed that the search of the first applicant's law office was based on a lawful search warrant which included the search and seizure of electronic data. The procedural safeguards laid down in Article 145 of the Code of Criminal Procedure, namely the right of the person concerned to object to an immediate examination and to request the deposit of data seized with the Regional Court and a decision by the Review Chamber, also applied to the search of electronic data.

22. In the present case, however, the officers had, whenever asked, complied with the first applicant's requests to seal certain documents and deposit them with the Regional Court. Some of these documents had been returned by the court in order to ensure compliance with the applicant's duty of professional secrecy.
23. It therefore concluded that the applicants' complaints were unfounded. The Review Chamber's decision was served on 7 February 2001.

C. The applicants' complaint to the Salzburg Independent Administrative Panel

24. In the meantime, on 20 November and on 21 November 2000 respectively, the applicants lodged complaints with the Salzburg Independent Administrative Panel (*Unabhängiger Verwaltungssenat*). They submitted that the search and seizure of electronic data in the first applicant's office had been unlawful.
25. On 2 April, 11 June and 11 July 2001 the Independent Administrative Panel held public hearings at which it heard evidence from a number of witnesses.

The IT specialist in charge of the first applicant's computer facilities said that he had been called and had arrived at the office when the search of the premises was already under way. He had left again after half an hour. The officer in charge of the search stated that the first applicant had been informed about the search of his computer data. Two other officers stated that the search of the first applicant's computer facilities had not been started until the arrival of his IT specialist and that the representative of the Bar Association had been temporarily present. This was confirmed by the representative of the Bar Association.

26. On 24 October 2001 the Salzburg Independent Administrative Panel rejected the applicants' complaints. It found that they concerned alleged breaches of certain provisions of the Code of Criminal Procedure regulating searches. The officers who had carried out the search had possibly not fully complied with these provisions. They had, however, acted on the basis of the search warrant and not exceeded the instructions of the investigating judge. The search was therefore imputable to the court. Consequently, a review of lawfulness did not fall within the competence of the Independent Administrative Panel.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions of the Code of Criminal Procedure relating to search and seizure

27. Articles 139 to 149 of the Code of Criminal Procedure concern the search of premises and persons and the seizure of objects.
28. Article 139 § 1 provides in particular that a search may only be carried out if there is a reasonable suspicion that a person suspected of having committed an offence is hiding on the premises concerned, or that there are objects there the possession or examination of which is relevant to a particular criminal investigation.
29. Pursuant to Article 140 § § 1 and 2 a search should in general only be carried out after the person concerned has been questioned, and only if the person sought has not come forward of his or her own volition or the object or objects sought have not been voluntarily produced and if the reasons leading to the search have not been eliminated. No such questioning is required where there is danger in delay.
30. Article 140 § 3 states that a search may, as a rule, only be carried out on the basis of a reasoned search warrant issued by a judge.
31. Pursuant to Article 142 § § 2 and 3 the occupant of the premises subject to the search or, if he is unavailable, a relative of the occupant, shall be present during the search. A report is to be drawn up and to be signed by all those present.
32. Article 143 § 1 of the Code of Criminal Procedure provides that, if objects relevant to the investigation or subject to forfeiture or confiscation are found, they are to be listed and taken to the court for safekeeping or seized. It refers, in this respect, to Article 98, pursuant to which objects in safe-keeping have to be put into an envelope to be sealed by the court, or have a label attached so as to avoid any substitution or confusion.
33. Article 145 reads as follows:
- “1. When searching through documents steps must be taken to ensure that their content does not become known to unauthorised persons.
2. If the owner of the documents does not want to permit their being searched, they shall be sealed and deposited with the court;

the Review Chamber must determine immediately whether they are to be examined or returned.”

34. According to the courts' case-law, which is endorsed by the opinion of academic writers (see Bertl/Vernier, *Grundriss des österreichischen Strafprozessrechts*, 7th edition), the provisions relevant to the search and seizure of paper documents also apply *mutatis mutandis* to the search and seizure of electronic data. If the owner of disks or hard disks on which data is stored objects to their being searched, the data carriers are to be sealed and the Review Chamber must decide whether they may be examined.

B. Provisions relating to the professional secrecy of lawyers

35. Section 9 of the Austrian Lawyers Act regulates the professional duties of lawyers including, *inter alia*, the duty to maintain professional secrecy.
36. Article 152 § 1 of the Code of Criminal Procedure exempts lawyers, notaries and business trustees from the obligation to give evidence as witnesses in respect of information given to them in the exercise of their profession.
37. It is established case-law that documents which contain information subject to professional secrecy may not be seized and used in a criminal investigation.
38. According to an instruction (*Erlaß*) of the Federal Minister of Justice of 21 July 1972, a representative of the competent Bar Association shall be present during the search of a lawyer's office in order to ensure that the search does not encroach on professional secrecy.

C. Review by the Independent Administrative Panel

39. By virtue of section 67a(1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*), Independent Administrative Panels have jurisdiction, *inter alia*, to examine complaints from persons alleging a violation of their rights resulting from the exercise of direct administrative authority and coercion (*Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt*).
40. Where police officers execute a court warrant their acts are imputable to the court unless they act in clear excess of the powers conferred on them. Only in the latter case are their acts

qualified as exercise of direct administrative authority and coercion and subject to review by the Independent Administrative Panel.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicants complain about the search and seizure of electronic data. They rely on Article 8 of the Convention which reads as follows:

“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 freedoms of others.”

A. Applicability of Article 8

42. The Government based their comments on the assumption that the search and seizure at issue interfered with the applicants' “private life” and “home”.
43. The Court reiterates that the search of a lawyer's office has been regarded as interfering with “private life” and “correspondence” and, potentially, home, in the wider sense implied by the French text which uses the term “*domicile*” (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-35, § § 29-33, and *Tamosius v. the United Kingdom* (dec.), no. 62002/00 62002/00, ECHR 2002-VIII; see also *Petri Sallinen and Others v. Finland*, no. 50882/99 50882/99, § 71, 27 September 2005, which confirms that the search of a lawyer's business premises also interfered with his right to respect for his “home”). The search of a company's business premises was also found to interfere with its right to respect for its “home” (see *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III, § § 40-42).
44. In the present case, the applicants do not complain about the search of their business premises, which are the first applicant's law office and the applicant company's seat nor do

they complain about the seizure of documents. They only complain in respect of the search and seizure of electronic data.

45. The Court considers that the search and seizure of electronic data constituted an interference with the applicants' right to respect for their "correspondence" within the meaning of Article 8 (see *Niemietz*, cited above, pp. 34-35, § 32 as regards a lawyer's business correspondence, and *Petri Sallinen and Others*, cited above, § 71, relating to the seizure of a lawyer's computer disks). Having regard to its above-cited case-law extending the notion of "home" to a company's business premises, the Court sees no reason to distinguish between the first applicant, who is a natural person, and the second applicant, which is a legal person, as regards the notion of "correspondence". It does not consider it necessary to examine whether there was also an interference with the applicants' "private life".
46. The Court must therefore determine whether the interference with the applicants' right to respect for their correspondence satisfied the requirements of paragraph 2 of Article 8.

B. Compliance with Article 8

1. *The parties' submissions*

47. The Court observes at the outset that in its admissibility decision of 16 May 2006 it joined the Government's objection as to non-exhaustion to the merits. The Government argued that the applicants had failed to make use of the possibility, provided for in the Code of Criminal Procedure, to request that documents or data be sealed and deposited with the court in order to obtain a court decision on whether or not they may be used for the investigation. The applicants contested this view, arguing that the manner in which the search was carried out had deprived them of the possibility to make effective use of their rights.
48. On the merits, the applicants asserted that the search and seizure of electronic data had been disproportionate. They claimed that the first applicant was not only the manager of the applicant company but also its counsel and the counsel of Novamed. Thus the search had necessarily led to correspondence, for instance letters and file notes that the first applicant had made in his capacity as counsel. During the search of the paper documents all such documents had either been removed immediately or sealed and returned to the applicant by the investigating judge as being subject to professional secrecy. In contrast, the electronic data had been seized without observing the attendant procedural guarantees. In this connection the applicants relied on the same arguments as submitted in respect of the issue of exhaustion of domestic remedies.
49. The applicants maintained that the applicant company's rights had also been infringed, since it had had no control over the kind of data that were seized. The search for the word Bicos had necessarily led to data unrelated to the subject defined in the search warrant. The procedural guarantees laid down in the Code of Criminal Procedure had not been complied with, since the applicant company had not been given the possibility to have the data sealed and to obtain a decision by the investigating judge as to which data might be used for the investigation.
50. The Government noted at the outset that the applicants only complained about the search of electronic data and that their submissions essentially related to the first applicant's position as a lawyer and to the alleged lack of safeguards to protect his duty of professional secrecy, while the complaint as regards the applicant company remained unsubstantiated.
51. Referring to the Court's case-law, the Government argued that the search and seizure of electronic data had a legal basis in the Code of Criminal Procedure and served legitimate aims, namely the prevention of crime and the protection of health.
52. As regards the necessity of the interference, the Government asserted that the search and seizure of the data had been proportionate to the legitimate aim pursued. The contested measures had been ordered by a judicial search warrant which had delimited their scope. Moreover, Austrian law contained specific procedural safeguards for the search of a lawyer's office. They had been complied with in that the search had taken place in the presence of the applicant and a representative of the Bar Association, whose role had been to ensure that the search did not encroach on the first applicant's duty of professional secrecy. In accordance with the search warrant, the first applicant's computer facilities had been searched with the help of certain key words, that is, the names of the firms involved, Novamed and Bicos, and the names of the suspects in the proceedings conducted in Italy. Since the first applicant was not the second applicant's counsel, their

lawyer-client relationship had not been affected. Moreover, the representative of the Bar Association had been informed of the search of the first applicant's computer facilities and the search procedure documented in the data securing report. The fact that the said report had not been drawn up during the search but later the same day was not decisive, since the main aim of recording which data had been seized had been achieved.

2. The Court's assessment

(a) In accordance with the law

53. The Court reiterates that an interference cannot be regarded as "in accordance with the law" unless, first of all, it has some basis in domestic law. In relation to Article 8 § 2 of the Convention, the term "law" is to be understood in its "substantive" sense, not in its "formal" one. In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it (see *Société Colas Est and Others*, cited above, § 43, with further references, and *Petri Sallinen and Others*, cited above, § 77).
54. The Austrian Code of Criminal Procedure does not contain specific provisions for the search and seizure of electronic data. However, it contains detailed provisions for the seizure of objects and, in addition, specific rules for the seizure of documents. It is established in the domestic courts' case-law that these provisions also apply to the search and seizure of electronic data (see paragraph 34 above). In fact, the applicants do not contest that the measures complained of had a basis in domestic law.
- (b) Legitimate aim**
55. The Court observes that the search and seizure was ordered in the context of criminal proceedings against third persons suspected of illegal trade in medicaments. It therefore served a legitimate aim, namely, the prevention of crime.
- (c) Necessary in a democratic society**
56. The parties' submissions concentrated on the necessity of the interference and in particular on the question whether the measures were proportionate to the legitimate aim pursued and whether the procedural safeguards provided for by the Code of Criminal Procedure were adequately complied with.
57. In comparable cases, the Court has examined whether domestic law and practice afforded adequate and effective safeguards against any abuse and arbitrariness (see, for instance, *Société Colas Est and Others*, cited above, § 48). Elements taken into consideration are, in particular, whether the search was based on a warrant issued by a judge and based on reasonable suspicion, whether the scope of the warrant was reasonably limited and – where the search of a lawyer's office was concerned – whether the search was carried out in the presence of an independent observer in order to ensure that materials subject to professional secrecy were not removed (see *Niemietz*, cited above, p. 36, § 37, and *Tamosius*, cited above).
58. In the present case, the search of the applicants' computer facilities was based on a warrant issued by the investigating judge in the context of legal assistance for the Italian authorities which were conducting criminal proceedings for illegal trade in medicaments against a number of companies and individuals. It relied on the fact that invoices addressed to Novamed, 100% owned by the applicant company, had been found. In these circumstances, the Court is satisfied that the search warrant was based on reasonable suspicion.
59. The Court also finds that the search warrant limited the documents or data to be looked for in a reasonable manner, by describing them as any business documents revealing contacts with the suspects in the Italian proceedings. The search remained within these limits, since the officers searched for documents or data containing either the word Novamed or Bicos or the name of any of the suspects.
60. Moreover, the Code of Criminal Procedure provides further procedural safeguards as regards the seizure of documents and electronic data. The Court notes the following provisions of the Code:
- (a) The occupant of premises searched shall be present;
 - (b) A report is to be drawn up at the end of the search and items seized are to be listed;
 - (c) If the owner objects to the seizure of documents or data carriers they are to be sealed and put before the judge for a decision as to whether or not they are to be used for the investigation; and
 - (d) In addition, as far as the search of a lawyer's

office is concerned, the presence of a representative of the Bar Association is required.

61. The applicants' claim is not that the guarantees provided by Austrian law are insufficient but that they were not complied with in the present case as regards the seizure of data. The Court notes that a number of officers carried out the search of the applicants' premises. While one group proceeded to the seizure of documents, the second group searched the computer system using certain search criteria and seized data by copying numerous files to disks.
62. The Court observes that the safeguards described above were fully complied with as regards the seizure of documents: whenever the representative of the Bar Association objected to the seizure of a particular document, it was sealed. A few days later the investigating judge decided in the presence of the applicant which files were subject to professional secrecy and returned a number of them to the applicant on this ground. In fact, the applicants do not complain in this respect.
63. What is striking in the present case is that the same safeguards were not observed as regards the electronic data. A number of factors show that the exercise of the applicants' rights in this respect was restricted. First, the member of the Bar Association, though temporarily present during the search of the computer facilities, was mainly busy supervising the seizure of documents and could therefore not properly exercise his supervisory function as regards the electronic data. Second, the report setting out which search criteria had been applied and which files had been copied and seized was not drawn up at the end of the search but only later the same day. Moreover, the officers apparently left once they had finished their task without informing the first applicant or the representative of the Bar Association of the results of the search.
64. It is true that the first applicant could have requested, in a global manner at the beginning of the search, to have any disks with copied data sealed and submitted to the investigating judge. However, since the Code of Criminal Procedure provides for a report to be drawn up at the end of the search, and requires that the items seized be listed, he could expect that procedure to be followed. Since this was not the case he had no opportunity to exercise his rights effectively. Consequently, the Govern-
- ment's objection of non-exhaustion has to be dismissed.
65. With regard to the first applicant this manner of carrying out the search incurred the risk of impinging on his right to professional secrecy. The Court has attached particular weight to that risk since it may have repercussions on the proper administration of justice (see *Niemietz*, cited above, p. 36, § 37). The domestic authorities and the Government argued that the first applicant was not the applicant company's counsel and that the data seized did not concern their client-lawyer relationship. It is true that the first applicant, contrary to his submissions before the Court, did not claim before the domestic authorities that he was the applicant company's counsel, nor that he was the counsel of Novamed. However, he claimed throughout the proceedings that he acted as counsel for numerous companies whose shares were held by the second applicant. Moreover, the Government did not contest the applicants' assertion that the electronic data seized contained by and large the same information as the paper documents seized, some of which were returned to the first applicant by the investigating judge as being subject to professional secrecy. It can therefore be reasonably assumed that the electronic data seized also contained such information.
66. In conclusion, the Court finds that the police officers' failure to comply with some of the procedural safeguards designed to prevent any abuse or arbitrariness and to protect the lawyer's duty of professional secrecy rendered the search and seizure of the first applicant's electronic data disproportionate to the legitimate aim pursued.
67. Furthermore, the Court observes that a lawyer's duty of professional secrecy also serves to protect the client. Having regard to its above findings that the first applicant represented companies whose shares were held by the second applicant and that the data seized contained some information subject to professional secrecy, the Court sees no reason to come to a different conclusion as regards the second applicant.
68. Consequently, there has been a violation of Article 8 in respect of both applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

70. Under the head of pecuniary damage, the first applicant claimed 4,000 euros (EUR) per year starting with the year 2000 for loss of clients. He submitted that he was unable to adduce proof without breaching his duty of professional secrecy. Moreover, he claimed EUR 10,000 as compensation for non-pecuniary damage since his reputation as a lawyer had suffered as a result of the events.
71. The applicant company claimed EUR 20,211.56 in compensation for pecuniary damage. It asserted that, being a holding company, its name had been ruined by the seizure of the data. Consequently, it had had to be newly established under another name and had therefore had to raise EUR 17,500 for the nominal capital of the new company and to pay costs of EUR 2,711.56 for the legal acts involved. It did not submit a claim in respect of non-pecuniary damage.
72. The Government asserted that there was no causal link between the violation at issue and the pecuniary damage alleged by the applicants.
73. With regard to the applicants' claims in respect of pecuniary damage, the Court observes that it cannot speculate as to what the effects on the applicants' reputation would have been had the search and seizure of electronic data been carried out in compliance with the requirements of Article 8 (see, *mutatis mutandis*, *Société Colas Est and Others*, cited above, § 54). Consequently, it makes no award under this head.
74. However, the Court accepts that the first applicant has suffered non-pecuniary damage, such as distress and frustration resulting from the manner in which the search and seizure of data were carried out. Making an assessment on an equitable basis and having regard to the sum

awarded in a comparable case (see *Petri Salinen and Others*, cited above, § 114) it grants the first applicant EUR 2,500 under the head of non-pecuniary damage.

B. Costs and expenses

75. The first applicant claimed a total amount of EUR 15,967.15 for costs and expenses, composed of EUR 9,204.52 in respect of the domestic proceedings and EUR 6,762.63 in respect of the Convention proceedings. These sums include value-added tax (VAT).
76. The Government accepted that the costs listed in respect of the domestic proceedings were necessarily incurred. However, they submitted that the amounts claimed were excessive since they were not in accordance with the relevant domestic laws and regulations on the remuneration of lawyers. In particular, only an amount of EUR 1,486.80 – instead of the EUR 4,858 claimed – was due in respect of the proceedings before the Salzburg Independent Administrative Panel. Moreover, the Government argued that the costs claimed in respect of the Convention proceedings were excessive. Only an amount of EUR 2,289.96 was appropriate.
77. The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses of the domestic proceedings which were necessarily incurred in order to prevent or redress the violation and are reasonable as to quantum (see *Société Colas Est and Others*, cited above, § 56).
78. The Court notes that it is not contested that the costs claimed by the first applicant were necessarily incurred. However, it considers that the sums claimed are not reasonable as to quantum. Regard being had to the information in its possession and to the sums awarded in comparable cases, the Court considers it reasonable to award the sum of EUR 10,000 covering costs under all heads. This sum includes VAT.
- ### C. Default interest
79. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection as to non-exhaustion of domestic remedies;
2. Holds unanimously that there has been a violation of Article 8 of the Convention in respect of the first applicant;
3. Holds by four votes to three that there has been a violation of Article 8 of the Convention in respect of the second applicant;
4. Holds unanimously
 - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage and EUR 10,000 (ten thousand euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. Dismisses unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 16 October 2007, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

T.L. Early, *Registrar*

Nicolas Bratza, *President*

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Sir Nicolas Bratza, Mr Casadevall and Ms Mijović is annexed to this judgment.

JOINT PARTLY DISSENTING OPINION OF JUDGES BRATZA, CASADEVALL AND MIJOVIĆ

While in full agreement that the first applicant's rights under Article 8 were violated in the present case, we take a different view as regards the second applicant.

Although the first applicant was the owner and general manager of the applicant company and although the company had its seat at the first applicant's law office, he was not the counsel or legal adviser of the company. It appears that the first applicant acted as legal adviser of certain of the companies owned by the second applicant. However, it has not been claimed that the search and seizure carried out in the first applicant's law office involved electronic data relating to any of the subsidiary companies of which he was the legal adviser. In these circumstances, we are not satisfied that the applicant company may be said to have been affected by the absence of procedural safeguards designed to protect the lawyer-client relationship which have been found by the Court to give rise to a finding of a violation of Article 8 of the Convention.

ECHR

ECJ

FOURTH SECTION

CASE OF COPLAND v THE UNITED KINGDOM

(Application no. 62617/00)

JUDGMENT

STRASBOURG

3 April 2007

FINAL

03/07/2007

PRIVATE LIFE, INTERFERENCE, E-MAIL, INTERNET, SURVEILLANCE, CORRESPONDENCE, MISUSE OF POWER, DEMOCRACY

IN THE CASE OF COPLAND V. THE UNITED KINGDOM,

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

Mr **J. Casadevall**, *President*,

Sir **Nicolas Bratza**,

Mr **G. Bonello**,

Mr **R. Maruste**,

Mr **S. Pavlovski**,

Mr **L. Garlicki**,

Mr **J. Borrego Borrego**, *judges*,

and Mr **T.L. Early**, *Section Registrar*,

Having deliberated in private on 7 March 2006 and on 13 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 62617/00 62617/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Lynette Copland.
2. The applicant was represented before the Court by Mr James Welch of Liberty, a non-governmental civil rights organisation based in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.
3. The applicant complained about the monitoring of her telephone calls, e-mail correspondence and internet usage under Articles 8 and 13.
4. By a decision of 7 March 2006, the Court declared the application partly admissible.
5. The applicant, but not the Government, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1950 and lives in Llanelli, Wales.
7. In 1991 the applicant was employed by Carmarthenshire College ("the College"). The College is a statutory body administered by the State and possessing powers under sections 18 and 19 of the Further and Higher Education Act 1992 relating to the provision of further and higher education.
8. In 1995 the applicant became the personal assistant to the College Principal ("CP") and from the end of 1995 she was required to work closely with the newly appointed Deputy Principal ("DP").
9. In about July 1998, whilst on annual leave, the applicant visited another campus of the College with a male director. She subsequently became aware that the DP had contacted that campus to enquire about her visit and understood that he was suggesting an improper relationship between her and the director.
10. During her employment, the applicant's telephone, e-mail and internet usage were subjected to monitoring at the DP's instigation. According to the Government, this monitoring took place in order to ascertain whether the applicant was making excessive use of College facilities for personal purposes. The Government stated that the monitoring of telephone usage consisted of analysis of the college telephone bills showing telephone numbers called, the dates and times of the calls and their length and cost. The applicant also believed that there had been detailed and comprehensive logging of the length of calls, the number of calls received and made and the telephone numbers of individuals calling her. She stated that on at least one occasion the DP became aware of the name of an individual with whom she had exchanged incoming and outgoing telephone calls. The Government submitted that the monitoring of telephone usage took place for a few months up to about 22 November 1999. The applicant contended that her telephone usage was monitored over a period of about 18 months until November 1999.
11. The applicant's internet usage was also monitored by the DP. The Government accepted

that this monitoring took the form of analysing the web sites visited, the times and dates of the visits to the web sites and their duration and that this monitoring took place from October to November 1999. The applicant did not comment on the manner in which her internet usage was monitored but submitted that it took place over a much longer period of time than the Government admit.

12. In November 1999 the applicant became aware that enquiries were being made into her use of e-mail at work when her step-daughter was contacted by the College and asked to supply information about e-mails that she had sent to the College. The applicant wrote to the CP to ask whether there was a general investigation taking place or whether her e-mails only were being investigated. By an e-mail dated 24 November 1999 the CP advised the applicant that, whilst all e-mail activity was logged, the information department of the College was investigating only her e-mails, following a request by the DP.
13. The Government submitted that monitoring of e-mails took the form of analysis of e-mail addresses and dates and times at which e-mails were sent and that the monitoring occurred for a few months prior to 22 November 1999. According to the applicant the monitoring of e-mails occurred for at least six months from May 1999 to November 1999. She provided documentary evidence in the form of printouts detailing her e-mail usage from 14 May 1999 to 22 November 1999 which set out the date and time of e-mails sent from her e-mail account together with the recipients' e-mail addresses.
14. By a memorandum dated 29 November 1999 the CP wrote to the DP to confirm the contents of a conversation they had had in the following terms:

"To avoid ambiguity I felt it worthwhile to confirm my views expressed to you last week, regarding the investigation of [the applicant's] e-mail traffic.

Subsequent to [the applicant] becoming aware that someone from [the College] had been following up her e-mails, I spoke to [ST] who confirmed that this was true and had been instigated by yourself. Given the forthcoming legislation making it illegal for organisations to examine someone's e-mail without permission, I naturally felt concerned over recent events and instructed [ST] not to carry out any further analysis. Furthermore, I asked you to do likewise and asked that any infor-

mation you have of concern regarding [the applicant] be forwarded to me as a matter of priority. You indicated that you would respond positively to both requests, whilst re-affirming your concerns regarding [the applicant]."

15. There was no policy in force at the College at the material time regarding the monitoring of telephone, e-mail or internet use by employees.
16. In about March or April 2000 the applicant was informed by other members of staff at the College that between 1996 and late 1999 several of her activities had been monitored by the DP or those acting on his behalf. The applicant also believed that people to whom she had made calls were in turn telephoned by the DP, or those acting on his behalf, to identify the callers and the purpose of the call. She further believed that the DP became aware of a legally privileged fax that was sent by herself to her solicitors and that her personal movements, both at work and when on annual or sick leave, were the subject of surveillance.
17. The applicant provided the Court with statements from other members of staff alleging inappropriate and intrusive monitoring of their movements. The applicant, who is still employed by the College, understands that the DP has been suspended.

II. RELEVANT DOMESTIC LAW

A. Law of privacy

18. At the relevant time there was no general right to privacy in English law.
19. Since the implementation of the Human Rights Act 1998 on 2 October 2000, the courts have been required to read and give effect to primary legislation in a manner which is compatible with Convention rights so far as possible. The Act also made it unlawful for any public authority, including a court, to act in a manner which is incompatible with a Convention right unless required to do so by primary legislation, thus providing for the development of the common law in accordance with Convention rights. In the case of *Douglas v Hello! Ltd* ([2001] 1 WLR 992), Sedley LJ indicated that he was prepared to find that there was a qualified right to privacy under English law, but the Court of Appeal did not rule on the point.
20. The Regulation of Investigatory Powers Act 2000 ("the 2000 Act") provided for the regu-

lation of, *inter alia*, interception of communications. The Telecommunications (Lawful Business Practice) Regulations 2000 were promulgated under the 2000 Act and came into force on 24 October 2000. The Regulations set out the circumstances in which employers could record or monitor employees' communications (such as e-mail or telephone) without the consent of either the employee or the other party to the communication. Employers were required to take reasonable steps to inform employees that their communications might be intercepted.

B. Contractual damages for breach of trust and confidence by employer

21. The House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 confirmed that, as a matter of law, a general term is implied into each employment contract that an employer will not "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". In *Malik*, the House of Lords was concerned with the award of so-called "stigma compensation" where an ex-employee is unable to find further employment due to association with a dishonest former employer. In considering the damages that could be awarded for breach of the obligation of trust and confidence, the House were solely concerned with the payment of compensation for financial loss resulting from handicap in the labour market. Lord Nicholls expressly noted that, "(f)or the present purposes I am not concerned with the exclusion of damages for injured feelings, the present case is concerned only with financial loss."

22. In limiting the scope of the implied term of trust and confidence in *Malik*, Lord Steyn stated as follows:

"the implied mutual obligation of trust and confidence applies only where there is 'no reasonable and proper cause' for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation."

C. Tort of misfeasance in public office

23. The tort of misfeasance in public office arises when a public official has either (a) exercised his power specifically intending to injure the

plaintiff, or (b) acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge or with reckless indifference to the probability of causing injury to the claimant or a class of people of which the claimant is a member (*Three Rivers D.C. v. Bank of England (No.3)* (HL) [2000] WLR 1220).

D. Data Protection Act 1984

24. At the time of the acts complained of by the applicant, the Data Protection Act 1984 ("the 1984 Act") regulated the manner in which people and organisations that held data, known as "data holders", processed or used that data. It provided certain actionable remedies to individuals in the event of misuse of their personal data. The 1984 Act has now been replaced by the Data Protection Act 1998.

25. Section 1 of the 1984 Act defined its terms as follows:

"(2) 'Data' means information recorded in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose.

(3) 'Personal data' means data consisting of information which relates to a living individual who can be identified from that information (or from that and other information in the possession of the data user...)

(4) 'Data subject' means an individual who is the subject of personal data.

(5) 'Data user' means a person who holds data, and a person 'holds' data if –

(a) the data form part of a collection of data processed or intended to be processed by or on behalf of that person as mentioned in subsection (2) above; and

(b) that person... controls the contents and use of the data comprised in the collection; and

(c) the data are in the form in which they have been or are intended to be processed as mentioned in paragraph (a)...

(7) 'Processing' in relation to data means amending, augmenting, deleting or re-arranging the data or extracting the information constituting the data and, in the case of personal data, means performing any of these operations by reference to the data subject.

(9) 'Disclosing' in relation to data, includes disclosing information extracted from the data..."

26. The "data protection principles" to be respected by data holders were set out in Part 1 to

Schedule 1 of the Act as follows:

“1. The information to be contained in personal data shall be obtained, and personal data shall be processed, fairly and lawfully.

2. Personal data shall be held only for one or more specified and lawful purposes ...

4. Personal data held for any purpose shall be adequate, relevant and not excessive in relation to that purpose or those purposes.”

27. Section 23 of the 1984 Act provided rights to compensation for the data subject in the event of unauthorised disclosure of personal data:

“ (1) An individual who is the subject of personal data held by a data user...and who suffers damage by reason of -

(c) ...the disclosure of the data or, access having been obtained to the data, without such authority as aforesaid,

shall be entitled to compensation from the data user...for that damage and for any distress which the individual has suffered by reason of the...disclosure or access.”

28. The 1984 Act also created the position of Data Protection Registrar, under a duty to promote the observance of the data protection principles by data users. In section 10 it created a criminal offence as follows:

“(1) If the Registrar is satisfied that a registered person has contravened or is contravening any of the data protection principles he may serve him with a notice (‘an enforcement notice’) requiring him to take ... such steps as are so specified for complying with the principle or principles in question.

(2) In deciding whether to serve an enforcement notice, the Registrar shall consider whether the contravention has caused or is likely to cause any person damage or distress.

...

(9) Any person who fails to comply with an enforcement notice shall be guilty of an offence...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant alleged that the monitoring activity that took place amounted to an interfer-

ence with her right to respect for private life and correspondence under Article 8, which reads as follows:

“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 freedoms of others.”

30. The Government contested that argument.

A. The parties' submissions

1. The Government

31. The Government accepted that the College was a public body for whose actions the State was directly responsible under the Convention.

32. Although there had been some monitoring of the applicant's telephone calls, e-mails and internet usage prior to November 1999, this did not extend to the interception of telephone calls or the analysis of the content of websites visited by her. The monitoring thus amounted to nothing more than the analysis of automatically generated information to determine whether College facilities had been used for personal purposes which, of itself, did not constitute a failure to respect private life or correspondence. The case of *P.G. and J.H. v. the United Kingdom*, no. 44787/98 44787/98, ECHR 2001-IX, could be distinguished since there actual interception of telephone calls occurred. There were significant differences from the case of *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, where the applicant's telephone calls were intercepted on a telephone which had been designated for private use and, in particular her litigation against her employer.

33. In the event that the analysis of records of telephone, e-mail and internet use was considered to amount to an interference with respect for private life or correspondence, the Government contended that the interference was justified.

34. First, it pursued the legitimate aim of protecting the rights and freedoms of others by en-

sure that the facilities provided by a publicly funded employer were not abused. Secondly, the interference had a basis in domestic law in that the College, as a statutory body, whose powers enable it to provide further and higher education and to do anything necessary and expedient for those purposes, had the power to take reasonable control of its facilities to ensure that it was able to carry out its statutory functions. It was reasonably foreseeable that the facilities provided by a statutory body out of public funds could not be used excessively for personal purposes and that the College would undertake an analysis of its records to determine if there was any likelihood of personal use which needed to be investigated. In this respect, the situation was analogous to that in *Peck v. the United Kingdom*, no. 44647/98 44647/98, ECHR 2003-I.

35. Finally, the acts had been necessary in a democratic society and were proportionate as any interference went no further than necessary to establish whether there had been such excessive personal use of facilities as to merit investigation.

2. The applicant

36. The applicant did not accept that her e-mails were not read and that her telephone calls were not intercepted but contended that, even if the facts were as set out by the Government, it was evident that some monitoring activity took place amounting to an interference with her right to respect for private life and correspondence.
37. She referred to legislation subsequent to the alleged violation, namely the Regulation of Investigatory Powers Act 2000 and the Telecommunications Regulations 2000 (see paragraph 20 above), which she claimed were an explicit recognition by the Government that such monitoring amounted to interference under Article 8 and required authorisation in order to be lawful. Since these laws came into force in 2000, the legal basis for such interference post-dated the events in the present case. Thus, the interference had no basis in domestic law and was entirely different from the position in *Peck* (see paragraph 34 above) where the local authority was specifically empowered by statute to record visual images of events occurring in its area. In the present case there was no such express power for the College to carry out surveillance on its employees and the statutory powers did not make such surveillance reason-

ably foreseeable.

38. The applicant asserted that the conduct of the College was neither necessary nor proportionate. There were reasonable and less intrusive methods that the College could have used such as drafting and publishing a policy dealing with the monitoring of employees' usage of the telephone, internet and e-mail.

B. The Court's assessment

39. The Court notes the Government's acceptance that the College is a public body for whose acts it is responsible for the purposes of the Convention. Thus, it considers that in the present case the question to be analysed under Article 8 relates to the negative obligation on the State not to interfere with the private life and correspondence of the applicant and that no separate issue arises in relation to home or family life.
40. The Court further observes that the parties disagree as to the nature of this monitoring and the period of time over which it took place. However, the Court does not consider it necessary to enter into this dispute as an issue arises under Article 8 even on the facts as admitted by the Government.

1. Scope of private life

41. According to the Court's case-law, telephone calls from business premises are *prima facie* covered by the notions of "private life" and "correspondence" for the purposes of Article 8 § 1 (see *Halford*, cited above, § 44 and *Amann v. Switzerland* [GC], no. 27798/95, § 43, ECHR 2000-II). It follows logically that e-mails sent from work should be similarly protected under Article 8, as should information derived from the monitoring of personal internet usage.
42. The applicant in the present case had been given no warning that her calls would be liable to monitoring, therefore she had a reasonable expectation as to the privacy of calls made from her work telephone (see *Halford*, § 45). The same expectation should apply in relation to the applicant's e-mail and internet usage.

2. Whether there was any interference with the rights guaranteed under Article 8.

43. The Court recalls that the use of information relating to the date and length of telephone conversations and in particular the numbers dialled can give rise to an issue under Article 8 as such information constitutes an "integral

element of the communications made by telephone” (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, § 84). The mere fact that these data may have been legitimately obtained by the College, in the form of telephone bills, is no bar to finding an interference with rights guaranteed under Article 8 (*ibid*). Moreover, storing of personal data relating to the private life of an individual also falls within the application of Article 8 § 1 (see *Amann*, cited above, § 65). Thus, it is irrelevant that the data held by the college were not disclosed or used against the applicant in disciplinary or other proceedings.

44. Accordingly, the Court considers that the collection and storage of personal information relating to the applicant's telephone, as well as to her e-mail and internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8.

3. Whether the interference was “in accordance with the law”

45. The Court recalls that it is well established in the case-law that the term “in accordance with the law” implies - and this follows from the object and purpose of Article 8 - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by Article 8 § 1. This is all the more so in areas such as the monitoring in question, in view of the lack of public scrutiny and the risk of misuse of power (see *Halford*, cited above, § 49).
46. This expression not only requires compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law (see, *inter alia*, *Khan v. the United Kingdom*, judgment of 12 May 2000, *Reports of Judgments and Decisions* 2000-V, § 26; *P.G. and J.H. v. the United Kingdom*, cited above, § 44). In order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to any such measures (see *Halford*, cited above, § 49 and *Malone*, cited above, § 67).
47. The Court is not convinced by the Government's submission that the College was authorised under its statutory powers to do “anything necessary or expedient” for the purposes of providing higher and further education, and

finds the argument unpersuasive. Moreover, the Government do not seek to argue that any provisions existed at the relevant time, either in general domestic law or in the governing instruments of the College, regulating the circumstances in which employers could monitor the use of telephone, e-mail and the internet by employees. Furthermore, it is clear that the Telecommunications (Lawful Business Practice) Regulations 2000 (adopted under the Regulation of Investigatory Powers Act 2000) which make such provision were not in force at the relevant time.

48. Accordingly, as there was no domestic law regulating monitoring at the relevant time, the interference in this case was not “in accordance with the law” as required by Article 8 § 2 of the Convention. The Court would not exclude that the monitoring of an employee's use of a telephone, e-mail or internet at the place of work may be considered “necessary in a democratic society” in certain situations in pursuit of a legitimate aim. However, having regard to its above conclusion, it is not necessary to pronounce on that matter in the instant case.
49. There has therefore been a violation of Article 8 in this regard.

II. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

50. The applicant submitted that no effective domestic remedy existed for the breaches of Article 8 of which she complained and that, consequently, there had also been a violation of Article 13 which provides as follows:

“Everyone whose rights and freedoms as set forth in [the] 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.”

51. Having regard to its decision on Article 8 (see paragraph 48 above), the Court does not consider it necessary to examine the applicant's complaint also under Article 13.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:
- “If the Court finds that there has been a

violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. The applicant made no claim for pecuniary damage but without quantifying an amount, claimed non-pecuniary loss for stress, anxiety, low mood and inability to sleep. She produced a medical report dated June 2006 recognising that she had suffered from stress and lack of sleep due to the work environment.
54. The Government submitted that the report presented by the applicant gave no indication that the stress complained of was caused by the facts giving rise to her complaint. Furthermore, as the Court had held in a number of cases relating to complaints involving the interception of the communications of suspected criminals by the police, in their view, a finding of a violation should in itself constitute sufficient just satisfaction (see *Taylor-Sabori v. the United Kingdom*, no. 47114/99 47114/99, § 28, 22 October 2002, *Hewitson v. the United Kingdom*, no. 50015/99 50015/99, § 25, 27 May 2003 and *Chalkley v. the United Kingdom*, no. 63831/00 63831/00, § 32, 12 June 2003). Moreover, since the conduct alleged consisted of monitoring and not interception, the nature of such interference was of a significantly lower order of seriousness than the cases mentioned above.
55. The Court notes the above cases cited by the Government, but recalls also that, in *Halford* (cited above, § 76) which concerned the interception of an employee's private telephone calls by her employer, it awarded GBP 10,000 in respect of non-pecuniary damage. Making an assessment on an equitable basis in the present case, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

56. The applicant claimed legal costs and expenses totalling GBP 9,363 inclusive of value-added tax. This included fees paid to a solicitor and trainee solicitor of GBP 7,171.62, disbursements of GBP 1,556.88 and the rest in anticipated future costs.
57. The Government submitted that the hourly rates charged by the solicitors and the rate of increase over the period during which the

case was pending were excessive. Moreover, the applicant's original application included a number of complaints which the Court declared inadmissible and therefore the portion of costs related to such claims should not be recoverable. In the Government's view the sum of GBP 2,000 would adequately cover costs and expenses incurred.

58. According to its settled case-law, the Court will award costs and expenses in so far as these relate to the violation found and to the extent to which they have been actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, *Schouten and Meldrum v. the Netherlands*, judgment of 9 December 1994, Series A no. 304, pp. 28-29, § 78 and *Lorsé and Others v. the Netherlands*, no. 52750/99 52750/99, § 103, 4 February 2003). Taking into account all the circumstances, it awards the applicant EUR 6,000 for legal costs and expenses, in addition to any VAT that may be payable.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds that it is not necessary to examine the case under Article 13 of the Convention.
3. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the time of settlement:
 - (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 6,000 (six thousand euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;

- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 April 2007, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

T.L. Early, *Registrar*

Josep Casadevall, *President*

ECHR

ECJ

FIRST SECTION

CASE OF SMIRNOV v RUSSIA

(Application no. 71362/01)

JUDGMENT

STRASBOURG

7 June 2007

FINAL

12/11/2007

COMPUTER, SEIZURE, CONFISCATION, PRIVATE LIFE, PROPERTY, PREVENTION OF DISORDER, PUBLIC SAFETY, EVIDENCE

IN THE CASE OF SMIRNOV V. RUSSIA,

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

Mr **C.L. Rozakis**, *President*,

Mr **A. Kovler**,

Mrs **E. Steiner**,

Mr **K. Hajiyev**,

Mr **D. Spielmann**,

Mr **S.E. Jebens**,

Mr **G. Malinverni**, *judges*,

and Mr **S. Nielsen**, *Section Registrar*,

Having deliberated in private on 15 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 71362/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Mikhail Vladimirovich Smirnov ("the applicant"), on 27 November 2000.
2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.
3. The applicant alleged, in particular, a violation of the right to respect for his home and the right to peaceful enjoyment of possessions as regards the search at his place of residence and the retention of his computer. He also claimed that he did not have an effective remedy in respect of the latter complaint.
4. By a decision of 30 June 2005 the Court declared the application partly admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in St Petersburg. The applicant is a lawyer; at the material time he was a member of the St Petersburg United Bar Association (*Санкт-Петербургская объединенная коллегия адвокатов*).

A. Search at the applicant's home

6. On 20 January 1999 the St Petersburg City Prosecutor opened criminal case no. 7806 against Mr Sh., Mr G. and fifteen other persons who were suspected of forming and participating in an organised criminal enterprise and of other serious offences.
7. On 7 March 2000 Mr D., an investigator with the Serious Crimes Department in the prosecutor's office, issued a search warrant which read in its entirety as follows:

"Taking into account that at the [applicant's] place of residence at the address [the applicant's home address] there might be objects and documents that are of interest for the investigation of criminal case [no. 7806], I order a search of the premises at the address [the applicant's home address] where [the applicant] permanently resides and the seizure of objects and documents found during the search."

8. On the same day a St Petersburg deputy prosecutor approved the search and countersigned the warrant.
9. The Government claimed that the applicant had not been a party to criminal case no. 7806 and had not represented anyone involved. The applicant maintained that he had been a representative of:
 - (a) Mr S., who had been first a suspect and later a witness in criminal case no. 7806. On 21 February 2000 the applicant had represented Mr S. before the Oktyabrskiy Court of St Petersburg in proceedings concerning a complaint about a decision by the investigator D. The applicant had also been S.'s representative in unrelated civil proceedings on the basis of an authority form of 25 May 1999;
 - (b) Mr Yu., who had been a defendant in criminal case no. 7806 and whom the applicant

had represented from 10 July to 25 December 1998;

- (c) Mr B., who had been the victim in a criminal case concerning the murder of his son. Subsequently that case had been joined to criminal case no. 7806. The applicant had represented Mr B. from 11 February to 23 March 2000;
 - (d) Mr Sh., who had been a defendant in criminal case no. 7806 and whom the applicant had represented before the Court (application no. 29392/02).
10. On 9 March 2000 the investigator D., in the presence of the applicant, assisted by police officers from the Organised Crime District Directorate (*РУБОП*) and two attesting witnesses (*поняты*), searched the applicant's flat. According to the record of the search, the applicant was invited to "voluntarily hand over... documents relating to the public company T. and the federal industrial group R.". The applicant responded that he had no such documents and countersigned under that statement.
 11. The investigator found and seized over twenty documents which the applicant declared to be his own and the central unit of the applicant's computer. According to the record of the search, the applicant had no complaints about the way the search was carried out, yet he objected to the seizure of the central unit because it contained two hard disks and was worth 1,000 United States dollars. The seized documents included, in particular, Mr S.'s power of attorney of 25 May 1999 and extracts of a memorandum in Mr B.'s case.
 12. On the same date the investigator D. held a formal interview with the applicant in connection with criminal case no. 7806.
 13. On 17 March 2000 the investigator L. issued an order for the attachment of the documents seized at the applicant's flat and the central unit of his computer as "physical evidence" in criminal case no. 7806.
- B. Judicial review of the search and seizure orders**
14. The applicant complained to a court. He sought to have the search and seizure of the documents declared unlawful. He claimed, in particular, that the central unit of the computer, his personal notebook and his clients' files

and records were not related to the criminal case and could not be attached as evidence because the seizure had impaired his clients' defence rights.

15. On 19 April 2000 the Oktyabrskiy Court of the Admiralteyskiy District of St Petersburg heard the applicant's complaint. The court found that the search had been approved and carried out in accordance with the applicable provisions of the domestic law and had therefore been lawful. As to the attachment of the computer, the court ruled as follows:

"...the purpose of the search was to find objects and documents in connection with a criminal case. During the search a number of documents and a computer central unit were seized; they were thoroughly examined by the investigator, as is evident from the record of the examination of the seized items and printouts of the files contained in the central unit.

Accordingly, the above shows that the aim of the search has been achieved; however, the order to attach the seized objects and documents as evidence in the criminal case amounts to the forfeiture of the [applicant's] property which was taken from him and never returned, whereas [the applicant] was neither a suspect nor a defendant in the criminal case and was interviewed as a witness.

Under such circumstances, the constitutional rights of the applicant, who was deprived of his property, were violated. Having achieved the purpose of the search and recorded the results received, the investigator, without any valid and lawful grounds, declared [the applicant's property] to be physical evidence..."

16. The District Court ordered that the applicant's documents, his notebook and the central unit be returned to
17. On 25 May 2000 the St Petersburg City Court quashed the judgment of 19 April 2000 and remitted the case for a fresh examination by a differently composed court. The City Court pointed out that the first-instance court had erroneously considered that the order for the attachment of objects as evidence amounted to the forfeiture of the applicant's property.
18. On 6 June 2000 the investigator returned the notebook and certain documents, but not the computer, to the applicant.
19. On 2 August 2000 the applicant brought a civil action against the St Petersburg City Prosecutor's Office and the Ministry of Finance, seeking

compensation for the non-pecuniary damage incurred as a result of the seizure of his belongings.

20. On 17 August 2000 the Oktyabrskiy Court of St Petersburg held a new hearing on the applicant's complaint. The court ruled that the search of the applicant's flat had been justified and lawful and that the remainder of the applicant's complaints were not amenable to judicial review.
21. On 12 September 2000 the St Petersburg City Court quashed the judgment of 17 August 2000 and remitted the case for a fresh examination by a differently composed court. The City Court found that the first-instance court had failed to examine, in a sufficiently thorough manner, whether the investigator had had sufficient grounds to search the flat of a person who had not been charged with any criminal offence.
22. On 17 November 2000 the Oktyabrskiy Court of St Petersburg delivered the final judgment on the applicant's complaint. As regards the lawfulness of the search, the court found as follows:

"The search warrant was issued because there were sufficient reasons [to believe] that [at the applicant's home address] where [the applicant] lived there could be objects and documents that could be used as evidence in connection with one of the counts in criminal case no. 7806. This fact was established by the court and confirmed by the materials in the case file, in particular, a statement by the investigator D[,] of 16 November 2000, the decision to bring charges of 22 February 1999, the decision to lodge an application for an extension of detention on remand of 10 July [? - unclear] 2000, letter no. 200409 of 22 September 1998 and other materials; therefore, the court comes to the conclusion that the search in [the applicant's] flat was justified under Article 168 of the RSFSR Code of Criminal Procedure..."

23. The court further established that the search had been carried out in strict compliance with the laws on criminal procedure. As regards the remainder of the applicant's claims, the court decided that it was not competent to examine them, but that it was open to the applicant to complain about the investigator's decisions to a supervising prosecutor.
24. On 19 December 2000 the St Petersburg City Court dismissed an appeal by the applicant.

It upheld the District Court's finding that the search at the applicant's flat had been justified and procedurally correct and that the order to attach objects as evidence was not amenable to judicial review because such an avenue of appeal was not provided for in domestic law.

25. The applicant's civil claim for damages has not been examined to date.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Searches at a person's home

26. Article 25 of the Constitution establishes that the home is inviolable. No one may penetrate into the home against the wishes of those who live there unless otherwise provided for in a federal law or a judicial decision.
27. The RSFSR Code of Criminal Procedure, in force at the material time, provided in Article 168 ("Grounds for carrying out a search") that an investigator could carry out a search to find objects and documents that were of relevance to the case, provided that he had sufficient grounds to believe that such objects and documents could be found in a specific place or on a specific person. The search could be carried out on the basis of a reasoned warrant issued by an investigator and approved by a prosecutor.
28. Searches and seizures were to be carried out in the presence of the person whose premises were being searched or adult members of his family. Two attesting witnesses were to be present as well (Article 169). Any person having no interest in the case could be an attesting witness. Attesting witnesses were required to certify the scope and results of the search, and could make comments which were to be entered into the search record (Article 135).
29. A complaint against the actions of an investigator could be submitted either directly to a prosecutor or through the person against whom the complaint was lodged. In the latter case the person concerned was to forward the complaint to the prosecutor within twenty-four hours, together with his explanations (Article 218). The prosecutor was to examine the complaint within three days and give a reasoned decision to the complainant (Article 219).
30. On 23 March 1999, the Constitutional Court de-

termed that decisions and actions of investigators and prosecutors relating to searches, seizure of property, suspension of proceedings and extension of time-limits for preliminary investigations should be amenable to judicial review on an application by the person whose rights had been violated.

B. Physical evidence

31. Article 83 of the Code of Criminal Procedure defined physical evidence as “any objects that... carried traces of a criminal offence... and any other objects that could be instrumental for detecting a crime, establishing the factual circumstances of a case, identifying perpetrators or rebutting the charges or extenuating punishment”.
32. Physical evidence was to be retained until the conviction had entered into force or the time-limit for appeal had expired. However, it could be returned to the owner before that if such return would not harm ongoing criminal proceedings (Article 85). The court was to order the return of physical evidence to its legal owner in the final decision closing the criminal proceedings (Article 86).

C. Council of Europe recommendation

33. Recommendation (2000) 21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer provides, *inter alia*, as follows:

“Principle I - General principles on the freedom of exercise of the profession of lawyer

... 6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicant complained that the search carried out at his place of residence infringed Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for... his home...

2. There shall be no interference by a public authority with the exercise of this right except

such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

35. The Government contested that view.

A. Whether there was an interference

36. The Court observes that the search and seizure ordered by the investigator concerned the applicant’s residential premises in which he kept his computer and certain work-related materials. The Court has consistently interpreted the notion “home” in Article 8 § 1 as covering both private individuals’ homes and professional persons’ offices (see *Buck v. Germany*, no. 41604/98, § 31, ECHR 2005-IV; and *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § § 29-31). It follows that in the present case there has been an interference with the applicant’s right to respect for his home.

B. Whether the interference was justified

37. The Court has next to determine whether the interference was justified under paragraph 2 of Article 8, that is, whether it was “in accordance with the law”, pursued one or more of the legitimate aims set out in that paragraph and was “necessary in a democratic society” to achieve that aim or those aims.

1. Whether the interference was “in accordance with the law”

38. The applicant claimed that the interference was not “in accordance with the law” because the search had been authorised by a deputy prosecutor rather than by a court, as the Constitution required. The Court observes that under the Russian Constitution, the right to respect for a person’s home may be interfered with on the basis of a federal law or a judicial decision (see paragraph 26 above). The RSFSR Code of Criminal Procedure – which had the status of federal law in the Russian legal system – vested the power to issue search warrants in investigators acting with the consent of a prosecutor (see paragraph 27 above). The Court is satisfied that that procedure was followed in the present case and that the interference was therefore “in accordance with the law”.

2. *Whether the interference pursued a legitimate aim*

39. The Government submitted that the interference had pursued the legitimate aim of the protection of rights and freedoms of others.

40. The Court notes that the purpose of the search, as set out in the investigator's decision, was to uncover physical evidence that might be instrumental for the criminal investigation into serious offences. Accordingly, it pursued the legitimate aims of furthering the interests of public safety, preventing disorder or crime and protecting the rights and freedoms of others.

3. *Whether the interference was "necessary in a democratic society"*

41. The applicant claimed that his flat had been searched with a view to obtaining evidence against his clients, including Mr S., Mr Yu., Mr B. and many others, and gaining access to the clients' files stored on his computer. The search had violated the lawyer-client privilege and had been followed by a formal interview in which the investigator D. had questioned him about the circumstances of which he had become aware as his clients' representative.

42. The Government submitted that the decision to search the applicant's flat had been based on witness testimony and that the search had been necessary because "objects and documents of importance for the investigation of criminal case no. 7806" could have been found in the applicant's flat. The applicant had not objected to the search.

43. Under the Court's settled case-law, the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" the Court will take into account that a certain margin of appreciation is left to the Contracting States (see, among other authorities, *Camenzind v. Switzerland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2893, § 44). However, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established (see *Buck*, cited above, § 44).

44. As regards, in particular, searches of premises and seizures, the Court has consistently held that the Contracting States may consider it

necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were "relevant" and "sufficient" and whether the aforementioned proportionality principle has been adhered to. As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued. The criteria the Court has taken into consideration in determining this latter issue have been, among others, the circumstances in which the search order had been issued, in particular further evidence available at that time, the content and scope of the warrant, the manner in which the search was carried out, including the presence of independent observers during the search, and the extent of possible repercussions on the work and reputation of the person affected by the search (see *Buck*, cited above, § 45; *Chappell v. the United Kingdom*, judgment of 30 March 1989, Series A no. 152-A, p. 25, § 60; *Camenzind*, cited above, pp. 2894-95, § 46; *Funke v. France*, judgment of 25 February 1993, Series A no. 256-A, p. 25, § 57; and *Niemietz*, cited above, pp. 35-36, § 37).

45. With regard to the safeguards against abuse existing in the Russian legislation the Court observes that, in the absence of a requirement for prior judicial authorisation, the investigation authorities had unfettered discretion to assess the expediency and scope of the search and seizure. In the cases of *Funke*, *Crémieux* and *Mialhe v. France* the Court found that owing, above all, to the lack of a judicial warrant, "the restrictions and conditions provided for in law... appear[ed] too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued" and held that there had been a violation of Article 8 of the Convention (see *Funke*, cited above, and *Crémieux v. France* and *Mialhe v. France* (no. 1), judgments of 25 February 1993, Series A nos. 256-B and 256-C). In the present case, however, the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability of an *ex post facto* judicial review. The applicant could, and did, make a complaint to a court which was called upon to review both

- the lawfulness of, and justification for, the search warrant. The efficiency of the actual review carried out by the domestic courts will be taken into account in the following analysis of the necessity of the interference.
46. The Court observes that the applicant himself was not charged with, or suspected of, any criminal offence or unlawful activities. On the other hand, the applicant submitted documents showing that he had represented, at different times, four persons in criminal case no. 7806, in connection with which the search had been ordered. In these circumstances, it is of particular concern for the Court that, when the search of the applicant's flat was ordered, no provision for safeguarding the privileged materials protected by professional secrecy was made.
47. The search order was drafted in extremely broad terms, referring indiscriminately to "any objects and documents that [were] of interest for the investigation of criminal case [no. 7806]", without any limitation. The order did not contain any information about the ongoing investigation, the purpose of the search or the reasons why it was believed that the search at the applicant's flat would enable evidence of any offence to be obtained (compare *Niemietz*, cited above, pp. 35-35, § 37, and *Ernst and Others v. Belgium*, no. 33400/96, § 116, 15 July 2003). Only after the police had penetrated into the applicant's flat was he invited to hand over "documents relating to the public company T. and the federal industrial group R.". However, neither the order nor the oral statements by the police indicated why documents concerning business matters of two private companies – in which the applicant did not hold any position – should have been found on the applicant's premises (compare *Buck*, cited above, § 50). The *ex post facto* judicial review did nothing to fill the lacunae in the deficient justification of the search order. The Oktyabrskiy Court confined its finding that the order had been justified, to a reference to four named documents and other unidentified materials, without describing the contents of any of them (see paragraph 22 above). The court did not give any indication as to the relevance of the materials it referred to and, moreover, two out of the four documents appeared after the search had been carried out. The Court finds that the domestic authorities failed in their duty to give "relevant and sufficient" reasons for issuing the search warrant.
48. As regards the manner in which the search was conducted, the Court further observes that the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were "of interest" for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to business matters of two private companies. In addition, the police took away the applicant's personal notebook, the central unit of his computer and other materials, including his client's authority form issued in unrelated civil proceedings and a draft memorandum in another case. As noted above, there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege (see *Sallinen and Others v. Finland*, no. 50882/99, § 89, 27 September 2005, and *Tamosius v. the United Kingdom* (dec.), no. 62002/00, ECHR 2002-VIII). Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued. The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see *Niemietz*, cited above, pp. 35-36, § 37).
49. In sum, the Court considers that the search carried out, without relevant and sufficient grounds and in the absence of safeguards against interference with professional secrecy, at the flat of the applicant, who was not suspected of any criminal offence but was representing defendants in the same criminal case, was not "necessary in a democratic society". There has therefore been a violation of Article 8 of the Convention.
- II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1**
50. The applicant complained under Article 1 of Protocol No. 1 about a violation of his property rights resulting from the seizure and retention of his documents and computer. Article 1 of Protocol No. 1 provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Submissions by the parties

51. The applicant submitted that the seizure of the central unit had constituted a disproportionate interference with his property rights and had imposed an excessive burden on him. The central unit proper could not be used as evidence in the criminal case because it had not been an instrument, object or product of a crime and had not borne any traces of a crime. Furthermore, the data contained therein could not have had any evidentiary value either, because the unit had been in the possession of the prosecution for a long time and the data could have been erased or modified. The applicant agreed with the reasons set out in the judicial decision of 19 April 2000. In his view, the prosecution should have abided by that decision rather than contesting it on appeal. The applicant claimed that the real purpose of the seizure had been to hinder his legal professional activities. The unlawful withholding of his computer had deprived him of access to more than two hundred clients' files and had been detrimental to his legal practice as a whole. Lastly, the applicant indicated that he had eventually received his notebook and some documents back.
52. The Government submitted that the central unit of the applicant's computer had been sealed and attached as physical evidence in criminal case no. 7806 in order to prevent loss of data. The examination of the criminal case had not yet been completed. The applicant's documents and central unit would be stored in the St Petersburg City Court until such time as the judgment had been delivered. Accordingly, the applicant's right to use his property had been restricted in the public interest, with a view to establishing the truth in criminal case no. 7806.

B. The Court's assessment

53. The Court observes that the search of the appli-

cant's home was followed by the seizure of certain documents, his notebook and the central unit of his computer – that is, the part containing hard disks with data. As the applicant eventually regained possession of his notebook and documents, the Court will confine its analysis to the compatibility of the retention of the computer to this day with the applicant's right to peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1.

54. It is undisputed that the applicant was the lawful owner of the computer; in other words, it was his “possession”. The investigator ordered that the computer be kept as physical evidence in a criminal case until such time as the trial court had given judgment, determining in particular the use of evidence. The Court considers that this situation falls to be examined from the standpoint of the right of a State to control the use of property in accordance with the general interest.
55. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. In particular, the second paragraph of Article 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing “laws”. Moreover, the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, for example, *Baklanov v. Russia*, no. 68443/01 68443/01, § 39-40, 9 June 2005, with further references).
56. The Court observes that the decision to retain the computer was based on the provisions of the RSFSR Code of Criminal Procedure governing the use of physical evidence in criminal proceedings (see paragraphs 31 and 32 above). The investigator had the discretion to order retention of any object which he considered to be instrumental for the investigation, as was the case with the applicant's computer. The Court has doubts that such a broad discretion not accompanied by efficient judicial supervision would pass the “quality of law” test but it sees no need for a detailed examination of this point for the following reasons.
57. The Court accepts that retention of physical evidence may be necessary in the interests of proper administration of justice, which is a “legitimate aim” in the “general interest” of the

community. It observes, however, that there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Edwards v. Malta*, no. 17647/04, § 69, 24 October 2006, with further references).

58. The Court agrees with the applicant's contention, not disputed by the Government, that the computer itself was not an object, instrument or product of any criminal offence (compare *Frizen v. Russia*, no. 58254/00, § § 29-31, 24 March 2005). What was valuable and instrumental for the investigation was the information stored on its hard disk. It follows from the judgment of 19 April 2000 that the information was examined by the investigator, printed out and included in the case file (see paragraph 15 above). In these circumstances, the Court cannot discern any apparent reason for continued retention of the central unit. No such reason has been advanced in the domestic proceedings or before the Court. Nevertheless, the computer has been retained by the domestic authorities until the present day, that is, for more than six years. The Court notes in this connection that the computer was the applicant's professional instrument which he used for drafting legal documents and storing his clients' files. The retention of the computer not only caused the applicant personal inconvenience but also handicapped his professional activities; this, as noted above, might have had repercussions on the administration of justice.
59. Having regard to the above considerations, the Court finds that the Russian authorities failed to strike a "fair balance" between the demands of the general interest and the requirement of the protection of the applicant's right to peaceful enjoyment of his possessions. There has therefore been a violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL NO. 1

60. The applicant complained under Article 13 of the Convention that he had not had an effective remedy in respect of the unlawful restriction on his property rights under Article 1 of Protocol No. 1. Article 13 provides as follows:

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

A. Submissions by the parties

61. The applicant pointed out that the scope of review by the domestic courts had been confined to the lawfulness of the search. As to his property complaints, the courts had determined that those issues had not been amenable to judicial review. In his view, the Constitutional Court's ruling of 23 March 1999 should have been interpreted as opening the way for judicial review of all decisions affecting a person's property rights. He stressed that his civil claim for damages had, under various pretexts, not been examined for more than four years.
62. The Government submitted that the applicant had been able to challenge the contested decision before a court which had considered and dismissed his complaints (on 19 December 2000 in the final instance). Furthermore, his civil claim for damages against the St Petersburg City Prosecutor and Ministry of Finance was now pending before the Oktyabrskiy Court of St Petersburg.

B. The Court's assessment

63. The Court has consistently interpreted Article 13 as requiring a remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, pp. 23-24, § 54). In the present case there has been a finding of a violation of Article 1 of Protocol No. 1 and the complaint under Article 13 must therefore be considered. It must accordingly be determined whether the Russian legal system afforded the applicant an "effective" remedy, allowing the competent "nation-

al authority” both to deal with the complaint and to grant appropriate relief (see *Camenzind*, cited above, pp. 2896-97, § 53).

64. The applicant asked for a judicial review of the lawfulness of the search and seizure conducted at his place of residence and of the decision on retention of his computer as physical evidence. Whereas the domestic courts examined the complaint concerning the search and seizure, they declared inadmissible the complaint about the failure to return the applicant’s computer on the ground that the retention decision was not amenable to judicial review (see paragraphs 22 et seq. above). The applicant was told to apply to a higher prosecutor instead. In this connection the Court reiterates its settled case-law to the effect that a hierarchical appeal to a higher prosecutor does not give the person employing it a personal right to the exercise by the State of its supervisory powers and for that reason does not constitute an “effective remedy” (see, for example, *Horvat v. Croatia*, no. 51585/99, § 47, ECHR 2001-VIII).
65. As regards the pending civil claim for damages to which the Government referred, the Court notes that a civil court is not competent to review the lawfulness of decisions made by investigators in criminal proceedings.
66. It follows that in these circumstances the applicant did not have “an effective remedy before a national authority” for airing his complaint arising out of a violation of Article 1 of Protocol No. 1. There has therefore been a violation of Article 13 of the Convention, taken together with Article 1 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

68. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the Chamber may reject the claim in whole or in part”.

69. In a letter of 5 July 2005, after the application had been declared admissible, the Court invited the applicant to submit claims for just satisfaction by 7 September 2005. He did not submit any such claim within the specified time-limit.

70. In these circumstances, the Court makes no award under Article 41.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. **Holds that there has been a violation of Article 8 of the Convention;**
2. **Holds that there has been a violation of Article 1 of Protocol No. 1;**
3. **Holds that there has been a violation of Article 13 of the Convention, taken together with Article 1 of Protocol No. 1;**
4. **Decides not to make an award under Article 41 of the Convention.**

Done in English, and notified in writing on 7 June 2007, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Søren Nielsen, *Registrar*
Christos Rozakis, *President*

ECHR

ECJ

FOURTH SECTION

CASE OF PETRI SALLINEN AND OTHERS v FINLAND

(Application no. 50882/99)

JUDGMENT

STRASBOURG
27 September 2005

FINAL
27/12/2005

COMPUTER, HARD-DISK, SEIZURE, INVESTIGATION, CONFISCATION, PRIVATE LIFE, CORRESPONDENCE, RESPECT FOR HOME

IN THE CASE OF PETRI SALLINEN AND OTHERS V. FINLAND,

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

Sir **Nicolas Bratza**, *President*,

Mr **G. Bonello**,

Mr **M. Pellonpää**,

Mr **K. Traja**,

Mr **L. Garlicki**,

Mr **J. Borrego Borrego**,

Ms **L. Mijović**, *judges*,

and Mrs **F. Elens-Passos**, *Deputy Section Registrar*,

Having deliberated in private on 25 November 2003 and on 6 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 50882/99 50882/99) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by 18 Finnish nationals, Mr Petri Sallinen (born in 1968 and resident in Joensuu), Ms. H. (born in 1931 and resident in Joensuu), Ms. M. (born in 1962 and resident in Joensuu), Mr. P.S. (born in 1962 and resident at Onkamo), Mr. J. (born in 1967 and resident in Joensuu), Mr. J.J. (born in 1974 and resident at Lehmo), Ms. N. (born in 1976 and resident at Lehmo), Mr. V. (born in 1940 and resident at Suhmura), Mr. L. (born in 1945 and resident at Suhmura), Mr. T. (born in 1943 and resident in Joensuu), Mr. K, born in 1964 and resident at Kylmäkoski, Mr. T.A. (born in 1968 and resident in Joensuu), Ms. T.S. (born in 1971 and resident in Joensuu), Ms. S. (born in 1942 and resident in Joensuu), Mr. J.V. (born in 1968 and resident in Joensuu), Mr. A.H. (born in 1952 and resident in Joensuu), Ms. T.T. (born in 1945 and resident in Joensuu), and Mr. R., born in 1962 and resident at Lehmo ("the

applicants"), on 2 September 1999.

2. The applicants were represented by Mr Markku Fredman, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen, Director, Ministry for Foreign Affairs.
3. The applicants complained about the search and seizure of privileged material in the first applicant's law firm. They relied on Articles 6, 8 and 13 of the Convention.
4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
5. By a decision of 25 November 2003 the Court declared the application admissible.
6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Finnish Bar Association, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties were given the possibility to reply to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant was born in 1968 and lives in Joensuu. He is a member of the Finnish Bar. The other 17 applicants were his clients at the relevant time ("the client applicants").
8. On 26 January 1999 the police conducted a search – it is not entirely clear of which premises – based on the suspicion that the first applicant's clients X and Y (not client applicants before the Court) had committed aggravated debtor's fraud. In the course of that search X managed to destroy the original of a promissory note which the police had attempted to seize and which may have been relevant to the financial arrangements underlying the sus-

- pected offence.
9. At the time the first applicant's status in the investigation had been that of a witness. On 22 February 1999 the police requested him to attend for questioning in this capacity. This request was apparently cancelled before he had taken any action thereon.
 10. A police officer in charge of the criminal investigations granted a search warrant and on 2 March 1999 seven officers of the National Bureau of Investigation (*keskusrikospoliisi, centralkriminalpolisen*), assisted by a tax inspector and an enforcement official (*ulosottomies, utmätningsman*), searched the first applicant's law office, flat and vehicles. This search warrant was likewise based on the suspicion that X and Y had committed aggravated debtor's fraud but the first applicant was now indicated as a suspect, namely that he had aided and abetted the offences by drafting certain documents.
 11. Under the terms of the warrant the search aimed at examining "the documents, computers and archives of the law office" as well as the first applicant's flat and vehicles "so as to investigate the share transactions by the limited liability company [H.] in 1998 and to find material relating to those transactions".
 12. During the search of his law office all of the first applicant's client files were allegedly perused. The police also examined all floppy disks and examined his note books pertaining to his meetings with clients. In addition, the hard disks in the office computers were copied: two were copied on the spot and two computers, including the one used by the first applicant himself, were seized for later disk-copying on police premises. Those computers were returned on 4 March 1999.
 13. The first applicant's computer also contained software for electronic mail, including his private and professional messages.
 14. A fellow member of the Bar assisted the first applicant during part of the search.
 15. On 4 March 1999 the first applicant requested the District Court (*käräjäoikeus, tingsrätten*) of Joensuu to revoke the seizure as being unlawful. On 24 March 1999 the court nevertheless maintained it, noting that the first applicant was suspected of aiding and abetting aggravated debtor's dishonesty.
 16. On 11 May 1999 the Court of Appeal (*hovioikeus, hovrätten*) of Eastern Finland upheld the District Court's decision and on 25 November 1999 the Supreme Court (*korkein oikeus, högsta domstolen*) refused the first applicant leave to appeal.
 17. On 4 May 1999 the police certified the return of three of the four hard disks and that they had destroyed any copies thereof. They stated however that they would retain a copy of the fourth hard disk until the lawfulness of the seizure had been finally decided or until the material could be destroyed for any other reason.
 18. In June 1999 three of the applicants (nos. 2-3 and 8) requested the District Court to revoke the seizure of the copy of the fourth hard disk (which contained material relating to their instructions to the first applicant) and to order the police to compensate their costs. They argued that the seizure had been unlawful from the outset. At any rate, the copy in question was of no relevance to the pre-trial investigation concerning X and Y.
 19. In its rejoinder the National Bureau of Investigation referred to the Court of Appeal's decision of 11 May 1999 in which the seizure had been found lawful. Moreover, the hard disks had only been subjected to a targeted search and they were able to search information concerning only relevant companies and individuals. Only the potentially relevant client files in the law office had been perused. The search and seizure had thus not been of wholesale nature. The tax and enforcement officials who had witnessed the search had been – and remained – under a duty to keep secret any information thereby obtained.
 20. On 17 June 1999 the District Court agreed with the three client applicants and ordered that the copy of the fourth hard disk be returned. It rejected, as not being based on law, the applicants' claim for compensation in respect of their costs. The applicants appealed on this point, whereas the police appealed against the revocation order.
 21. In its submissions to the Court of Appeal the National Bureau of Investigation listed the contents of the copied hard disk. For example, specific mention was made of what appears to have been the promissory note which the police had been looking for (and had found). The submissions indicated the debtor's and the creditor's names as well as the amount of the debt. The National Bureau of Investigation furthermore explained that the material on the relevant hard disk had been copied to a so-

called optical disk which could in any case not be returned as it also contained internal police data. The submissions by the Bureau were apparently not ordered to be kept confidential.

22. On 27 January 2000 the Court of Appeal declined to examine the parties' appeals, considering that the matter had been resolved *res judicata* in the first set of proceedings ending with the Supreme Court's decision of 25 November 1999. The Supreme Court granted leave to appeal to the three client applicants in question.
23. On 3 March 2000 the public prosecutor charged, among others, X and Y with aggravated debtor's dishonesty but decided to press no charges against the first applicant, having found no evidence of any crime.
24. On 20 April 2001 the Supreme Court ruled that although a final decision had already been rendered in respect of another appellant, it did not prevent the courts from examining similar appeals filed by other parties. The case was referred back to the Court of Appeal which, on 4 October 2001, revoked the District Court's decision on the basis that the seizure had been lawful.
25. The three client applicants in question were again granted leave to appeal to the Supreme Court. On 18 October 2002 it revoked the seizure in so far as it pertained to information which those applicants had given to the first applicant.
26. The Supreme Court found it undisputed that the copied hard disk contained information relating to the three client applicants' instructions to the first applicant. It had not been argued that this information was not protected by counsel's secrecy obligation under Chapter 17, section 23 of the Code of Judicial Procedure. Nor did the information in question pertain to any suspicion that the first applicant or any one else had committed a crime.
27. The Supreme Court accepted that the police had been entitled by Chapter 4, section 1 of the Coercive Measures Act (*pakkokeinolaki, tvångsmedelslagen* 450/1987 450/1987) to seize the first applicant's hard disk and make a copy thereof. Technical reasons and practical needs (the fact that the police had been obliged at the time of the search to copy the whole hard disk) did not however permit any deviation from the prohibition on seizure of privileged material. The police should there-

fore have returned the computer files immediately or destroyed them. The appellants were awarded reasonable compensation for their costs and expenses.

28. On 11 November 2002 the Chief Enforcement Officer of Vantaa confirmed that the copy of the hard disk had been destroyed on that day.
29. On 22 August 2003 the Deputy Chancellor of Justice (*valtioneuvoston apulaisoikeuskansleri, justitiekansleradjoinen i statsrådet*) issued his decision in response to a petition by the Finnish Bar Association concerning, *inter alia*, the alleged unlawfulness of the coercive measures against the first applicant. He found it established that the tax inspector and the enforcement official had attended the search in their respective capacity as a witness and expert. He nevertheless concluded, *inter alia*, that from the point of view of foreseeability of domestic law, as required by Article 8 of the Convention, the relationship between the Coercive Measures Act (Chapter 4, section 2, subsection 2), the Code of Judicial Procedure (Chapter 17, section 23, subsection 1 (4)) and the Advocates Act (section 5 c) was somewhat unclear and permitted very diverging interpretations as to the extent to which privileged material could be subject to search and seizure. The Deputy Chancellor therefore requested the Ministry of Justice to consider whether there was a need to amend the relevant legislation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. General conditions for searches and seizures

30. Under the Coercive Measures Act (450/1987) the police may conduct a search, *inter alia*, if there is reason to suspect that an offence has been committed and provided the maximum sentence applicable exceeds six months' imprisonment (Chapter 5, section 1). The search warrant is issued by the police themselves.
31. A search may also be conducted on the premises of a person other than the one who is under reasonable (*todennäköinen, sannolik*) suspicion of having committed an offence of the aforementioned nature, provided the offence was committed on those premises or the suspect was apprehended there or if there are very strong reasons for assuming that a search of those premises will produce an object to be seized or other information pertaining to

- the offence (Chapter 5, section 2). In order for an object to qualify for seizure there must be a reason to presume that it may serve as evidence in the criminal proceedings, that it may have been removed from someone by a criminal offence or that the court may order its forfeiture (Chapter 4, section 1).
32. A sealed letter or other private document which has been seized may only be opened by the head of investigation, by the prosecutor or by the court. In addition, only the investigators of the offence in question may examine such a document more closely. However, an expert or other person whose assistance is used in investigating the offence or who is otherwise heard in the case may examine the material, as directed by the head of investigation, by the prosecutor or by the court (Chapter 4, section 8).
 33. Whenever possible, the officer in charge shall call a witness to attend the search. If deemed necessary, the officer may also seek the assistance of an expert or other person (Chapter 5, section 4, subsection 1).
 34. The officer in charge may allow a complainant or his representative to attend a search in order to provide necessary information. The responsible officer must nonetheless ensure that a complainant or representative does not obtain any more information than necessary through the search (Chapter 5, section 4, subsection 3).
 35. According to section 40 of the Pre-trial Investigation Act, only such evidence as may be considered relevant in the case shall be placed on record.
 36. As regards other evidence, it is the respondent Government's view that a police officer is under an obligation to respect the confidentiality requirement stipulated by section 17 of the Civil Servants Act (*valtion virkamieslaki, statstjänstemannalagen 750/94*).
 37. Section 8 of the Pre-Trial Investigation Act (*esitutkintalaki, förundersökningslagen 449/1987*) stipulates that in an investigation no one's rights shall be infringed any more than necessary for the achievement of its purpose. No one shall be placed under suspicion without due cause and no one shall be subjected to harm or inconvenience unnecessarily.
 38. Chapter 7, section 1 a, of the Coercive Measures Act provides that only such measures may be used which can be deemed justified in light of the seriousness of the offence under investigation, the importance of the investigation and the degree of interference with the rights of the suspect or other persons subject to the measures, as well as in light of any other pertinent circumstances.
 39. According to Chapter 4, section 11, a seizure shall be lifted as soon as it is no longer necessary. If charges have not been brought within four months of the seizure the court may extend it at the request of a police officer competent to issue arrest warrants.
 2. *Particular conditions in respect of privileged material*
 40. Chapter 4, section 2, subsection 2 of the Coercive Measures Act provides that a document shall not be seized for evidential purposes if it may be presumed to contain information in regard to which a person referred to in Chapter 17, section 23, of the Code of Judicial Procedure is not allowed to give evidence at a trial and provided that the document is in the possession of that person or the person for whose benefit the secrecy obligation has been prescribed. A document may nevertheless be seized if, under section 27, subsection 2 of the Pre-Trial Investigation Act, a person referred to in Chapter 17, Article 23, of the Code of Judicial Procedure would have been entitled or obliged to give evidence in the pre-trial investigation about the matter contained in the document.
 41. Under Chapter 17, section 23, subsection 1 of the Code of Judicial Procedure counsel may not testify in respect of what a client has told him or her for the purpose of pleading a case, unless the client consents to such testimony. Although subsection 3 provides for an exception to this secrecy obligation if the charges concern an offence carrying a minimum sentence of six years' imprisonment (or attempting or aiding and abetting such an offence), this exception does not extend to counsel for an accused.
 42. Under section 5 c (626/1995) of the Advocates Act (*laki asianajajista, lagen om advokater*) an advocate or his assistant shall not without due permission disclose the secrets of an individual or family or business or professional secrets which have come to his knowledge in the course of his professional activity. Breach of this confidentiality obligation shall be punishable in accordance with Chapter 38, section 1 or 2, of the Penal Code (*rikoslaki, strafflagen*), unless

the law provides for a more severe punishment on another court.

43. In their book "Pre-trial investigation and coercive measures" (*Esitutkinta ja pakkokeinot*, Helsinki, 2002) Klaus Helminen, Kari Lehtola and Pertti Virolainen state (at page 742) that in the legal literature and in police practice a principle has been consistently followed whereby a search may not be performed in order for investigators to obtain documents that are subject to a seizure prohibition.
44. The Ministry of Justice appointed a Working Group on Internet Aided Crimes (*tietoverkkorikostyöryhmä, arbetsgruppen för IT brottslighet*) which also considered the question of searches and seizures of computer files and computers by the police. On June 2003 the Working Group issued a report, which was sent out for comments to various interest groups and experts. On the basis of the working group's report and the comments given, the Ministry of Justice is expected to prepare a government bill.

3. Remedies

45. Chapter 4, section 13, of the Coercive Measures Act provides that at the request of a person whom the case concerns the court shall decide whether the seizure shall remain in force. A request which has been submitted to the court before its examination of the charges shall be considered within a week from its reception by the court. The court shall provide those with an interest in the matter an opportunity to be heard, but the absence of anyone shall not preclude a decision on the issue. A decision reviewing a seizure is subject to a separate appeal.
46. According to section 118, subsection 3 of the Constitution (*perustuslaki, grundlagen* 731/1999) everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person performing a public function shall have the right to request that the civil servant or other person in charge of the public function be sentenced to a punishment and that the public organisation, official or other person in charge of a public function be held liable for damages, as provided in more detail by an Act. This section is equivalent to section 93 of the repealed Constitution Act of Finland of 1918 (*Suomen Hallitusmuoto, Regeringsform för Finland*), as in force at the relevant time.
47. Until 31 December 1998, Chapter 24, section 2 of the Penal Code provided that if a search of premises was carried out by someone lacking the authority to do so, or if someone having such authority carried it out in an unlawful manner, he or she was to be sentenced to a fine or to imprisonment for a maximum of one year. According to Government Bill no. 6/1997, the provision was proposed to be repealed as "in cases where the above-mentioned act is committed by a public official in the performance of his or her official duties, Chapter 40, section 10 is applicable".
48. Chapter 40, section 10, subsection 1 of the Penal Code provides that if a public official, when acting in his office, intentionally in a manner other than that provided above in this Chapter violates or neglects to fulfil his official duty based on the provisions or regulations to be followed in official functions, and the act, when assessed as a whole, taking into consideration its detrimental and harmful effect and the other circumstances connected with the act, is not petty, he shall be sentenced for violation of official duties to a fine or to imprisonment for at most one year.
49. Chapter 40, section 11 of the Penal Code provides that if a public official, when acting in his office, through carelessness or lack of caution, in a manner other than that referred to in section 5, subsection 2, violates or neglects to fulfil his or her official duty based on the provisions or regulations to be followed in official functions, and the act, when assessed as a whole, taking into consideration its detrimental and harmful effect and the other circumstances connected with the act, is not petty, he shall be sentenced for a negligent violation of official duties to a warning or to a fine.
50. According to Chapter 1, section 14 of the Criminal Procedure Act (*laki oikeudenkäynnistä rikosasioissa, lag om rättegång i brottmål* 689/1997), an injured party may bring a private prosecution only if the public prosecutor has decided not to press charges.
51. Under the 1974 Damage Compensation Act (*vahingonkorvauslaki, skadeståndslagen* 412/1974) proceedings may be brought against the State in respect of damage resulting from fault or neglect by its employees in the performance of their duties (Chapters 3 and 4).

Council of Europe recommendation

52. Recommendation (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer provides, *inter alia*, as follows:

“Principle I - General principles on the freedom of exercise of the profession of lawyer

... 6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.”

III. THIRD PARTY INTERVENTION

53. The Finnish Bar Association (*Finlands Advokatförbund, Finlands Advokatförbund*) noted that the case did not meet a single criterion for the lawful execution of search and seizure as set out in the case law of the Court. Further, under Finnish legislation, there are no provisions affording a legal remedy against a search warrant issued by the police. A search may be carried out on the premises of a person to whom a confidentiality obligation applies provided that the object to be seized may be found there. The threshold for the execution of a search is low in the extreme and the execution of a search in and of itself interferes with the right and obligation of secrecy of a person to whom a confidentiality obligation applies.
54. The wording of the instructions pertaining to the search in the present case was rather expansive and no attempt was made to attend to the advocate's confidentiality obligation. Disregard of this obligation is particularly manifest in the participation of a tax inspector and an enforcement official in the search. The confidentiality obligation of advocates was also disregarded in respect of the seizures executed in connection with the search. The hard disks of the law office's computers, floppy disks and several notebooks pertaining to meetings with clients were seized in connection with the latter search, in addition to which data on the office secretary's computer was copied. Subsequent to the seizure, the material was not e.g. sealed and consigned for safekeeping until a court could rule on the lawfulness of the seizure.
55. In terms of the confidentiality obligation, the possibility of submitting the issue of a seizure to the court for review as provided for in the Coercive Measures Act had in this case

remained a dead letter. All the information deemed confidential by the advocate and his clients had been disclosed prior to the court proceedings, as the authorities examined the seized material without waiting for a court to rule on the issue.

56. The Association further maintained that the police could have availed themselves of the procedure provided for in the Advocates Act, wherein the searched material would have been examined by an outside advocate who would have determined which material was related to the pre-trial investigation being conducted by the police and which was not. This procedure would have allowed for the upholding of the advocate's confidentiality obligation as well as the client's right to confidentiality.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The applicants complained that the search and seizure of privileged material had breached Article 8 of the Convention, which provides:

“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 freedoms of others.”

A. The parties' submissions

1. *The applicants*
58. The first applicant complained under Article 8 of the Convention that the search and seizure of privileged material violated his right to respect for his private life, home and correspondence. Apart from documents relating to his clients' instructions, his private notes and electronic messages were also seized.
59. The applicants nos. 1-3 and 8 complained that the search and seizure, including the retention by the police of a copy of the fourth hard disk violated their right to respect for their private

life, family life and correspondence. The other applicants complained that the search and the short-term seizure which the police revoked of its own motion violated their right to respect for their private life, family life and correspondence.

60. The applicants did not base their complaint on the possibility that the police might have used the information obtained through the search. They argued that their uncertainty in this respect must be taken into account in assessing the compatibility of the search with the requirements of Article 8.
61. In so far as the seizure extended to material containing information in respect of which the first applicant was not allowed to testify, the applicants alleged that it was not in accordance with domestic law. In so far as the search sought to obtain such material for seizure, that interference was likewise in breach of domestic law. They referred to Chapter 4, section 2 of the Coercive Measures Act, which obliges the police to show circumspection when conducting a seizure. They argued that since a search may only be performed to find potentially admissible evidence the police are not authorised by law to conduct a search if the purpose is to find a document which is arguably of a privileged character.
62. The applicants further argued that in the present circumstances the assistance which the tax inspector and enforcement official provided during the search raised a further question under Article 8. Further, the police did not fully respect its duty of secrecy as it disclosed some of that material in its appeal to the Court of Appeal.
63. The applicants concluded that Finnish practice in coercive measures was very deficient in terms of oversight and legal safeguards. In the present case the authorities did not adhere to the procedure recommended in the legal literature. The applicants noted that in Finland no provision was made for involving an appointed representative of the Bar in any search and seizure of material relating to a member's practice.

2. *The Government*

64. The Government submitted that in respect of the first applicant, a search performed in his office may have constituted an interference within the meaning of Article 8 of the Convention. As regards the client applicants, the Govern-

ment noted that correspondence with a lawyer falls under the protection of Article 8. However, the Government contended that there were any interference with the client applicants' rights. The Government argued that the applicants had not sufficiently substantiated their allegation that the retained copy of the fourth hard disk contained material which was unrelated to the offence under investigation. Furthermore, even if the disk did contain any material irrelevant to the investigated offence, that material could not have been used by the police.

65. Were the Court to find that there was an interference with the right protected under Article 8, the Government noted that the first applicant was suspected of aggravated debtor's fraud and of aiding and abetting aggravated debtor's dishonesty. As the maximum penalty for an aggravated debtor's fraud is four years' imprisonment the search and seizure were in accordance with the law. In the Government's view a lawyer suspected of a severe offence cannot be treated differently from other suspects. The search and the seizure were carried out with a view to investigating a serious offence, which justified the interference with the privileged client-lawyer relationship.
66. As regards the other applicants, the Government referred to section 34 of the Police Act, under which information concerning exclusively a person unrelated to the investigation shall be destroyed without delay, unless the material is needed for the investigation of the offence. They further noted that the police often resorted to the expertise of tax inspectors when investigating matters relating to accounting. Subject to the instructions given by the head of the investigation, such an expert or assistant could examine a sealed letter or other document. The impugned measures were therefore in accordance with law also in this respect.
67. The Government further opined that the interference pursued the legitimate aim of preventing crime and protecting the rights and freedoms of others. The measures were proportionate to those aims, corresponded to a pressing social need and were accompanied by adequate and effective safeguards. They argued that it was necessary for the police to examine all of the material in the first applicant's office in order to find out which part of it was relevant to the investigation of the offence. The hard disks were subjected to a targeted search and only the potentially relevant client files in

the law office were perused. The reason for retaining a copy of the fourth hard disk was thoroughly explained and reviewed in the national proceedings, and was relevant and sufficient also for the purposes of Article 8 § 2. Moreover, police officers were under an obligation to respect confidentiality.

B. The Court's assessment

1. *Whether there was an interference*

68. The first applicant claimed that the search of his business and residential premises and the seizure of several documents had interfered with his right to respect for his private life, home and correspondence as guaranteed by Article 8 § 1. In this respect, the Government agreed that a search may have constituted an interference.
69. The client applicants claimed that the search and seizure of privileged material interfered with their rights under Article 8 of the Convention. The Government contested the other applicants' view, arguing that even though the correspondence with a lawyer falls under the protection of Article 8, there had not been any interference with their rights within the meaning of Article 8 of the Convention.
70. The Court would point out that, as it has now repeatedly held, the notion of "home" in Article 8 § 1 encompasses not only a private individual's home. It recalls that the word "*domicile*" in the French version of Article 8 has a broader connotation than the word "home" and may extend, for example, to a professional person's office. Consequently, "home" is to be construed as including also the registered office of a company run by a private individual, as well as a juristic person's registered office, branches and other business premises (see, *inter alia*, *Buck v. Germany*, no. 41604/98, § 31, 28 April 2005, *Chappell v. the United Kingdom*, judgment of 30 March 1989, Series A no. 152-A, pp. 12-13 and 21-22, § § 26 and 51; *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, § § 29-31).
71. In the present case, the searches and seizure ordered by the police concerned, *inter alia*, the law office owned and managed by the first applicant. The search warrants were issued by the officer in charge of the police investigation, in which the first applicant was first considered as a witness, but the second search warrant was based on the suspicion that he was suspected of having aided and abetted an offence of ag-

gravated debtor's fraud allegedly committed by two of his clients (who are not applicants before the Court). It is undisputed that the police had copied a hard disk from one of the first applicant's computers and that the copy was kept by the police until a final court decision. The Court finds that the search by the police of the residential premises and the business premises of the first applicant, and the seizure of hard disks there, amounted to an interference with the right to respect for the first applicant's "home" and "correspondence", as those terms have been interpreted in the Court's case-law (*Niemietz*, cited above, § 30). It follows that the search and seizure also amounted to an interference with the right to respect for the client applicants' "correspondence" (see *Niemietz*, cited above, § 32).

72. Consequently, the Court finds it unnecessary to determine whether, as it has found in several comparable cases (see, *inter alia*, *Chappell*, cited above, § 51; *Niemietz*, cited above, § § 29-31), there has also been an interference with the applicants' right to respect for their private life as guaranteed by Article 8 § 1.
73. The Court must therefore examine whether this interference was in conformity with the requirements of the second paragraph of Article 8, in other words whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aim or aims in question.

2. *Was the interference justified*

(a) **Was the interference "in accordance with the law"?**

74. The parties disagreed as to the description of domestic law. The applicants maintained that the search warrant was not in accordance with domestic law, as Chapter 4, section 2 of the Coercive Measures Act required the police to show circumspection when a lawyer was involved in the seizure. They further maintained that since a search could only be performed to find something which could be seized and used as evidence (see Coercive Measures Act, Chapter 5, section 1), the police were not authorised under the law to conduct a search if the purpose was to find a document in respect of which an evidential or seizure prohibition might be applied.
75. The Government contested this view, arguing that according to Chapter 5, section 1 of

the Coercive Measures Act, a search could be carried out in order to seize an object which might be relevant in investigating an offence for which a penalty of more than six months' imprisonment was provided. In the present case where the first applicant was suspected of aggravated debtor's fraud and of aiding and abetting an offence of aggravated debtor's dishonesty, the search and seizure had been carried out for the purposes of investigating such a serious offence, which they submitted justified any interference with the confidentiality of the client-lawyer relationship that would normally enjoy special protection. In the Government's view, it was of no relevance in this context that the first applicant was a lawyer and that the search was carried out in his office.

As regards the other applicants, the Government submitted that, according to section 34 of the Police Act, information exclusively concerning third parties had to be destroyed after review without delay, unless it was needed for the investigation of the offence. In their view, the impugned measures were in accordance with the law also in this respect.

76. The Court notes that the expression "in accordance with the law", within the meaning of Article 8 § 2 requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law (see eg. *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, § 55).

– *Whether there was a legal basis in Finnish law*

77. The Court recalls that in accordance with the case-law of the Convention institutions, in relation to Article 8 § 2 of the Convention, the term "law" is to be understood in its "substantive" sense, not its "formal" one. In a sphere covered by written law, the "law" is the enactment in force as the competent courts have interpreted it (see, *inter alia*, *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III). In this respect, the Court reiterates that its power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see, *inter alia*, *Chappell*, cited above, p. 23, § 54).

78. In principle, therefore, it is not for the Court to

express an opinion contrary to that of the domestic courts, which found that the search and seizure were based on the Coercive Measures Act and the Code on Judicial Procedure.

79. In short, the interference complained of had a legal basis in Finnish law.

– *"Quality of the law"*

80. The second requirement which emerges from the phrase "in accordance with the law" – the accessibility of the law – does not raise any problem in the instant case.

81. The same is not true of the third requirement, the "foreseeability" of the meaning and nature of the applicable measures.

82. The Court reiterates in that connection that Article 8 § 2 requires the law in question to be "compatible with the rule of law". In the context of searches and seizures, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such measures (see *mutatis mutandis*, *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 541, § 64).

83. The Court must examine the "quality" of the legal rules applicable to the applicants in the instant case.

84. The Court notes in the first place that under the Coercive Measures Act, Chapter 4, section 2, subsection 2, a document shall not be seized for evidential purposes if it may be presumed to contain information in regard to which a person is not allowed to give evidence.

85. Under Code of Judicial Procedure, Chapter 15, section 23, counsel may not testify in respect of what a client has told him or her for the purpose of pleading a case.

86. Under the Advocates Act, section 5 c, an advocate shall not without due permission disclose the secrets of an individual or family or business or professional secrets which have come to his knowledge in the course of his professional activity.

87. On the face of the above-mentioned provision of the Code of Judicial Procedure, the Court finds the text unclear as far as it concerns confidentiality. The above-mentioned domestic law

- does not state with the requisite clarity whether the notion of “pleading a case” covers only the relationship between a lawyer and his/her clients in a particular case or their relationship generally. The Court refers to a lawyer’s general obligation of professional secrecy and confidentiality. In this respect the Court refers to the Recommendation (REC 2000/21) of the Committee of Ministers, according to which States should take all necessary measures to ensure the respect of the confidentiality of the client-lawyer relationship.
88. The Government sought to resolve this by noting that in any case, the search and seizure were carried out for the purposes of investigation of a serious offence. A lawyer suspected of a severe crime could not, on their view, be treated differently from other suspects.
89. The Court, however, is not persuaded by this argument. In the present case, hard disks were searched, copied and seized. They contained information passing between the first applicant and his clients, who had no role in the investigated offence. While the seized hard disks were returned to the first applicant, however, a copy of the fourth hard disk remained with the police for some considerable time. The Court notes that the search and seizure were rather extensive and is struck by the fact that there was no independent or judicial supervision.
90. The Court would emphasise that search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a “law” that is particularly precise. It is essential to have clear, detailed rules on the subject.
91. In that connection, the Court notes that the relationship between the Coercive Measures Act, the Code of Judicial Procedure and the Advocates Act (read together) was somewhat unclear and gave rise to diverging views on the extent of the protection afforded to privileged material in searches and seizures, a situation which was identified also by the Deputy Chancellor of Justice of Finland.
92. In sum, the Court finds that the search and seizure measures in the present case were implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of applicable regulations specifying with an appropriate degree of precision the circumstances in which privileged material could be subject to search and seizure deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society (see, *mutatis mutandis*, *Narinen v. Finland*, no. 45027/98, § 36, 1 June 2004).
93. The Court finds that in these circumstances it cannot be said that the interference in question was “in accordance with the law” as required by Article 8 § 2 of the Convention.
94. There has therefore been a violation of Article 8 of the Convention.
- (b) Purpose and necessity of the interference**
95. Having regard to the above conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 in this case (see *e.g. Kopp*, cited above, § 76).
- ## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION
96. The client applicants complained that the search and perusal of privileged material had breached Article 6 of the Convention, which provides:
- “1. In the determination 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. ...
3. Everyone charged with a criminal offence has the following minimum rights: ...
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing”
- A. The parties' submissions**
1. *The applicant*
97. The client applicants complained under Article 6 of the Convention and notably under § 3 (b) and (c) that the search and perusal of privileged material relating to their respective instructions violated their right to a fair hearing and an effective defence. Some of the applicants had instructed the first applicant to assist them in criminal proceedings in which the police investigation had been conducted by officers also participating in the search.

98. As the same fairness guarantees in principle also apply prior to the actual court proceedings as well as in other than criminal proceedings, the search and seizure also violated the rights under Article 6 of those client applicants who had not already been charged at that moment. A situation whereby public officials can study privileged material relating to cases not yet heard by the courts and other authorities waters down the guarantee of equality of arms between the parties.

99. The applicants relied on the wholesale character of the coercive measures, which were conducted without resorting to the assistance of an independent counsel appointed by the Bar Association, as recommended in the legal literature.

2. *The Government*

100. The Government accepted that in theory where a lawyer is involved in a search, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6. In the present case however it was necessary for the police to examine all of the material in the first applicant's office in order to identify those of relevance to the investigation. Only those documents were examined more closely and under domestic law no other material was to be entered into the investigation record. The police officers were – and remain – under an obligation to respect confidentiality. Moreover, officials who obtain information in the context of a seizure are not allowed to use that information for purposes other than a criminal investigation.

101. The Government considered unsubstantiated the applicants' allegation that information gleaned from the seized material was being used against the applicants in other proceedings.

B. **The Court's assessment**

102. In view of the above finding of a violation of Article 8 based on the lack of foreseeability of the domestic law the Court considers that in the circumstances of this case there is no need to examine separately the additional complaints under Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

103. The applicants complained that the lack of effective remedy against the interference had breached Article 13 of the Convention, which provides:

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

A. **The parties' submissions**

1. *The applicant*

104. The applicants complained under Article 13 of the Convention that they had no effective remedy against the interference (search) other than the possibility of seeking a review of the lawfulness of the seizure. Even if the District Court did order the seizure to be revoked in response to such a request, that decision was overturned on appeal before the copied hard disk could be restored. Even assuming that the applicants had been successful in having that copy restored, the police had had ample time to peruse the documents thereon.

105. They maintained that as Finnish law stood at the time there seemed to be no effective remedy against the revelation of confidential information.

2. *The Government*

106. The Government reiterated that, according to section 118 of the Constitution, everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person performing a public function may bring charges against a civil servant or other person in charge of a public function, and also claim damages. Moreover, the Tort Liability Act also entitles an individual to institute proceedings against investigative authorities or against a court of law, before a district court, on the ground that he or she has suffered damage due to the performance of a public function.

107. Finally, anyone affected by a seizure may challenge its lawfulness before a court of law under Chapter 4 section 13 of the Coercive Measures Act, as was done by four of the applicants. One may also petition the Ombudsman or the Chancellor of Justice or the regional or su-

preme police command of the Ministry of the Interior.

108. As regards the destruction of property which has allegedly been seized unlawfully, including copies made of seized documents, the person affected by the seizure may request a court to issue a civil law order, whereby the investigative authorities are placed under an obligation to destroy the said material.

B. The Court's assessment

109. The Court recalls that the applicants complained in essence about the search and seizure of privileged material.
110. In view of the submissions of the applicant in the present case and of the grounds on which it has found a violation of Article 8 of the Convention, the Court considers that there is no need to examine separately the complaints under Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

112. Under the head of non-pecuniary damage the applicants asked the Court to award each of the 18 applicants 2,500 euros (EUR), totalling EUR 45,000, for suffering and distress resulting from the alleged violations.
113. The Government found the sum claimed for non-pecuniary damage excessive. In their view, the mere finding of a violation would suffice for the client applicants. In the case of the first applicant, the amount to be awarded should not exceed EUR 2,000.
114. The Court accepts that the first applicant has certainly suffered non-pecuniary damage – such as distress and frustration resulting from the search and seizure – which is not sufficiently compensated by the findings of violation of the Convention. The Court awards the first applicant EUR 2,500 under this head, whereas it considers that the finding of a violation of Ar-

ticle 8 constitutes sufficient just satisfaction for the client applicants.

B. Costs and expenses

115. The applicants requested reimbursement of the balance of the legal expenses incurred by them in the Supreme Court by EUR 870.65, including value-added tax (VAT). The Supreme Court awarded those applicants who were part of the proceedings before the Supreme Court EUR 3,500 for costs and expenses. This was EUR 870.65 less than the costs incurred.
116. They also claimed the reimbursement of their legal costs and expenses incurred in the proceedings before this Court, amounting to EUR 6,135.84 (including VAT).
117. The Court recalls that the established principle in relation to domestic legal costs is that an applicant is entitled to be reimbursed those costs actually and necessarily incurred to prevent or redress the breach of the Convention, to the extent that the costs are reasonable as to quantum (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom (Article 41)*, nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). It finds that the proceedings brought by the applicants nos. 2-3 and 8 against the seizure may be regarded as incurred to redress the breach of Article 8 of the Convention complained of by the applicants. The Court observes that in the Supreme Court's judgment of 18 October 2002 it was mentioned that the said applicants requested reimbursement of their legal expenses before the domestic proceedings. Having regard to all the circumstances, the Court awards the applicants nos. 2-3 and 8 EUR 870.

118. As for the proceedings before this Court the applicants' bill of costs and expenses of 26 January 2004 totalled EUR 6,135.84 (including VAT). Having regard to all the circumstances, the Court awards the applicants EUR 6,000 under this head.

C. Default interest

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

**FOR THESE REASONS, THE COURT
UNANIMOUSLY**

Françoise Elens-Passos, *Deputy Registrar*
Nicolas Bratza, *President*

Holds that there has been a violation of Article 8 of the Convention;

1. Holds that there is no need to examine separately the complaints under Article 6 of the Convention;
2. Holds that there is no need to examine separately the complaints under Article 13 of the Convention;
3. Holds:
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 2,500 (two thousand five hundred euros) to the first applicant in respect of non-pecuniary damage;
 - (ii) EUR 870 (eight hundred seventy euros) to applicant nos. 2, 3 and 8 in respect of costs and expenses incurred before the national proceedings;
 - (iii) EUR 6,000 (six thousand euros) to the applicants jointly in respect of costs and expenses incurred in Strasbourg;
 - (iv) any tax that may be chargeable on the above amounts;
 - (b) that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the client applicants;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 September 2005, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

ECHR

ECJ

COURT (PLENARY)

CASE OF MALONE v THE UNITED KINGDOM

(Application no. 8691/79)

JUDGMENT

STRASBOURG

2 August 1984

COMPUTER, PROFILING, INFORMATION TECHNOLOGY, INTERCEPTION, SECRET INFORMATION, PRIVATE LIFE, INFORMATIONAL SELF-DETERMINATION, SENSITIVE DATA

IN THE MALONE CASE,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 50 of the Rules of Court* and composed of the following judges:

Mr. **G. Wiarda**, *President*,

Mr. **R. Ryssdal**,

Mr. **J. Cremona**,

Mr. **Thór Vilhjálmsson**,

Mr. **W. Ganshof van der Meersch**,

Mrs. **D. Bindschedler-Robert**,

Mr. **D. Evrigenis**,

Mr. **G. Lagergren**,

Mr. **F. Gölcüklü**,

Mr. **F. Matscher**,

Mr. **J. Pinheiro Farinha**,

Mr. **E. García de Enterría**,

Mr. **L.-E. Pettiti**,

Mr. **B. Walsh**,

Sir **Vincent Evans**,

Mr. **R. Macdonald**,

Mr. **C. Russo**,

Mr. **J. Gersing**,

and also Mr. **M.-A. Eissen**, *Registrar*,

and Mr. **H. Petzold**, *Deputy Registrar*,

Having deliberated in private on 22 and 23 February and on 27 June 1984,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 May 1983, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 8691/79) against the United Kingdom of

Great Britain and Northern Ireland lodged with the Commission on 19 July 1979 under Article 25 (art. 25) by a United Kingdom citizen, Mr. James Malone.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 (art. 8, art. 13) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Malone stated that he wished to participate in the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 27 May 1983, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Zekia and Mr. Bernhardt, who were prevented from taking part in the consideration of the case, were subsequently replaced by Mr. B. Walsh and Mr. E. García de Enterría, substitute judges (Rules 22 para. 1 and 24 para. 1).

5. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the lawyers for the applicant regarding the need for a written procedure. On 24 June, he directed that the Agent and the lawyers for the applicant should each have until 16 September to file a memorial and that the Delegate should be entitled to file, within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid documents should last be filed, a memorial in reply (Rule 37 para. 1).

On 14 September, the President extended until 14 October each of the time-limits granted to

the Agent and the applicant's lawyers.

6. The Government's memorial was received at the registry on 14 October, the applicant's memorial on 25 October. The Secretary to the Commission informed the Registrar by letter received on 22 December that the Delegate did not wish to file any written reply to these memorials but would be presenting his comments at the hearings.
7. On 27 October, the Chamber unanimously decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50). On the same day, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyers for the applicant, the President of the Court directed that the oral proceedings should open on 20 February 1984 (Rule 38).
8. By letter received on 6 October 1983, the Post Office Engineering Union ("the POEU") requested leave under Rule 37 para. 2 to submit written comments, indicating, inter alia, its "specific occupational interest" in the case and five themes it would want to develop in written comments. On 3 November, the President granted leave but on narrower terms than those sought: he specified that the comments should bear solely on certain of the matters referred to in the POEU's list of proposed themes and then only "in so far as such matters relate to the particular issues of alleged violation of the Convention which are before the Court for decision in the Malone case". He further directed that the comments should be filed not later than 3 January 1984.

On 16 December 1983, this time-limit was extended by the President by three weeks. The POEU's comments were received at the registry on 26 January 1984.

9. On 17 February 1984, the lawyers for the applicant filed the applicant's claims for just satisfaction under Article 50 (art. 50) of the Convention. On the same day, the Government supplied two documents whose production the Registrar had asked for on the instructions of the President. By letter received on 19 February, the Government, with a view to facilitating the hearings the following day, gave a clarification regarding a certain matter in the case.
10. The hearings were held in public at the Human Rights Building, Strasbourg, on 20 February. Immediately prior to their opening, the Court had held a preparatory meeting.

There appeared before the Court:

- (a) for the Government

Mr. **M. Eaton**, Legal Counsellor, Foreign and Commonwealth Office, *Agent*,

Sir **Michael Havers**, Q.C., M.P., Attorney General,

Mr. **N. Bratza**, Barrister-at-Law, *Counsel*,

Mr. **H. Steel**, Law Officers' Department,

Mrs. **S. Evans**, Legal Adviser, Home Office, *Advisers*;

- (b) for the Commission

Mr. **C. Nørgaard**, President of the Commission, *Delegate*;

- (c) for the applicant

Mr. **C. Ross-Munro**, Q.C.,

Mr. **D. Serota**, Barrister-at-Law, *Counsel*.

The Court heard addresses by Sir Michael Havers for the Government, by Mr. Nørgaard for the Commission and by Mr. Ross-Munro for the applicant, as well as their replies to its questions.

11. On 27 February, in fulfilment of an undertaking given at the hearing, the Government supplied copies of extracts from a document which had been referred to in argument at the hearing. By letter received on 5 June, they notified the Registrar of an amendment to this document.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

12. Mr. James Malone was born in 1937 and is resident in Dorking, Surrey. In 1977, he was an antique dealer. It appears that he has since ceased business as such.
13. On 22 March 1977, Mr. Malone was charged with a number of offences relating to dishonest handling of stolen goods. His trial, which took place in June and August 1978, resulted in his being acquitted on certain counts and the jury disagreeing on the rest. He was retried on the remaining charges between April and May 1979. Following a further failure by the jury to agree, he was once more formally arraigned;

the prosecution offered no evidence and he was acquitted.

14. During the first trial, it emerged that details of a telephone conversation to which Mr. Malone had been a party prior to 22 March 1977 were contained in the note-book of the police officer in charge of the investigations. Counsel for the prosecution then accepted that this conversation had been intercepted on the authority of a warrant issued by the Secretary of State for the Home Department.
15. In October 1978, the applicant instituted civil proceedings in the Chancery Division of the High Court against the Metropolitan Police Commissioner, seeking, *inter alia*, declarations to the effect that interception, monitoring and recording of conversations on his telephone lines without his consent was unlawful, even if done pursuant to a warrant of the Secretary of State. The Solicitor General intervened in the proceedings on behalf of the Secretary of State but without being made a party. On 28 February 1979, the Vice-Chancellor, Sir Robert Megarry, dismissed the applicant's claim (*Malone v. Commissioner of Police of the Metropolis* (No. 2), [1979] 2 All England Law Reports 620; also reported at [1979] 2 Weekly Law Reports 700). An account of this judgment is set out below (at paragraphs 31-36).
16. The applicant further believed that both his correspondence and his telephone calls had been intercepted for a number of years. He based his belief on delay to and signs of interference with his correspondence. In particular, he produced to the Commission bundles of envelopes which had been delivered to him either sealed with an adhesive tape of an identical kind or in an unsealed state. As to his telephone communications, he stated that he had heard unusual noises on his telephone and alleged that the police had at times been in possession of information which they could only have obtained by telephone tapping. He thought that such measures had continued since his acquittal on the charges against him.

It was admitted by the Government that the single conversation about which evidence emerged at the applicant's trial had been intercepted on behalf of the police pursuant to a warrant issued under the hand of the Secretary of State for the prevention and detection of crime. According to the Government, this interception was carried out in full conformity with the law and the relevant procedures.

No disclosure was made either at the trial of the applicant or during the course of the applicant's proceedings against the Commissioner of Police as to whether the applicant's own telephone number had been tapped or as to whether other and, if so, what other, telephone conversations to which the applicant was a party had been intercepted. The primary reasons given for withholding this information were that disclosure would or might frustrate the purpose of telephone interceptions and might also serve to identify other sources of police information, particularly police informants, and thereby place in jeopardy the source in question. For similar reasons, the Government declined to disclose before the Commission or the Court to what extent, if at all, the applicant's telephone calls and correspondence had been intercepted on behalf of the police authorities. It was however denied that the resealing with adhesive tape or the delivery unsealed of the envelopes produced to the Commission was attributable directly or indirectly to any interception. The Government conceded that, as the applicant was at the material time suspected by the police of being concerned in the receiving of stolen property and in particular of stolen antiques, he was one of a class of persons against whom measures of interception were liable to be employed.

17. In addition, Mr. Malone believed that his telephone had been "metered" on behalf of the police by a device which automatically records all numbers dialled. As evidence for this belief, he asserted that when he was charged in March 1977 the premises of about twenty people whom he had recently telephoned were searched by the police. The Government affirmed that the police had neither caused the applicant's telephone calls to be metered nor undertaken the alleged or any search operations on the basis of any list of numbers obtained from metering.
18. In September 1978, the applicant requested the Post Office and the complaints department of the police to remove suspected listening devices from his telephone. The Post Office and the police both replied that they had no authority in the matter.

II. RELEVANT LAW AND PRACTICE

A. Introduction

19. The following account is confined to the law and practice in England and Wales relating to

the interception of communications on behalf of the police for the purposes of the prevention and detection of crime. The expression "interception" is used to mean the obtaining of information about the contents of a communication by post or telephone without the consent of the parties involved.

20. It has for long been the practice for the interception of postal and telephone communications in England and Wales to be carried out on the authority of a warrant issued by a Secretary of State, nowadays normally the Secretary of State for the Home Department (the Home Secretary). There is no overall statutory code governing the matter, although various statutory provisions are applicable thereto. The effect in domestic law of these provisions is the subject of some dispute in the current proceedings. Accordingly, the present summary of the facts is limited to what is undisputed, the submissions in relation to the contested aspects of these provisions being dealt with in the part of the judgment "as to the law".
21. Three official reports available to the public have described and examined the working of the system for the interception of communications.

Firstly, a Committee of Privy Councillors under the chairmanship of Lord Birkett was appointed in June 1957 "to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to what safeguards, this power should be exercised ...". The Committee's report (hereinafter referred to as "the Birkett report") was published in October 1957 (as Command Paper 283). The Government of the day announced that they accepted the report and its recommendations, and were taking immediate steps to implement those recommendations calling for a change in procedure. Subsequent Governments, in the person of the Prime Minister or the Home Secretary, publicly reaffirmed before Parliament that the arrangements relating to the interception of communications were strictly in accordance with the procedures described and recommended in the Birkett report.

Secondly, a Command Paper entitled "The Interception of Communications in Great Britain"

was presented to Parliament by the then Home Secretary in April 1980 (Command Paper 7873 - hereinafter referred to as "the White Paper"). The purpose of the White Paper was to bring up to date the account given in the Birkett report.

Finally, in March 1981 a report by Lord Diplock, a Lord of Appeal in Ordinary who had been appointed to monitor the relevant procedures on a continuing basis (see paragraphs 54 and 55 below), was published outlining the results of the monitoring he had carried out to date.

22. The legal basis of the practice of intercepting telephone communications was also examined by the Vice-Chancellor in his judgment in the action which the applicant brought against the Metropolitan Police Commissioner (see paragraphs 31-36 below).
23. Certain changes have occurred in the organisation of the postal and telephone services since 1957, when the Birkett Committee made its report. The Post Office, which ran both services, was then a Department of State under the direct control of a Minister (the Postmaster General). By virtue of the Post Office Act 1969, it became a public corporation with a certain independence of the Crown, though subject to various ministerial powers of supervision and control exercised at the material time by the Home Secretary. The Post Office Act 1969 was repealed in part and amended by the British Telecommunications Act 1981. That Act divided the Post Office into two corporations: the Post Office, responsible for mail, and British Telecommunications, responsible for telephones. The 1981 Act made no change of substance in relation to the law governing interceptions. For the sake of convenience, references in the present judgment are to the position as it was before the 1981 Act came into force.

B. Legal position relating to interception of communications prior to 1969

24. The existence of a power vested in the Secretary of State to authorise by warrant the interception of correspondence, in the sense of detaining and opening correspondence transmitted by post, has been acknowledged from early times and its exercise has been publicly known (see the Birkett report, Part I, especially paras. 11, 17 and 39). The precise origin in law of this executive authority is obscure (*ibid.*, para. 9). Nevertheless, although none of the Post Office statutes (of 1710, 1837, 1908 or 1953) contained clauses expressly conferring

authority to intercept communications, all recognised the power as an independently existing power which it was lawful to exercise (*ibid.*, paras. 17 and 38).

25. At the time of the Birkett report, the most recent statutory provision recognising the right of interception of a postal communication was section 58 sub-section 1 of the Post Office Act 1953, which provides:

"If any officer of the Post Office, contrary to his duty, opens ... any postal packet in course of transmission by post, or wilfully detains or delays ... any such postal packet, he shall be guilty of a misdemeanour ..."

Provided that nothing in this section shall extend to ... the opening, detaining or delaying of a postal packet ... in obedience to an express warrant in writing under the hand of a Secretary of State."

"Postal packet" is defined in section 87 sub-section 1 of the Act as meaning:

"a letter, postcard, reply postcard, newspaper, printed packet, sample packet or parcel and every packet or article transmissible by post, and includes a telegram".

Section 58, which is still in force, reproduced a clause that had been on the statute book without material amendment since 1710.

26. So far as telecommunications are further concerned, it is an offence under section 45 of the Telegraph Act 1863 if an official of the Post Office "improperly divulges to any person the purport of any message". Section 11 of the Post Office (Protection) Act 1884 creates a similar offence in relation to telegrams. In addition, section 20 of the Telegraph Act 1868 makes it a criminal offence if any Post Office official "shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic message or any message entrusted to the [Post Office] for the purpose of transmission".

These provisions are still in force.

27. It was held in a case decided in 1880 (*Attorney General v. Edison Telephone Company*, (1880) 6 Queen's Bench Division 244) that a telephone conversation is a "telegraphic communication" for the purposes of the Telegraph Acts. It has not been disputed in the present proceedings that the offences under the Telegraph Acts apply to telephone conversations.

28. The power to intercept telephone messages has been exercised in England and Wales from time to time since the introduction of the telephone. Until the year 1937, the Post Office, which was at that time a Department of Government, acted upon the view that the power which the Crown exercised in intercepting telephone messages was a power possessed by any operator of telephones and was not contrary to law. Consequently, no warrants by the Secretary of State were issued and arrangements for the interception of telephone conversations were made directly between the police authorities and the Director-General of the Post Office. In 1937, the position was reviewed by the Home Secretary and the Postmaster General (the Minister then responsible for the administration of the Post Office) and it was decided, as a matter of policy, that it was undesirable that records of telephone conversations should be made by Post Office servants and disclosed to the police without the authority of the Secretary of State. The view was taken that the power which had for long been exercised to intercept postal communications on the authority of a warrant of the Secretary of State was, by its nature, wide enough to include the interception of telephone communications. Since 1937 it had accordingly been the practice of the Post Office to intercept telephone conversations only on the express warrant of the Secretary of State (see the Birkett report, paras. 40-41).

The Birkett Committee considered that the power to intercept telephone communications rested upon the power plainly recognised by the Post Office statutes as existing before the enactment of the statutes (Birkett report, para. 50). It concluded (*ibid.*, para. 51):

"We are therefore of the opinion that the state of the law might fairly be expressed in this way.

(a) The power to intercept letters has been exercised from the earliest times, and has been recognised in successive Acts of Parliament.

(b) This power extends to telegrams.

(c) It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well."

C. Post Office Act 1969

29. Under the Post Office Act 1969, the "Post Of-

office" ceased to be a Department of State and was established as a public corporation of that name with the powers, duties and functions set out in the Act. In consequence of the change of status of the Post Office and of the fact that the Post Office was no longer under the direct control of a Minister of the Crown, it became necessary to make express statutory provision in relation to the interception of communications on the authority of a warrant of the Secretary of State. By section 80 of the Act it was therefore provided as follows:

"A requirement to do what is necessary to inform designated persons holding office under the Crown concerning matters and things transmitted or in course of transmission by means of postal or telecommunication services provided by the Post Office may be laid on the Post Office for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid on the Postmaster General to do what is necessary to inform such persons concerning matters and things transmitted or in course of transmission by means of such services provided by him."

30. The 1969 Act also introduced, for the first time, an express statutory defence to the offences under the Telegraph Acts mentioned above (at paragraph 26), similar to that which exists under section 58 para. 1 of the Post Office Act 1953. This was effected by paragraph 1 subparagraph 1 of Schedule 5 to the Act, which reads:

"In any proceedings against a person in respect of an offence under section 45 of the Telegraph Act 1863 or section 11 of the Post Office (Protection) Act 1884 consisting in the improper divulging of the purport of a message or communication or an offence under section 20 of the Telegraph Act 1868 it shall be a defence for him to prove that the act constituting the offence was done in obedience to a warrant under the hand of a Secretary of State."

D. Judgment of Sir Robert Megarry V.-C. in *Malone v. Commissioner of Police of the Metropolis*

31. In the civil action which he brought against the Metropolitan Police Commissioner, Mr. Malone sought various relief including declarations to the following effect:
- that any "tapping" (that is, interception, monitoring or recording) of conversations on his telephone lines without his consent,

or disclosing the contents thereof, was unlawful even if done pursuant to a warrant of the Home Secretary;

- that he had rights of property, privacy and confidentiality in respect of conversations on his telephone lines and that the above-stated tapping and disclosure were in breach of those rights;
- that the tapping of his telephone lines violated Article 8 (art. 8) of the Convention.

In his judgment, delivered on 28 February 1979, the Vice-Chancellor noted that he had no jurisdiction to make the declaration claimed in respect of Article 8 (art. 8) of the Convention. He made a detailed examination of the domestic law relating to telephone tapping, held in substance that the practice of tapping on behalf of the police as recounted in the Birkett report was legal and accordingly dismissed the action.

32. The Vice-Chancellor described the central issue before him as being in simple form: is telephone tapping in aid of the police in their functions relating to crime illegal? He further delimited the question as follows:

"... the only form of telephone tapping that has been debated is tapping which consists of the making of recordings by Post Office officials in some part of the existing telephone system, and the making of those recordings available to police officers for the purposes of transcription and use. I am not concerned with any form of tapping that involved electronic devices which make wireless transmissions, nor with any process whereby anyone trespasses onto the premises of the subscriber or anyone else to affix tapping devices or the like. All that I am concerned with is the legality of tapping effected by means of recording telephone conversations from wires which, though connected to the premises of the subscriber, are not on them." ([1979] 2 All England Law Reports, p. 629)

33. The Vice-Chancellor held that there was no right of property (as distinct from copyright) in words transmitted along telephone lines (*ibid.*, p. 631).

As to the applicant's remaining contentions based on privacy and confidentiality, he observed firstly that no assistance could be derived from cases dealing with other kinds of warrant. Unlike a search of premises, the process of telephone tapping on Post Office premises did not involve any act of trespass

and so was not prima facie illegal (*ibid.*, p. 640). Secondly, referring to the warrant of the Home Secretary, the Vice-Chancellor remarked that such warrant did not "purport to be issued under the authority of any statute or of the common law". The decision to introduce such warrants in 1937 seemed "plainly to have been an administrative decision not dictated or required by statute" (*ibid.*). He referred, however, to section 80 of the Post Office Act 1969 and Schedule 5 to the Act, on which the Solicitor General had based certain contentions summarised as follows:

"Although the previous arrangements had been merely administrative, they had been set out in the Birkett report a dozen years earlier, and the section plainly referred to these arrangements; ... A warrant was not needed to make the tapping lawful: it was lawful without any warrant. But where the tapping was done under warrant ... [section 80] afforded statutory recognition of the lawfulness of the tapping." (*ibid.*, p. 641)

"In their essentials", stated the Vice-Chancellor, "these contentions seem to me to be sound." He accepted that, by the 1969 Act,

"Parliament has provided a clear recognition of the warrant of the Home Secretary as having an effective function in law, both as providing a defence to certain criminal charges, and also as amounting to an effective requirement for the Post Office to do certain acts" (*ibid.*, pp. 641-642).

The Vice-Chancellor further concluded that there was in English law neither a general right of privacy nor, as the applicant had contended, a particular right of privacy to hold a telephone conversation in the privacy of one's home without molestation (*ibid.*, pp. 642-644). Moreover, no duty of confidentiality existed between the Post Office and the telephone subscriber; nor was there any other obligation of confidence on a person who overheard a telephone conversation, whether by means of tapping or otherwise (*ibid.*, pp. 645-647).

34. Turning to the arguments based on the Convention, the Vice-Chancellor noted firstly that the Convention was not part of the law of England and, as such, did not confer on the applicant direct rights that could be enforced in the English courts (*ibid.*, p. 647).

He then considered the applicant's argument that the Convention, as interpreted by the European Court in the case of *Klass and Others*

(judgment of 6 September 1978, Series A no. 28), could be used as a guide to assist in the determination of English law on a point that was uncertain. He observed that the issues before him did not involve construing legislation enacted with the purpose of giving effect to obligations imposed by the Convention. Where Parliament had abstained from legislating on a point that was plainly suitable for legislation, it was difficult for the court to lay down new rules that would carry out the Crown's treaty obligations, or to discover for the first time that such rules had always existed. He compared the system of safeguards considered in the *Klass* case with the English system, as described in the Birkett report, and concluded:

"... Not a single one of these safeguards is to be found as a matter of established law in England, and only a few corresponding provisions exist as a matter of administrative procedure.

It does not, of course, follow that a system with fewer or different safeguards will fail to satisfy Article 8 (art. 8) in the eyes of the European Court of Human Rights. At the same time, it is impossible to read the judgment in the *Klass* case without it becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that Court, whatever administrative provisions there may be. ... Even if the system [in operation in England] were to be considered adequate in its conditions, it is laid down merely as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could at any time be altered without warning or subsequent notification. Certainly in law any 'adequate and effective safeguards against abuse' are wanting. In this respect English law compares most unfavourably with West German law: this is not a subject on which it is possible to feel any pride in English law.

I therefore find it impossible to see how English law could be said to satisfy the requirements of the Convention, as interpreted in the *Klass* case, unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes."

This conclusion did not, however, enable the Vice-Chancellor to decide the case in the way the applicant sought:

"It may perhaps be that the common law is sufficiently fertile to achieve what is required by the first limb of [the above-stated proviso]:

possible ways of expressing such a rule may be seen in what I have already said. But I see the greatest difficulty in the common law framing the safeguards required by the second limb. Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject-matter the greater the difficulty in the court doing what it is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.

... Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the *Klass* case can, I think, play any proper part in deciding the issue before me." (ibid., pp. 647-649)

He added that "this case seems to me to make it plain that telephone tapping is a subject which cries out for legislation", and continued:

"However much the protection of the public against crime demands that in proper cases the police should have the assistance of telephone tapping, I would have thought that in any civilised system of law the claims of liberty and justice would require that telephone users should have effective and independent safeguards against possible abuses. The fact that a telephone user is suspected of crime increases rather than diminishes this requirement: suspicions, however reasonably held, may sometimes prove to be wholly unfounded. If there were effective and independent safeguards, these would not only exclude some cases of excessive zeal but also, by their mere existence, provide some degree of reassurance for those who are resentful of the police or believe themselves to be persecuted." (ibid., p. 649)

35. As a final point of substance, the Vice-Chancellor dealt, in the following terms, with the applicant's contention that as no power to tap telephones had been given by either statute or common law, the tapping was necessarily unlawful:

"I have already held that, if such tapping can be carried out without committing any breach of the law, it requires no authorisation by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful. Now that I have held that such tapping can indeed be carried out without committing any breach of the law, the contention necessarily fails. I may also say that the statutory recognition given to the Home Secretary's warrant seems to me to point clearly to the same conclusion." (ibid., p. 649)

36. The Vice-Chancellor therefore held that the applicant's claim failed in its entirety. He made the following concluding remarks as to the ambit of his decision:

"Though of necessity I have discussed much, my actual decision is closely limited. It is confined to the tapping of the telephone lines of a particular person which is effected by the Post Office on Post Office premises in pursuance of a warrant of the Home Secretary in a case in which the police have just cause or excuse for requesting the tapping, in that it will assist them in performing their functions in relation to crime, whether in prevention, detection, discovering the criminals or otherwise, and in which the material obtained is used only by the police, and only for those purposes. In particular, I decide nothing on tapping effected for other purposes, or by other persons, or by other means; nothing on tapping when the information is supplied to persons other than the police; and nothing on tapping when the police use the material for purposes other than those I have mentioned. The principles involved in my decision may or may not be of some assistance in such other cases, whether by analogy or otherwise: but my actual decision is limited in the way that I have just stated." (ibid., p. 651)

E. Subsequent consideration of the need for legislation

37. Following the Vice-Chancellor's judgment, the necessity for legislation concerning the interception of communications was the subject of review by the Government, and of Parliamentary discussion. On 1 April 1980, on the publication of the White Paper, the Home Secretary announced in Parliament that after carefully considering the suggestions proffered by the Vice-Chancellor in his judgment, the Government had decided not to introduce legislation. He explained the reasons for this decision in the following terms:

"The interception of communications is, by

definition, a practice that depends for its effectiveness and value upon being carried out in secret, and cannot therefore be subject to the normal processes of parliamentary control. Its acceptability in a democratic society depends on its being subject to ministerial control, and on the readiness of the public and their representatives in Parliament to repose their trust in the Ministers concerned to exercise that control responsibly and with a right sense of balance between the value of interception as a means of protecting order and security and the threat which it may present to the liberty of the subject.

Within the necessary limits of secrecy, I and my right hon. Friends who are concerned are responsible to Parliament for our stewardship in this sphere. There would be no more sense in making such secret matters justiciable than there would be in my being obliged to reveal them in the House. If the power to intercept were to be regulated by statute, then the courts would have power to inquire into the matter and to do so, if not publicly, then at least in the presence of the complainant. This must surely limit the use of interception as a tool of investigation. The Government have come to the clear conclusion that the procedures, conditions and safeguards described in the [White] Paper ensure strict control of interception by Ministers, are a good and sufficient protection for the liberty of the subject, and would not be made significantly more effective for that purpose by being embodied in legislation. The Government have accordingly decided not to introduce legislation on these matters" (Hansard, House of Commons, 1 April 1980, cols. 205-207).

He gave an assurance that "Parliament will be informed of any changes that are made in the arrangements" (*ibid.*, col. 208).

38. In the course of the Parliamentary proceedings leading to the enactment of the British Telecommunications Act 1981, attempts were made to include in the Bill provisions which would have made it an offence to intercept mail or matters sent by public telecommunication systems except pursuant to a warrant issued under conditions which corresponded substantially to those described in the White Paper. The Government successfully opposed these moves, primarily on the grounds that secrecy, which was essential if interception was to be effective, could not be maintained if the arrangements for interception were laid down by legislation and thus became justiciable in the courts. The present arrangements and safe-

guards were adequate and the proposed new provisions were, in the Government's view, unworkable and unnecessary (see, for example, the statement of the Home Secretary in the House of Commons on 1 April 1981, Hansard, cols. 334-338). The 1981 Act eventually contained a re-enactment of section 80 of the Post Office Act 1969 applicable to the Telecommunications Corporation (Schedule 3, para. 1, of the 1981 Act). Section 80 of the 1969 Act itself continues to apply to the Post Office.

39. In its report presented to Parliament in January 1981 (Command Paper 8092), the Royal Commission on Criminal Procedure, which had been appointed in 1978, also considered the possible need for legislation in this field. In the chapter entitled "Investigative powers and the rights of the citizen", the Royal Commission made the following recommendation in regard to what it termed "surreptitious surveillance" (paras. 3.56-3.60):

"... [A]lthough we have no evidence that the existing controls are inadequate to prevent abuse, we think that there are strong arguments for introducing a system of statutory control on similar lines to that which we have recommended for search warrants. As with all features of police investigative procedures, the value of prescribing them in statutory form is that it brings clarity and precision to the rules; they are open to public scrutiny and to the potential of Parliamentary review. So far as surveillance devices in general are concerned this is not at present so.

...

We therefore recommend that the use of surveillance devices by the police (including the interception of letters and telephone communications) should be regulated by statute."

These recommendations were not adopted by the Government.

40. A few months later, the Law Commission, a permanent body set up by statute in 1965 for the purpose of promoting reform of the law, produced a report on breach of confidence (presented to Parliament in October 1981 - Command Paper 8388). This report examined, *inter alia*, the implications for the civil law of confidence of the acquisition of information by surveillance devices, and made various proposals for reform of the law (paras. 6.35 - 6.46). The Law Commission, however, felt that the question whether "the methods which the police ... may use to obtain information should be

defined by statute" was a matter outside the scope of its report (paras. 6.43 and 6.44 in fine). No action has been taken by the Government on this report.

F. The practice followed in relation to interceptions

41. Details of the current practices followed in relation to interceptions are set out in the Government's White Paper of 1980. The practices there summarised are essentially the same as those described and recommended in the Birkett report, and referred to in Parliamentary statements by successive Prime Ministers and Home Secretaries in 1957, 1966, 1978 and 1980.
42. The police, H.M. Customs and Excise and the Security Service may request authority for the interception of communications for the purposes of "detection of serious crime and the safeguarding of the security of the State" (paragraph 2 of the White Paper). Interception may take place only on the authority of the Secretary of State given by warrant under his own hand. In England and Wales, the power to grant such warrants is exercised by the Home Secretary or occasionally, if he is ill or absent, by another Secretary of State on his behalf (*ibid.*). In the case of warrants applied for by the police to assist them in the detection of crime, three conditions must be satisfied before a warrant will be issued:
 - (d) the offence must be "really serious";
 - (e) normal methods of investigation must have been tried and failed or must, from the nature of things, be unlikely to succeed;
 - (f) there must be good reason to think that an interception would be likely to lead to an arrest and a conviction.
43. As is indicated in the Birkett report (paras. 58-61), the concept of "serious crime" has varied from time to time. Changing circumstances have made some acts serious offences which were not previously so regarded; equally, some offences formerly regarded as serious enough to justify warrants for the interception of communications have ceased to be so regarded. Thus, the interception of letters believed to contain obscene or indecent matter ceased in the mid-1950s (Birkett report, para. 60); no warrants for the purpose of preventing the transmission of illegal lottery material have been issued since November 1953 (*ibid.*, para. 59). "Serious crime" is defined in the White Paper,

and subject to the addition of the concluding words has been consistently defined since September 1951 (Birkett report, para. 64), as consisting of "offences for which a man with no previous record could reasonably be expected to be sentenced to three years' imprisonment, or offences of lesser gravity in which either a large number of people is involved or there is good reason to apprehend the use of violence" (White Paper, para. 4). In April 1982, the Home Secretary announced to Parliament that, on a recommendation made by Lord Diplock in his second report (see paragraph 55 below), the concept of a serious offence was to be extended to cover offences which would not necessarily attract a penalty of three years' imprisonment on first conviction, but in which the financial rewards of success were very large (Hansard, House of Commons, 21 April 1982, col. 95).

Handling (including receiving) stolen goods, knowing or believing them to be stolen, is an offence under section 22 of the Theft Act 1968, carrying a maximum penalty of fourteen years' imprisonment. According to the Government, the receiving of stolen property is regarded as a very serious offence since the receiver lies at the root of much organised crime and encourages large-scale thefts (see the Birkett report, para. 103). The detection of receivers of stolen property was at the time of the Birkett report (*ibid.*), and remains, one of the important uses to which interception of communications is put by the police.

44. Applications for warrants must be made in writing and must contain a statement of the purpose for which interception is requested and of the facts and circumstances which support the request. Every application is submitted to the Permanent Under-Secretary of State - the senior civil servant - at the Home Office (or, in his absence, a nominated deputy), who, if he is satisfied that the application meets the required criteria, submits it to the Secretary of State for approval and signature of a warrant. In a case of exceptional urgency, if the Secretary of State is not immediately available to sign a warrant, he may be asked to give authority orally, by telephone; a warrant is signed and issued as soon as possible thereafter (White Paper, para. 9).

In their submissions to the Commission and the Court, the Government supplemented as follows the information given in the White Paper. Except in cases of exceptional urgency,

an application will only be considered in the Home Office if it is put forward by a senior officer of the Metropolitan Police, in practice the Assistant Commissioner (Crime), and also, in the case of another police force, by the chief officer of police concerned. Close personal consideration is given by the Secretary of State to every request for a warrant submitted to him. In the debate on the British Telecommunications Bill in April 1981, the then Home Secretary confirmed before Parliament that he did not and would not sign any warrant for interception unless he were personally satisfied that the relevant criteria were met (Hansard, House of Commons, 1 April 1981, col. 336).

45. Every warrant sets out the name and address of the recipient of mail in question or the telephone number to be monitored, together with the name and address of the subscriber. Any changes require the authority of the Secretary of State, who may delegate power to give such authority to the Permanent Under-Secretary. If both the mail and the telephone line of a person are to be intercepted, two separate warrants are required (White Paper, para. 10).
46. Every warrant is time-limited, specifying a date on which it expires if not renewed. Warrants are in the first place issued with a time-limit set at a defined date not exceeding two months from the date of issue. Warrants may be renewed only on the personal authority of the Secretary of State and may be renewed for not more than one month at a time. In each case where renewal of a warrant is sought, the police are required first to satisfy the Permanent Under-Secretary of State at the Home Office that the reasons for which the warrant was first issued are still valid and that the case for renewal is justified: a submission to the Secretary of State for authority to renew the warrant is only made if the Permanent Under-Secretary is so satisfied (White Paper, para. 11).
47. Warrants are reviewed monthly by the Secretary of State. When an interception is considered to be no longer necessary, it is immediately discontinued and the warrant is cancelled on the authority of the Permanent Under-Secretary of State at the Home Office. In addition to the monthly review of each warrant by the Secretary of State, the Metropolitan Police carry out their own review each month of all warrants arising from police applications: where an interception is deemed to be no longer necessary, instructions are issued to the Post Office to discontinue the interception forthwith and

the Home Office is informed so that the warrant can be cancelled (Birkett report, paras. 72-74; White Paper, paras. 12-13).

48. In accordance with the recommendations of the Birkett report (para. 84), records are kept in the Home Office, showing in respect of each application for a warrant:
 - (a) the ground on which the warrant is applied for;
 - (b) a copy of the warrant issued or a note of rejection of the application;
 - (c) the dates of any renewals of the warrant;
 - (d) a note of any other decisions concerning the warrant;
 - (e) the date of cancellation of the warrant (White Paper, para. 14).
49. On the issue of a warrant, the interception is effected by the Post Office. Telephone interceptions are carried out by a small staff of Post Office employees who record the conversation but do not themselves listen to it except from time to time to ensure that the apparatus is working correctly. In the case of postal communications, the Post Office makes a copy of the correspondence. As regards the interception of communications for the purpose of the detection of crime, in practice the "designated person holding office under the Crown" to whom the Post Office is required by sub-section 80 of the Post Office Act 1969 to transmit the intercepted information (see paragraph 29 above) is invariably the Commissioner of Police of the Metropolis. The product of the interception - that is, the copy of the correspondence or the tape-recording - is made available to a special unit of the Metropolitan Police who note or transcribe only such parts of the correspondence or the telephone conversation as are relevant to the investigation. When the documentary record has been made, the tape is returned to the Post Office staff, who erase the recording. The tape is subsequently re-used. The majority of recordings are erased within one week of their being taken (Birkett report, paras. 115-117; White Paper, para. 15).
50. A Consolidated Circular to Police, issued by the Home Office in 1977, contained the following paragraphs in a section headed "Supply of information by Post Office to police":

"1.67 Head Postmasters and Telephone Managers have been given authority to assist the

police as indicated in paragraph 1.68 below without reference to Post Office Headquarters, in circumstances where the police are seeking information

(a) in the interests of justice in the investigation of a serious indictable offence; or

(b) when they are acting in a case on the instructions of the Director of Public Prosecutions; or

(c) when a warrant has been issued for the arrest of the offender, or the offence is such that he can be arrested without a warrant; or

...

1.68 Head Postmasters, or (in matters affecting the telecommunication service) Telephone Managers, may afford the following facilities in response to a request made by the officer locally in charge of the force at the town where the Head Postmaster is stationed

...

(g) Telegrams. Telegrams may be shown to the police on the authority of the sender or addressee. Apart from this the Post Office is prepared to give authority in particular cases of serious crime where the inspection of a telegram is a matter of urgency, and will do so at once on telephonic application, by a chief officer of police or a responsible officer acting on his behalf, to the Chief Inspector, Post Office Investigation Division. ...

...

1.69 ...

1.70 As regards any matter not covered by paragraphs 1.67 and 1.68 above, if the police are in urgent need of information which the Post Office may be able to furnish in connection with a serious criminal offence, the police officer in charge of the investigation should communicate with the Duty Officer, Post Office Investigation Division who will be ready to make any necessary inquiries of other branches of the Post Office and to communicate any information which can be supplied."

In May 1984, the Home Office notified chief officers of police that paragraph 1.68 (g), described as containing advice and information to the police which was "in some respects misleading", was henceforth to be regarded as deleted, with the exception of the first complete sentence. At the same time, chief officers of police were reminded that the procedures for the interception of communications were set out in the White Paper and rigorously applied

in all cases.

51. The notes or transcriptions of intercepted communications are retained in the police interception unit for a period of twelve months or for as long as they may be required for the purposes of investigation. The contents of the documentary record are communicated to the officers of the appropriate police force engaged in the criminal investigation in question. When the notes or transcriptions are no longer required for the purposes of the investigation, the documentary record is destroyed (Birkett report, para. 118; White Paper, para. 15). The product of intercepted communications is used exclusively for the purpose of assisting the police to pursue their investigations: the material is not tendered in evidence, although the interception may itself lead to the obtaining of information by other means which may be tendered in evidence (Birkett report, para. 151; White Paper, para. 16). In accordance with the recommendation of the Birkett Committee (Birkett report, para. 101), information obtained by means of an interception is never disclosed to private individuals or private bodies or to courts or tribunals of any kind (White Paper, para. 17).
52. An individual whose communications have been intercepted is not informed of the fact of interception or of the information thereby obtained, even when the surveillance and the related investigations have terminated.
53. For security reasons it is the normal practice not to disclose the numbers of interceptions made (Birkett report, paras. 119-121; White Paper, paras. 24-25). However, in order to allay public concern as to the extent of interception, both the Birkett report and the White Paper gave figures for the number of warrants granted annually over the years preceding their publication. The figures in the White Paper (Appendix III) indicate that in England and Wales between 1969 and 1979 generally something over 400 telephone warrants and something under 100 postal warrants were granted annually by the Home Secretary. Paragraph 27 of the White Paper also gave the total number of Home Secretary warrants in force on 31 December for the years 1958 (237), 1968 (273) and 1978 (308). The number of telephones installed at the end of 1979 was, according to the Government, 26,428,000, as compared with 7,327,000 at the end of 1957. The Government further stated that over the period from 1958 to 1978 there was a fourfold increase in indictable crime,

from 626,000 to 2,395,000.

54. When the White Paper was published on 1 April 1980, the Home Secretary announced in Parliament that the Government, whilst not proposing to introduce legislation (see paragraph 37 above), intended to appoint a senior member of the judiciary to conduct a continuous independent check so as to ensure that interception of communications was being carried out for the established purposes and in accordance with the established procedures. His terms of reference were stated to be:

"to review on a continuing basis the purposes, procedures, conditions and safeguards governing the interception of communications on behalf of the police, HM Customs and Excise and the security service as set out in [the White Paper]; and to report to the Prime Minister" (Hansard, House of Commons, 1 April 1980, cols. 207-208).

It was further announced that the person appointed would have the right of access to all relevant papers and the right to request additional information from the departments and organisations concerned. For the purposes of his first report, which would be published, he would examine all the arrangements set out in the White Paper; his subsequent reports on the detailed operation of the arrangements would not be published, but Parliament would be informed of any findings of a general nature and of any changes that were made in the arrangements (*ibid.*).

55. Lord Diplock, a Lord of Appeal in Ordinary since 1968, was appointed to carry out the review. In his first report, published in March 1981, Lord Diplock recorded, *inter alia*, that, on the basis of a detailed examination of apparently typical cases selected at random, he was satisfied
- (i) that, in each case, the information provided by the applicant authorities to the Secretary of State in support of the issue of a warrant was stated with accuracy and candour and that the procedures followed within the applicant authorities for vetting applications before submission to the Secretary of State were appropriate to detect and correct any departure from proper standards;
 - (ii) that warrants were not applied for save in proper cases and were not continued any longer than was necessary to carry out their legitimate purpose.

Lord Diplock further found from his examination of the system that all products of interception not directly relevant to the purpose for which the warrant was granted were speedily destroyed and that such material as was directly relevant to that purpose was given no wider circulation than was essential for carrying it out.

In early 1982, Lord Diplock submitted his second report. As the Secretary of State informed Parliament, Lord Diplock's general conclusion was that during the year 1981 the procedure for the interception of communications had continued to work satisfactorily and the principles set out in the White Paper had been conscientiously observed by all departments concerned.

In 1982, Lord Diplock resigned his position and was succeeded by Lord Bridge of Harwich, a Lord of Appeal in Ordinary since 1980.

G. "Metering"

56. The process known as "metering" involves the use of a device called a meter check printer which registers the numbers dialled on a particular telephone and the time and duration of each call. It is a process which was designed by the Post Office for its own purposes as the corporation responsible for the provision of telephone services. Those purposes include ensuring that the subscriber is correctly charged, investigating complaints of poor quality service and checking possible abuse of the telephone service. When "metering" a telephone, the Post Office - now British Telecommunications (see paragraph 23 above) - makes use only of signals sent to itself.

In the case of the Post Office, the Crown does not require the keeping of records of this kind but, if the records are kept, the Post Office may be compelled to produce them in evidence in civil or criminal cases in the ordinary way, namely by means of a subpoena duces tecum. In this respect the position of the Post Office does not differ from that of any other party holding relevant records as, for instance, a banker. Neither the police nor the Crown are empowered to direct or compel the production of the Post Office records otherwise than by the normal means.

However, the Post Office do on occasions make and provide such records at the request of the police if the information is essential to police enquiries in relation to serious crime and can-

not be obtained from other sources. This practice has been made public in answer to parliamentary questions on more than one occasion (see, for example, the statement by the Home Secretary to Parliament, Hansard, House of Commons, 23 February 1978, cols. 760-761).

H. Possible domestic remedies in respect of the alleged violation of the Convention

57. Commission, Government and applicant are agreed that, at least in theory, judicial remedies are available in England and Wales, in both the civil and the criminal courts, in respect of interceptions of communications carried out unlawfully. The remedies referred to by the Government were summarised in the pleadings as follows:
- (i) In the event of any interception or disclosure of intercepted material effected by a Post Office employee "contrary to duty" or "improperly" and without a warrant of the Secretary of State, a criminal offence would be committed under the Telegraph Acts 1863 and 1868 and the Post Office (Protection) Act 1884 (as regards telephone interceptions) and under the Post Office Act 1953 (as regards postal interceptions) (see paragraphs 25-27 above). On complaint that communications had been unlawfully intercepted, it would be the duty of the police to investigate the matter and to initiate a prosecution if satisfied that an offence had been committed. If the police failed to prosecute, it would be open to the complainant himself to commence a private prosecution.
 - (ii) In addition to (i) above, in a case of unlawful interception by a Post Office employee without a warrant, an individual could obtain an injunction from the domestic courts to restrain the person or persons concerned and the Post Office itself from carrying out further unlawful interception of his communications: such an injunction is available to any person who can show that a private right or interest has been interfered with by a criminal act (see, for example, *Gouriet v. The Union of Post Office Workers*, [1977] 3 All England Law Reports 70; *Ex parte Island Records Ltd.*, [1978] 3 All England Law Reports 795).
 - (iii) On the same grounds, an action would lie for an injunction to restrain the divulging or publication of the contents of intercepted communications by employees
- of the Post Office, otherwise than under a warrant of the Secretary of State, or to any person other than the police.
- Besides these remedies, unauthorised interference with mail would normally constitute the tort of trespass to (that is, wrongful interference with) chattels and so give rise to a civil action for damages.
58. The Government further pointed to the following possible non-judicial remedies:
- (i) In the event that the police were themselves implicated in an interception carried out without a warrant, a complaint could additionally be lodged under section 49 of the Police Act 1964, which a chief officer of police would, by the terms of the Act, be obliged to investigate and, if an offence appeared to him to have been committed, to refer to the Director of Public Prosecutions.
 - (ii) If a complainant were able to establish merely that the police or the Secretary of State had misappreciated the facts or that there was not an adequate case for imposing an interception, the individual concerned would be able to complain directly to the Secretary of State himself or through his Member of Parliament: if a complainant were to give the Home Secretary information which suggested that the grounds on which a warrant had been issued did not in fact fall within the published criteria or were inadequate or mistaken, the Home Secretary would immediately cause it to be investigated and, if the complaint were found to be justified, would immediately cancel the warrant.
 - (iii) Similarly, if there were non-compliance with any of the relevant administrative rules of procedure set out in the *Birkett* report and the *White Paper*, a remedy would lie through complaint to the Secretary of State who would, in a proper case, cancel or revoke a warrant and thereby terminate an interception which was being improperly carried out.
- According to the Government, in practice there never has been a case where a complaint in any of the three above circumstances has proved to be well-founded.

PROCEEDINGS BEFORE THE COMMISSION

59. In his application of 19 July 1979 to the Commission (no. 8691/79), Mr. Malone complained of the admitted interception of a telephone conversation to which he had been a party. He further stated his belief that, at the behest of the police, his correspondence as well as that of his wife had been intercepted, his telephone lines "tapped" and, in addition, his telephone "metered" by a device recording all the numbers dialled. He claimed that by reason of these matters, and of relevant law and practice in England and Wales, he had been the victim of breaches of Articles 8 and 13 (art. 8, art. 13) of the Convention.
60. The Commission declared the application admissible on 13 July 1981.

In its report adopted on 17 December 1982 (Article 31) (art. 31), the Commission expressed the opinion:

- that there had been a breach of the applicant's rights under Article 8 (art. 8) by reason of the admitted interception of a telephone conversation to which he was a party and of the law and practice in England and Wales governing the interception of postal and telephone communications on behalf of the police (eleven votes, with one abstention);
- that it was unnecessary in the circumstances of the case to investigate whether the applicant's rights had also been interfered with by the procedure known as "metering" of telephone calls (seven votes to three, with two abstentions);
- that there had been a breach of the applicant's rights under Article 13 (art. 13) in that the law in England and Wales did not provide an "effective remedy before a national authority" in respect of interceptions carried out under a warrant (ten votes to one, with one abstention).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

61. At the hearings on 20 February 1984, the Government maintained the submissions set out in their memorial, whereby they requested the Court

"(1) with regard to Article 8 (art. 8),

(i) to decide and declare that the interference with the exercise of the rights guaranteed by Article 8 para. 1 (art. 8-1) of the Convention resulting from the measures of interception of communications on behalf of the police in England and Wales for the purpose of the detection and prevention of crime, and any application of those measures to the applicant, were and are justified under paragraph 2 of Article 8 (art. 8-2) as being in accordance with the law and necessary in a democratic society for the prevention of crime and for the protection of the rights and freedoms of others and that accordingly there has been no breach of Article 8 (art. 8) of the Convention;

(ii) (a) to decide and declare that it is unnecessary in the circumstances of the present case to investigate whether the applicant's rights under Article 8 (art. 8) were interfered with by the so-called system of 'metering'; alternatively (b) to decide and declare that the facts found disclose no breach of the applicant's rights under Article 8 (art. 8) by reason of the said system of 'metering';

(2) with regard to Article 13 (art. 13),

to decide and declare that the circumstances of the present case disclose no breach of Article 13 (art. 13) of the Convention".

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 8 (ART. 8)

62. Article 8 (art. 8) provides as follows:

"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 freedoms of others."

The applicant alleged violation of this Article (art. 8) under two heads. In his submission, the first violation resulted from interception of his postal and telephone communications by or on behalf of the police, or from the law and practice in England and Wales relevant thereto; the second from "metering" of his telephone by or on behalf of the police, or from the law and practice in England and Wales relevant thereto.

A. Interception of communications

1. *Scope of the issue before the Court*

63. It should be noted from the outset that the scope of the case before the Court does not extend to interception of communications in general. The Commission's decision of 13 July 1981 declaring Mr. Malone's application to be admissible determines the object of the case brought before the Court (see, inter alia, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 63, para. 157). According to that decision, the present case "is directly concerned only with the question of interceptions effected by or on behalf of the police" - and not other government services such as H.M. Customs and Excise and the Security Service - "within the general context of a criminal investigation, together with the legal and administrative framework relevant to such interceptions".

2. *Whether there was any interference with an Article 8 (art. 8) right*

64. It was common ground that one telephone conversation to which the applicant was a party was intercepted at the request of the police under a warrant issued by the Home Secretary (see paragraph 14 above). As telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (art. 8) (see the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 21, para. 41), the admitted measure of interception involved an "interference by a public authority" with the exercise of a right guaranteed to the applicant under paragraph 1 of Article 8 (art. 8-1).

Despite the applicant's allegations, the Government have consistently declined to disclose to what extent, if at all, his telephone calls and

mail have been intercepted otherwise on behalf of the police (see paragraph 16 above). They did, however, concede that, as a suspected receiver of stolen goods, he was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed. As the Commission pointed out in its report (paragraph 115), the existence in England and Wales of laws and practices which permit and establish a system for effecting secret surveillance of communications amounted in itself to an "interference ... with the exercise" of the applicant's rights under Article 8 (art. 8), apart from any measures actually taken against him (see the above-mentioned Klass and Others judgment, *ibid.*). This being so, the Court, like the Commission (see the report, paragraph 114), does not consider it necessary to inquire into the applicant's further claims that both his mail and his telephone calls were intercepted for a number of years.

3. *Whether the interferences were justified*

65. The principal issue of contention was whether the interferences found were justified under the terms of paragraph 2 of Article 8 (art. 8-2), notably whether they were "in accordance with the law" and "necessary in a democratic society" for one of the purposes enumerated in that paragraph.

(a) "In accordance with the law"

i *General principles*

66. The Court held in its Silver and Others judgment of 25 March 1983 (Series A no. 61, pp. 32-33, para. 85) that, at least as far as interferences with prisoners' correspondence were concerned, the expression "in accordance with the law/ prévue par la loi" in paragraph 2 of Article 8 (art. 8-2) should be interpreted in the light of the same general principles as were stated in the Sunday Times judgment of 26 April 1979 (Series A no. 30) to apply to the comparable expression "prescribed by law/ prévues par la loi" in paragraph 2 of Article 10 (art. 10-2).

The first such principle was that the word "law/ loi" is to be interpreted as covering not only written law but also unwritten law (see the above-mentioned Sunday Times judgment, p. 30, para. 47). A second principle, recognised by Commission, Government and applicant as being applicable in the present case, was that "the interference in question must have some basis in domestic law" (see the the above-men-

tioned Silver and Others judgment, p. 33, para. 86). The expressions in question were, however, also taken to include requirements over and above compliance with the domestic law. Two of these requirements were explained in the following terms:

"Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." (Sunday Times judgment, p. 31, para. 49; Silver and Others judgment, p. 33, paras. 87 and 88)

67. In the Government's submission, these two requirements, which were identified by the Court in cases concerning the imposition of penalties or restrictions on the exercise by the individual of his right to freedom of expression or to correspond, are less appropriate in the wholly different context of secret surveillance of communications. In the latter context, where the relevant law imposes no restrictions or controls on the individual to which he is obliged to conform, the paramount consideration would appear to the Government to be the lawfulness of the administrative action under domestic law.

The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, *mutatis mutandis*, the above-mentioned Silver and Others judgment, p. 34, para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34). The phrase thus implies - and this follows from the object and purpose of Article 8 (art. 8) - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) (see the report of the Commission, paragraph 121). Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the above-mentioned Klass and Others judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49). Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be

exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

68. There was also some debate in the pleadings as to the extent to which, in order for the Convention to be complied with, the "law" itself, as opposed to accompanying administrative practice, should define the circumstances in which and the conditions on which a public authority may interfere with the exercise of the protected rights. The above-mentioned judgment in the case of Silver and Others, which was delivered subsequent to the adoption of the Commission's report in the present case, goes some way to answering the point. In that judgment, the Court held that "a law which confers a discretion must indicate the scope of that discretion", although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (*ibid.*, Series A no. 61, pp. 33-34, paras. 88-89). The degree of precision required of the "law" in this connection will depend upon the particular subject-matter (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49). Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

- ii *Application in the present case of the foregoing principles*

69. Whilst the exact legal basis of the executive's power in this respect was the subject of some dispute, it was common ground that the settled practice of intercepting communications on behalf of the police in pursuance of a warrant issued by the Secretary of State for the purposes of detecting and preventing crime, and hence the admitted interception of one of the applicant's telephone conversations, were lawful under the law of England and Wales. The legality of this power to intercept was established in relation to telephone communications in the judgment of Sir Robert Megarry dismissing the applicant's civil action (see paragraphs 31-36 above) and, as shown by the independent findings of the Birkett report (see paragraph 28 in fine above), is generally recognised for postal communications.

70. The issue to be determined is therefore whether, under domestic law, the essential elements of the power to intercept communications were laid down with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities.

This issue was considered under two heads in the pleadings: firstly, whether the law was such that a communication passing through the services of the Post Office might be intercepted, for police purposes, only pursuant to a valid warrant issued by the Secretary of State and, secondly, to what extent the circumstances in which a warrant might be issued and implemented were themselves circumscribed by law.

71. On the first point, whilst the statements of the established practice given in the Birkett report and the White Paper are categorical para. 55 of the Birkett report and para. 2 of the White Paper - see paragraph 42 above), the law of England and Wales, as the applicant rightly pointed out (see paragraph 56 of the Commission's report), does not expressly make the exercise of the power to intercept communications subject to the issue of a warrant. According to its literal terms, section 80 of the Post Office Act 1969 provides that a "requirement" may be laid on the Post Office to pass information to the police, but it does not in itself render illegal interceptions carried out in the absence of a warrant amounting to a valid "requirement" (see paragraph 29 above). The Commission, however, concluded that this appeared to be the effect of section 80 when read in conjunction with the criminal offences created by sec-

tion 58 para. 1 of the Post Office Act 1953 and by the other statutory provisions referred to in paragraph 1, sub-paragraph 1 of Schedule 5 to the 1969 Act (see paragraphs 129-135 of the report, and paragraphs 25, 26 and 30 above). The reasoning of the Commission was accepted and adopted by the Government but, at least in respect of telephone interceptions, disputed by the applicant. He relied on certain dicta to the contrary in the judgment of Sir Robert Megarry (see paragraphs 31-36 above, especially paragraphs 33 and 35). He also referred to the fact that the 1977 Home Office Consolidated Circular to Police made no mention, in the section headed "Supply of information by Post Office to police", of the warrant procedure (see paragraph 50 above).

72. As to the second point, the pleadings revealed a fundamental difference of view as to the effect, if any, of the Post Office Act 1969 in imposing legal restraints on the purposes for which and the manner in which interception of communications may lawfully be authorised by the Secretary of State.

73. According to the Government, the words in section 80 - and, in particular, the phrase "for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid" - define and restrict the power to intercept by reference to the practice which prevailed in 1968. In the submission of the Government, since the entry into force of the 1969 Act a requirement to intercept communications on behalf of the police can lawfully be imposed on the Post Office only by means of a warrant signed personally by the Secretary of State for the exclusive purpose of the detection of crime and satisfying certain other conditions. Thus, by virtue of section 80 the warrant must, as a matter of law, specify the relevant name, address and telephone number; it must be time-limited and can only be directed to the Post Office, not the police. In addition, the Post Office is only required and empowered under section 80 to make information available to "designated persons holding office under the Crown". Any attempt to broaden or otherwise modify the purposes for which or the manner in which interceptions may be authorised would require an amendment to the 1969 Act which could only be achieved by primary legislation.

74. In its reasoning, which was adopted by the applicant, the Commission drew attention to various factors of uncertainty arguing against the Government's view as to the effect of the 1969

Act (see paragraphs 136-142 of the report).

75. Firstly, the relevant wording of the section, and especially the word "may", appeared to the Commission to authorise the laying of a requirement on the Post Office for whatever purposes and in whatever manner it would previously have been lawfully possible to place a ministerial duty on the Postmaster General, and not to be confined to what actually did happen in practice in 1968. Yet at the time of the Birkett report (see, for example, paragraphs 15, 21, 27, 54-55, 56, 62 and 75), and likewise at the time when the 1969 Act was passed, no clear legal restrictions existed on the permissible "purposes" and "manner". Indeed the Birkett report at one stage (paragraph 62) described the Secretary of State's discretion as "absolute", albeit specifying how its exercise was in practice limited.
76. A further difficulty seen by the Commission is that, on the Government's interpretation, not all the details of the existing arrangements are said to have been incorporated into the law by virtue of section 80 but at least the principal conditions, procedures or purposes for the issue of warrants authorising interceptions. Even assuming that the reference to "like purposes" and "like manner" is limited to previous practice as opposed to what would have been legally permissible, it was by no means evident to the Commission what aspects of the previous "purposes" and "manner" have been given statutory basis, so that they cannot be changed save by primary legislation, and what aspects remain matters of administrative discretion susceptible of modification by governmental decision. In this connection, the Commission noted that the notion of "serious crime", which in practice serves as a condition governing when a warrant may be issued for the purpose of the detection of crime, has twice been enlarged since the 1969 Act without recourse to Parliament (see paragraphs 42-43 above).
77. The Commission further pointed out that the Government's analysis of the law was not shared by Sir Robert Megarry in his judgment of February 1979. He apparently accepted the Solicitor General's contentions before him that section 80 referred back to previous administrative arrangements for the issue of warrants (see paragraph 33 above). On the other hand, he plainly considered that these arrangements remained administrative in character and had not, even in their principal aspects, been made binding legal requirements by virtue of section

80 (see paragraph 34 above).

78. It was also somewhat surprising, so the Commission observed, that no mention of section 80 as regulating the issue of warrants should have been made in the White Paper published by the Government in the wake of Sir Robert Megarry's judgment (see paragraph 21 above). Furthermore, the Home Secretary, when presenting the White Paper to Parliament in April 1980, expressed himself in terms suggesting that the existing arrangements as a whole were matters of administrative practice not suitable for being "embodied in legislation", and were subject to change by governmental decision of which Parliament would be informed (see paragraphs 37 in fine and 54 in fine above).
79. The foregoing considerations disclose that, at the very least, in its present state the law in England and Wales governing interception of communications for police purposes is somewhat obscure and open to differing interpretations. The Court would be usurping the function of the national courts were it to attempt to make an authoritative statement on such issues of domestic law (see, *mutatis mutandis*, the Deweer judgment of 27 February 1980, Series A no. 35, p. 28, in fine, and the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 30, fourth sub-paragraph). The Court is, however, required under the Convention to determine whether, for the purposes of paragraph 2 of Article 8 (art. 8-2), the relevant law lays down with reasonable clarity the essential elements of the authorities' powers in this domain.

Detailed procedures concerning interception of communications on behalf of the police in England and Wales do exist (see paragraphs 42-49, 51-52 and 54-55 above). What is more, published statistics show the efficacy of those procedures in keeping the number of warrants granted relatively low, especially when compared with the rising number of indictable crimes committed and telephones installed (see paragraph 53 above). The public have been made aware of the applicable arrangements and principles through publication of the Birkett report and the White Paper and through statements by responsible Ministers in Parliament (see paragraphs 21, 37-38, 41, 43 and 54 above).

Nonetheless, on the evidence before the Court, it cannot be said with any reasonable certainty what elements of the powers to intercept are

incorporated in legal rules and what elements remain within the discretion of the executive. In view of the attendant obscurity and uncertainty as to the state of the law in this essential respect, the Court cannot but reach a similar conclusion to that of the Commission. In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.

iii *Conclusion*

80. In sum, as far as interception of communications is concerned, the interferences with the applicant's right under Article 8 (art. 8) to respect for his private life and correspondence (see paragraph 64 above) were not "in accordance with the law".

(b) "Necessary in a democratic society" for a recognised purpose

81. Undoubtedly, the existence of some law granting powers of interception of communications to aid the police in their function of investigating and detecting crime may be "necessary in a democratic society ... for the prevention of disorder or crime", within the meaning of paragraph 2 of Article 8 (art. 8-2) (see, *mutatis mutandis*, the above-mentioned *Klass and Others* judgment, Series A no. 28, p. 23, para. 48). The Court accepts, for example, the assertion in the Government's White Paper (at para. 21) that in Great Britain "the increase of crime, and particularly the growth of organised crime, the increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crime". However, the exercise of such powers, because of its inherent secrecy, carries with it a danger of abuse of a kind that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole (*ibid.*, p. 26, para. 56). This being so, the resultant interference can only be regarded as "necessary in a democratic society" if the particular system of secret surveillance adopted contains adequate guarantees against abuse (*ibid.*, p. 23, paras. 49-50).
82. The applicant maintained that the system in England and Wales for the interception of postal and telephone communications on behalf of the police did not meet this condition.
- In view of its foregoing conclusion that the interferences found were not "in accordance with the law", the Court considers that it does not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 (art. 8-2) and whether the system circumstances.
- B. Metering**
83. The process known as "metering" involves the use of a device (a meter check printer) which registers the numbers dialled on a particular telephone and the time and duration of each call (see paragraph 56 above). In making such records, the Post Office - now British Telecommunications - makes use only of signals sent to itself as the provider of the telephone service and does not monitor or intercept telephone conversations at all. From this, the Government drew the conclusion that metering, in contrast to interception of communications, does not entail interference with any right guaranteed by Article 8 (art. 8).
84. As the Government rightly suggested, a meter check printer registers information that a supplier of a telephone service may in principle legitimately obtain, notably in order to ensure that the subscriber is correctly charged or to investigate complaints or possible abuses of the service. By its very nature, metering is therefore to be distinguished from interception of communications, which is undesirable and illegitimate in a democratic society unless justified. The Court does not accept, however, that the use of data obtained from metering, whatever the circumstances and purposes, cannot give rise to an issue under Article 8 (art. 8). The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8 (art. 8).
85. As was noted in the Commission's decision declaring Mr. Malone's application admissible, his complaints regarding metering are closely connected with his complaints regarding interception of communications. The issue before the Court for decision under this head is similarly limited to the supply of records of metering to the police "within the general context

of a criminal investigation, together with the legal and administrative framework relevant [thereto]" (see paragraph 63 above).

86. In England and Wales, although the police do not have any power, in the absence of a subpoena, to compel the production of records of metering, a practice exists whereby the Post Office do on occasions make and provide such records at the request of the police if the information is essential to police enquiries in relation to serious crime and cannot be obtained from other sources (see paragraph 56 above). The applicant, as a suspected receiver of stolen goods, was, it may be presumed, a member of a class of persons potentially liable to be directly affected by this practice. The applicant can therefore claim, for the purposes of Article 25 (art. 25) of the Convention, to be a "victim" of a violation of Article 8 (art. 8) by reason of the very existence of this practice, quite apart from any concrete measure of implementation taken against him (cf., *mutatis mutandis*, paragraph 64 above). This remains so despite the clarification by the Government that in fact the police had neither caused his telephone to be metered nor undertaken any search operations on the basis of any list of telephone numbers obtained from metering (see paragraph 17 above; see also, *mutatis mutandis*, the above-mentioned *Klass and Others* judgment, Series A no. 28, p. 20, para. 37 in fine).

87. Section 80 of the Post Office Act 1969 has never been applied so as to "require" the Post Office, pursuant to a warrant of the Secretary of State, to make available to the police in connection with the investigation of crime information obtained from metering. On the other hand, no rule of domestic law makes it unlawful for the Post Office voluntarily to comply with a request from the police to make and supply records of metering (see paragraph 56 above). The practice described above, including the limitative conditions as to when the information may be provided, has been made public in answer to parliamentary questions (*ibid.*). However, on the evidence adduced before the Court, apart from the simple absence of prohibition, there would appear to be no legal rules concerning the scope and manner of exercise of the discretion enjoyed by the public authorities. Consequently, although lawful in terms of domestic law, the interference resulting from the existence of the practice in question was not "in accordance with the law", within the meaning of paragraph 2 of Article 8 (art. 8-2) (see paragraphs 66 to 68 above).

88. This conclusion removes the need for the Court to determine whether the interference found was "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8 (art. 8-2) (see, *mutatis mutandis*, paragraph 82 above).

C. Recapitulation

89. There has accordingly been a breach of Article 8 (art. 8) in the applicant's case as regards both interception of communications and release of records of metering to the police.

II. ALLEGED BREACH OF ARTICLE 13 (ART. 13)

90. The applicant submitted that no effective domestic remedy existed for the breaches of Article 8 (art. 8) of which he complained and that, consequently, there had also been a violation of Article 13 (art. 13) which provides:

"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."

91. Having regard to its decision on Article 8 (art. 8) (see paragraph 89 above), the Court does not consider it necessary to rule on this issue.

III. APPLICATION OF ARTICLE 50 (ART. 50)

92. The applicant claimed just satisfaction under Article 50 (art. 50) under four heads:
- (i) legal costs that he was ordered by Sir Robert Megarry to pay to the Metropolitan Commissioner of Police, assessed at £9,011.00,
 - (ii) costs, including disbursements, paid by him to his own lawyers in connection with the same action, assessed at £5,443.20,
 - (iii) legal costs incurred in the proceedings before the Commission and the Court, as yet unquantified, and
 - (iv) "compensation of a moderate amount" for interception of his telephone conversations.

He further sought recovery of interest in respect of the first two items.

The Government have so far made no submissions on these claims.

93. The question is thus not yet ready for decision and must be reserved; in the circumstances of the case, it is appropriate to refer the matter back to the Chamber (Rule 53 paras. 1 and 3 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. **Holds unanimously that there has been a breach of Article 8 (art. 8) of the Convention;**
2. **Holds by sixteen votes to two that it is not necessary also to examine the case under Article 13 (art. 13);**
3. **Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;**
 - (a) **accordingly, reserves the whole of the said question;**
 - (b) **refers back to the Chamber the said question.**

Done in English and in French at the Human Rights Building, Strasbourg, this second day of August, one thousand nine hundred and eighty-four.

G rard WIARDA, *President*
Marc-Andr  EISSEN, *Registrar*

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court:

- partially dissenting opinion of Mr. Matscher and Mr. Pinheiro Farinha;
- concurring opinion of Mr. Pettiti.

PARTIALLY DISSENTING OPINION OF JUDGES MATSCHER AND PINHEIRO FARINHA

(Translation)

We recognise that Article 13 (art. 13) constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation. This is probably the reason why, for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons.

It is only in the last few years that the Court, aware of its function of interpreting and ensuring the application of all the Articles of the Convention whenever called on to do so by the parties or the Commission has also embarked upon the interpretation of Article 13 (art. 13). We refer in particular to the judgments in the cases of *Klass and Others* (Series A no. 28, paras. 61 et seq.), *Sporrong and L nnroth* (Series A no. 52, para. 88), *Silver and Others* (Series A no. 61, paras. 109 et seq.) and, most recently, *Campbell and Fell* (Series A no. 80, paras. 124 et seq.), where the Court has laid the foundation for a coherent interpretation of this provision.

Having regard to this welcome development, we cannot, to our regret, concur with the opinion of the majority of the Court who felt able to forego examining the allegation of a breach of Article 13 (art. 13). In so doing, the majority, without offering the slightest justification, have departed from the line taken *inter alia* in the *Silver and Others* judgment, which was concerned with legal issues very similar to those forming the object of the present case.

Indeed, applying the approach followed in the *Silver and Others* judgment, the Court ought in the present case, and to the same extent, to have arrived at a finding of a violation of Article 13 (art. 13).

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I have voted with my colleagues for the violation of Article 8 (art. 8), but I believe that the European Court could have made its decision more explicit and not confined itself to ascertaining whether, in the words of Article 8 (art. 8), the interference was

"in accordance with the law", an expression which in its French version ("prévue par la loi") is used in Article 8 para. 2, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 (art. 8-2, P1-1, P4-2), the term "the law" being capable of being interpreted as covering both written law and unwritten law.

The European Court considered that the finding of a breach on this point made it unnecessary, in the Malone case, to examine the British system currently in force, which was held to have been at fault because of a lack of "law", and to determine whether or not adequate guarantees existed.

In my view, however, the facts as described in the Commission's report and in the Court's summary of facts also called for an assessment of the British measures and practices under Article 8 para. 2 (art. 8-2).

This appears necessary to me because of the major importance of the issue at stake, which I would summarise as follows.

The danger threatening democratic societies in the years 1980-1990 stems from the temptation facing public authorities to "see into" the life of the citizen. In order to answer the needs of planning and of social and tax policy, the State is obliged to amplify the scale of its interferences. In its administrative systems, the State is being led to proliferate and then to computerise its personal data-files. Already in several of the member States of the Council of Europe each citizen is entered on 200 to 400 data-files.

At a further stage, public authorities seek, for the purposes of their statistics and decision-making processes, to build up a "profile" of each citizen. Enquiries become more numerous; telephone tapping constitutes one of the favoured means of this permanent investigation.

Telephone tapping has during the last thirty years benefited from many "improvements" which have aggravated the dangers of interference in private life. The product of the interception can be stored on magnetic tapes and processed in postal or other centres equipped with the most sophisticated material. The amateurish tapping effected by police officers or post office employees now exists only as a memory of pre-war novels. The encoding of programmes and tapes, their decoding, and computer processing make it possible for interceptions to be multiplied a hundredfold and to be analysed in shorter and shorter time-spans, if need be by computer. Through use of the "mosaic" technique, a complete picture can be assembled of the life-style of even the "model" citizen.

It would be rash to believe that the number of telephone interceptions is only a few hundred per year in each country and that they are all known to the authorities.

Concurrently with developments in the techniques of interception, the aims pursued by the authorities have diversified. Police interception for the prevention of crime is only one of the practices employed; to this should be added political interceptions, interceptions of communications of journalists and leading figures, not to mention interceptions required by national defence and State security, which are included in the "top-secret" category and not dealt with in the Court's judgment or the present opinion.

Most of the member States of the Council of Europe have felt the need to introduce legislation on the matter in order to bring to an end the abuses which were proliferating and making vulnerable even those in power.

The legislative technique most often employed is that of criminal procedure: the interception of communications is made subject to the decision and control of a judge within the framework of a criminal investigation by means of provisions similar to those governing searches carried out on the authority of a warrant.

The order by the judge must specify the circumstances justifying the measure, if need be subject to review by an appeal court. Variations exist according to the types of system and code of criminal procedure.

The governing principle of these laws is the separation of executive and judicial powers, that is to say, not to confer on the executive the initiative and the control of the interception, in line with the spirit of Article 8 (art. 8).

The British system analysed in the Malone judgment - and held by the Court not to be "in accordance with the law" - is a typical example of a practice that places interception of communications within the sole discretion and under the sole control of the Minister of the Interior, this being compounded by the fact that intercepted material is not disclosed to the judicial authorities (in the form of evidence), which therefore have no knowledge of the interception (see paragraph 51).

Even in the case of interception of communications required by the imperative necessities of counter-espionage and State security, most systems of law include strict rules providing for derogations from the ordinary law, the intervention and control of

the Prime Minister or the Minister of Justice, and the recourse to boards or commissions composed of judges at the peak of the judicial hierarchy.

The European Court has, it is true, "considered[d] that it does not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 (art. 8-2) and whether the system complained of furnished those guarantees in the particular circumstances" (paragraph 82).

This reservation makes clear that in limiting itself to finding a violation because the governmental interference was not in accordance with the law, the Court did not intend, even implicitly, to mark approval of the British system and thus reserved any adjudication on a possible violation of Article 8 para. 2 (art. 8-2).

In my opinion, however, the Court could at this point have completed its reasoning and analysed the components of the system so as to assess their compatibility and draw the conclusion of a breach of Article 8 para. 2 (art. 8-2), there being no judicial control.

Even if a "law", within the meaning of Article 8 paras. 1 and 2 (art. 8-1, art. 8-2), contains detailed rules which do not merely legalise practices but define and delimit them, the lack of judicial control could still entail, in my view, a violation of Article 8 para. 2 (art. 8-2), subject of course to review by the Court.

It must also be borne in mind that the practice of police interception leads to the establishment of "prosecution" files which thereafter carry the risk of rendering inoperative the rules of a fair trial provided for under Article 6 (art. 6) by building up a presumption of guilt. The judicial authorities should therefore be left a full power of appreciation over the field of decision and control.

The object of the laws in Europe protecting private life is to prevent any clandestine disclosure of words uttered in a private context; certain laws have even made illegal any tapping of a telephone communication, any interception of a message without the consent of the parties. The link between laws on "private life" and laws on "interception of communications" is very close.

German law enumerates the offences for the detection of which measures of interception may be ordered. The list of offences set out in this law is entirely directed towards the preservation of democracy, the sole justification for the attendant interference.

In the *Klass* case and the accompanying comparative examination of the rules obtaining in the dif-

ferent signatory States of the Convention, the need for a system of protection in this sphere was emphasised. It admittedly falls to the State to operate such a system, but only within the bounds set by Article 8 (art. 8).

There were, in the *Malone* case, factors permitting the Court to draw a distinction between the dangers of a crisis situation caused by terrorism (*Klass* case) and the dangers of ordinary criminality, and hence to consider that two different sets of rules could be adopted. In so far as the prevention of crime under the ordinary law is concerned, it is difficult to see the reason for ousting judicial control, at the very least such control as would secure at a later stage the right to the destruction of the product of unjustified interceptions.

Reasoning along these lines could have been adopted by the Court, even on an alternative basis. The interference caused by interception of communications is more serious than an ordinary interference since the "innocent" victim is incapable of discovering it.

If, as the British Government submitted, only the suspected criminal is placed under secret surveillance, there can be no ground for denying a measure involving judicial or equivalent control, or for refusing to have a neutral and impartial body situated between the authority deciding on the interception and the authority responsible for controlling the legality of the operation and its conformity with the legitimate aims pursued.

The requirement of judicial control over telephone interceptions does not flow solely from a concern rooted in a philosophy of power and institutions but also from the necessities of protecting private life.

In reality, even justified and properly controlled telephone interceptions call for counter-measures such as the right of access by the subject of the interception when the judicial phase has terminated in the discharge or acquittal of the accused, the right to erasure of the data obtained, the right of restitution of the tapes.

Other measures are necessary, such as regulations safeguarding the confidentiality of the investigation and legal professional privilege, when the interception has involved monitoring a conversation between lawyer and client or when the interception has disclosed facts other than those forming the subject of the criminal investigation and the accusation.

Provisions of criminal procedure alone are capable

of satisfying such requirements which, moreover, are consistent with the Council of Europe Convention of 1981 (Private Life, Data Banks). It is in fact impossible to isolate the issue of interception of communications from the issue of data banks since interceptions give rise to the filing and storing of the information obtained. For States which have also ratified the 1981 Convention, their legislation must satisfy these double requirements.

The work of the Council of Europe (Orwell Colloquy in Strasbourg on 2 April 1984, and Data Bank Colloquy in Madrid on 13 June 1984) has been directed towards the same end, namely the protection of the individual threatened by methods of storing and transmission of information. The mission of the Council of Europe and of its organs is to prevent the establishment of systems and methods that would allow "Big Brother" to become master of the citizen's private life. For it is just as serious to be made subject to measures of interception against one's will as to be unable to stop such measures when they are illegal or unjustified, as was for example the case with Orwell's character who, within his own home, was continually supervised by a television camera without being able to switch it off.

The distinction between administrative interceptions and interceptions authorised by a judicial authority must be clearly made in the law in order to comply with Article 8 (art. 8); it would appear preferable to lay down the lawfulness of certain interventions within an established legal framework rather than leaving a legal vacuum permitting arbitrariness. The designation of the collective institutions responsible for ensuring the *ex post facto* control of the manner of implementation of measures of interception; the determination of the dates of cancellation of the tapping and monitoring measures, the means of destruction of the product of interception; the inclusion in the code of criminal procedure of all measures applying to such matters in order to afford protection of words uttered in a private context or in a private place, verification that the measures do not constitute an unfair stratagem or a violation of the rights of the defence - all this panoply of requirements must be taken into consideration to judge whether or not the system satisfies the provisions of Article 8 (art. 8). The Malone case prompted queries of this kind since the State cannot enjoy an "unlimited discretion" in this respect (see the Klass judgment).

According to the spirit of the Council of Europe Convention of 1981 on private life and data banks, the right of access includes the right for the individual to establish the existence of the data, to establish the banks of which he is a "data subject",

access properly speaking, the right to challenge the data, and the exceptions to and derogations from this right of access in the case notably of police or judicial investigations which must by nature remain secret during the initial phase so as not to alert the criminals or potential criminals.

Recommendation R (83) 10 of the Committee of Ministers of the Council of Europe states that respect for the privacy of individuals should be guaranteed "in any research project requiring the use of personal data".

The nature and implications of data processing are totally different as soon as computerisation enters the picture. The Karlsruhe Constitutional Court has rightly identified the concept of "informational self-determination", that is to say, the right of the individual to decide within what limits data concerning his private life might be divulged and to protect himself against an increasing tendency to make him "public property".

In 1950, techniques for interfering in private life were still archaic; the meaning and import of the term interference as understood at that time cannot prevail over the current meaning. Consequently, interceptions which in previous times necessitated recourse to tapping must be classified as "interferences" in 1984, even if they have been effected without tapping thanks to "bugging" and long-distance listening techniques.

For it is settled, as was recalled in paragraph 42 of the Klass judgment, that Article 8 para. 2 (art. 8-2), since it provides for an exception to a guaranteed right, "is to be narrowly interpreted" and that "powers of secret surveillance of citizens, characterising as they do the police State, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions". To leave to the police alone, even subject to the control of the Home Office, the task of assessing the degree of suspicion or dangerousness cannot, in my opinion, be regarded as an adequate means consistent with the aim pursued, even if that aim be legitimate; and in any event, practices of systematic interception of communications in the absence of impartial, independent and judicial control would be disproportionate to the aim sought to be achieved. In this connection, the Malone judgment has to read with reference to the reasoning expounded in the Klass judgment.

States must admittedly be left a domestic discretion and the scope of this discretion is admittedly not identical in respect of each of the aims enumerated in Articles 8 and 10 (art. 8, art. 10), but the right to respect for private life against spying by ex-

ecutive authorities comes within the most exacting category of Convention rights and hence entails a certain restriction on this domestic "discretion" and on the margin of appreciation. In this sphere (more than in the sphere of morality - cf. the *Handyside* judgment), it can be maintained that it is possible, whilst still taking account of the circumstances resulting from the threat posed to democratic societies by terrorism, to identify European standards of State conduct in relation to surveillance of citizens. The shared characteristics of statutory texts or draft legislation on data banks and interception of communications is evidence of this awareness.

The Court in its examination of cases of violation of Article 8 (art. 8) must be able to inquire into all the techniques giving rise to the interference.

The Post Office Engineering Union, during the course of the *Malone* case, referred to proposals for the adoption of regulations capable of being adapted to new techniques as they are developed and for a system of warrants issued by "magistrates".

The Court has rightly held that there was also violation of Article 8 para. 1 (art. 8-1) in respect of metering.

On this point, it would likewise have been possible to have given a ruling by applying Article 8 para. 2 (art. 8-2). The comprehensive metering of telephone communications (origin, destination, duration), when effected for a purpose other than its sole accounting purpose, albeit in the absence of any interception as such, constitutes an interference in private life. On the basis of the data thereby obtained, the authorities are enabled to deduce information that is not properly meant to be within their knowledge. It is known that, as far as data banks are concerned, the processing of "neutral" data may be as revealing as the processing of sensitive data.

The simple reference in the judgment to the notion of necessity in a democratic society and to the requirement of "adequate guarantees", without any elucidation of the principles and principal conditions attaching to these guarantees, might well be inadequate for the purposes of the interpretation that the State should give to the Convention and to the judgment.

The *Malone* judgment complementing as it does the *Klass* judgment, in that it arrives at a conclusion of violation by finding unsatisfactory a system that is laid down neither by statute nor by any statutory equivalent in Anglo-Saxon law, takes its place in that continuing line of decisions through which

the Court acts as guardian of the Convention. The Court fulfils that function by investing Article 8 (art. 8) with its full dimension and by limiting the margin of appreciation especially in those areas where the individual is more and more vulnerable as a result of modern technology; recognition of his right to be "left alone" is inherent in Article 8 (art. 8). The Convention protects the community of men; man in our times has a need to preserve his identity, to refuse the total transparency of society, to maintain the privacy of his personality.

ECHR

ECJ

GRAND CHAMBER

CASE OF BYKOV v RUSSIA

(Application no. 4378/02)

JUDGMENT

STRASBOURG

10 March 2009

PRIVATE LIFE, COMMUNICATION, TELEPHONE, TAPPING, SURVEILLANCE, INTERCEPTION, INTERFERENCE, SECRET

IN THE CASE OF BYKOV V. RUSSIA,

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

Jean-Paul Costa, *President*,

Christos Rozakis,

Nicolas Bratza,

Peer Lorenzen,

Françoise Tulkens,

Josep Casadevall,

Ireneu Cabral Barreto,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Ljiljana Mijović,

Dean Spielmann,

David Thór Björgvinsson,

George Nicolaou,

Mirjana Lazarova Trajkovska,

Nona Tsotsoria, *judges*,

and **Michael O'Boyle**, *Deputy Registrar*,

Having deliberated in private on 18 June 2008 and on 21 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 4378/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Anatoly Petrovich Bykov ("the applicant"), on 21 December 2001.
2. The applicant was represented by Mr D. Krauss, Professor of Law at Humboldt University, Berlin, and by Mr J.-C. Pastille and Mr G. Padva, lawyers practising in Riga and Moscow respectively. The Russian Government ("the Government")

were initially represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant complained under Article 6 § 1 and Article 8 of the Convention about the covert recording made at his home and its use as evidence in the ensuing criminal proceedings against him. He also alleged that his pre-trial detention was excessively long and not justified for the purposes of Article 5 § 3 of the Convention.
4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 7 September 2006 it was declared partly admissible by a Chamber of that Section composed of the following judges: Christos Rozakis, Loukis Loucaides, Françoise Tulkens, Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, and also of Søren Nielsen, Section Registrar. On 22 November 2007 a Chamber of that Section, composed of the following judges: Christos Rozakis, Loukis Loucaides, Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Dean Spielmann, and also of Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).
5. The composition of the Grand Chamber was determined according to the provisions of Article 27 § 2 and 3 of the Convention and Rule 24 of the Rules of Court.
6. The applicant and the Government each filed written observations on the merits.
7. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 June 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms V. Milinchuk, *Agent*,

Ms I. Mayke,

Ms Y. Tsimbalova,

Mr A. Zazulskiy, *Advisers*;

(b) *for the applicant*

Mr D. Krauss,

Mr J.-C. Pastille, *Counsel*,

Mr G. Padva,

Ms J. Kvjatkovska, *Advisers.*

The applicant was also present.

The Court heard addresses by Mr Krauss and Ms Milinchuk, as well as the answers by Mr Pastille and Ms Milinchuk to questions put to the parties.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1960 and lives in Krasnoyarsk.
9. From 1997 to 1999 the applicant was chairman of the board of the Krasnoyarsk Aluminium Plant. At the time of his arrest in October 2000 he was a major shareholder and an executive of a corporation called OAO Krasnergomash-Holding and a founder of a number of affiliated firms. He was also a deputy of the Krasnoyarsk Regional Parliamentary Assembly.

A. Covert operation

10. In September 2000 the applicant allegedly ordered V., a member of his entourage, to kill S., the applicant's former business associate. V. did not comply with the order, but on 18 September 2000 he reported the applicant to the Federal Security Service of the Russian Federation ("the FSB"). On the following day V. handed in the gun which he had allegedly received from the applicant.
11. On 21 September 2000 the Prosecutor of the Severo-Zapadnyy District of Moscow opened a criminal investigation in respect of the applicant on suspicion of conspiracy to murder.
12. On 26 and 27 September 2000 the FSB and the police decided to conduct a covert operation to obtain evidence of the applicant's intention to murder S.
13. On 29 September 2000 the police staged the discovery of two dead men at S.'s home. They officially announced in the media that one of those killed had been identified as S. The other man was his business partner, I.
14. On 3 October 2000 V., acting on the police's instructions, came to see the applicant at his estate. He carried a hidden radio-transmitting device while a police officer outside received and

recorded the transmission. He was received by the applicant in a "guest house", a part of the estate connected to his personal residence. In accordance with the instructions, V. engaged the applicant in conversation by telling him that he had carried out the assassination. As proof of his accomplishment he handed the applicant several objects taken from S. and I.: a certified copy of a mining project feasibility study marked with a special chemical agent, two watches belonging to S. and I. and 20,000 United States dollars (USD) in cash. At the end of the conversation V. took the cash, as suggested by the applicant. The police obtained a sixteen-minute recording of the dialogue between V. and the applicant.

15. On 4 October 2000 the applicant's estate was searched. Several watches were seized, including those belonging to S. and I. A chemical analysis was conducted and revealed the presence on the applicant's hands of the chemical agent which had been used to mark the feasibility study. The applicant was arrested.
16. On 27 February 2001 the applicant complained to the Prosecutor of the Severo-Zapadnyy District of Moscow that his prosecution had been unlawful because it involved numerous procedural violations of his rights, including the unauthorised intrusion into his home and the use of the radio-transmitting device. On 2 March 2001 the prosecutor dismissed his complaint, having found, in particular, that the applicant had let V. into his house voluntarily and that therefore there had been no intrusion. It was also found that no judicial authorisation had been required for the use of the radio-transmitting device because in accordance with the Operational-Search Activities Act, it was only required for the interception of communications transmitted by means of wire channels or mail services, none of which had been employed in the covert operation at issue.

B. Pre-trial detention

17. Following the applicant's arrest on 4 October 2000, on 6 October 2000 the Deputy Prosecutor of the Severo-Zapadnyy District of Moscow ordered his detention during the investigation, having found that it was "in accordance with the law" and necessary in view of the gravity of the charge and the risk that the applicant might influence witnesses. Further extensions were ordered by the competent prosecutor on 17 November 2000 (until 21 December 2000) and on 15 December 2000 (until 21 March

2001). The reasons for the applicant's continued detention were the gravity of the charge and the risk of his influencing the witnesses and obstructing the investigation. The applicant appealed against each of these decisions to a court.

18. On 26 January 2001 the Lefortovskiy District Court of Moscow examined the applicant's appeal against his continued detention on remand and confirmed the lawfulness of his detention. The court referred to the gravity of the charge and noted that this measure had been applied in accordance with the law. The applicant lodged a further appeal, which was also dismissed by the Moscow City Court.
19. In view of the forthcoming expiry of the term of the applicant's detention, its further extension was ordered by the competent prosecutor, first on 15 March 2001, until 4 April 2001, and then on 21 March 2001, until 4 June 2001, still on the grounds of the gravity of the charge and the risk of his influencing the witnesses and obstructing the investigation. The applicant challenged the extensions before the court.
20. On 11 April 2001 the Lefortovskiy District Court of Moscow declared that the applicant's detention until 4 June 2001 was lawful and necessary on account of the gravity of the charge. The applicant lodged an appeal with the Moscow City Court, which was dismissed on 15 May 2001. The appeal court considered the applicant's detention lawful and necessary "until the bill of indictment had been submitted or until the applicant's immunity had been confirmed".
21. On 22 May 2001 the Deputy Prosecutor General extended the applicant's detention on remand until 4 September 2001, still on the grounds of the gravity of the charge and the risk of his influencing the witnesses and obstructing the investigation.
22. On 27 August 2001 the case was referred to the Tushinskiy District Court of Moscow. On 7 September 2001 the court scheduled the hearing for 26 September 2001 and authorised the applicant's further detention without indicating any reasons or the length of the extension. On 3 October 2001 the Moscow City Court examined and dismissed an appeal by the applicant, upholding his continued detention without elaborating on the reasons.
23. On 21 December 2001 the Meshchanskiy District Court of Moscow scheduled the hearing for 4 January 2002 and authorised the ap-

plicant's further detention, citing no reasons. The court did not indicate the length of the prospective detention. It again reviewed the lawfulness of the applicant's detention on 4 January 2002 but found that it was still necessary owing to the gravity of the charges and the "circumstances of the case". An appeal by the applicant to the Moscow City Court was dismissed on 15 January 2002.

24. Further applications by the applicant for release were examined on 23 January, 6 March, 11 March and 23 April 2002. As before, the Meshchanskiy District Court of Moscow refused his release, citing the gravity of the charge and the risk of his evading trial and influencing the witnesses. The applicant was released on 19 June 2002 following his conviction (see paragraph 45 below).

C. Criminal investigation and trial

25. On 3 October 2000, immediately after visiting the applicant in the "guest house", V. was questioned by the investigators. He reported on the contents of his conversation with the applicant and submitted that he had handed him the gun, the watches and the feasibility study. He was subsequently questioned on 12 October, 9 November, 8 December and 18 December 2000.
26. The applicant was questioned as a suspect for the first time on 4 October 2000. From October to December 2000 he was questioned at least seven times.
27. On 10 October 2000 the applicant and V. were questioned in a confrontation with each other. The applicant's legal counsel were present at the confrontation. The statements made by the applicant on that occasion were subsequently summarised in the indictment, of which the relevant part reads as follows:

"At the confrontation between A.P. Bykov and [V.] on 10 October 2000 Bykov altered, in part, certain substantive details of his previous statements, as follows. [He] claims that he has been acquainted with [V.] for a long time, about 7 years; they have normal relations; the last time he saw him was on 3 October 2000, and before that they had been in contact about two years previously. He has never given any orders or instructions to [V.], including any concerning [S.]. When [V.] came to see him on 3 October 2000 he began to tell him off for coming to him. When he asked [V.] who had told him to kill [S.] he replied that nobody had, he had just wanted to prove to himself that he

could do it. He began to comfort [V.], saying that he could help with his father; [he] did not suggest that [V.] flee the town [or] the country, and did not promise to help him financially. He did not instruct [V.] on what to do if [V.] was arrested; he asked him what was going to happen if he was arrested; [V.] said that he would tell how it all happened and would confess to having committed the crime, [and the applicant] approved of that. Concerning K., Bykov stated that this was his partner who lived and worked in Switzerland; he admitted *de facto* that he had spoken to him on the phone at the beginning of August... but had given him no directions about [V.]”

28. On 13 October 2000 the applicant was charged with conspiracy to murder. Subsequently the charges were extended to include conspiracy to acquire, possess and handle firearms.
29. On 8 December 2000 two appointed linguistic experts examined the recording of the applicant's conversation with V. of 3 October 2000 and answered the following questions put to them:
 - “1. Is it possible to establish, on the basis of the text of the conversation submitted for examination, the nature of relations between Bykov and [V.], the extent of their closeness, sympathy for each other, subordination; how is it expressed?
 2. Was Bykov's verbal reaction to [V.]'s statement about the 'murder' of [S.] natural assuming he had ordered the murder of [S.]?
 3. Are there any verbal signs indicating that Bykov expressed mistrust about [V.]'s information?
 4. Is it possible to assess Bykov's verbal style as unequivocally aiming at closing the topic, ending the conversation?
 5. Are there any identifiable stylistic, verbal signs of fear (caution) on Bykov's part in relation to [V.]?”
30. In respect of the above questions the experts found:
 - on question 1, that the applicant and V. had known each other for a long time and had rather close and generally sympathetic relations; that V. had shown subordination to the applicant; that the applicant had played an instructive role in the conversation;
 - on question 2, that the applicant's reaction to V.'s information about the accomplished murder was natural and that he had insistently questioned V. on the technical details of its execution;
 - on question 3, that the applicant had shown no sign of mistrusting V.'s confession to the murder;
 - on question 4, that the applicant had not shown any clear signs of wishing to end or to avoid the conversation;
 - on question 5, that the applicant had not shown any fear of V.; on the contrary, V. appeared to be afraid of the applicant.
31. On 11 January 2001 the investigation was completed and the applicant was allowed access to the case file.
32. On 27 August 2001 the case was referred to the Tushinskiy District Court of Moscow.
33. On 22 October 2001 the Tushinskiy District Court declined jurisdiction in favour of the Meshchanskiy District Court of Moscow, having established that the venue of the attempted murder lay within that court's territorial jurisdiction.
34. On 16 December 2001 V. made a written statement certified by the Russian consulate in the Republic of Cyprus repudiating his statements against the applicant. He submitted that he had made those statements under pressure from S. Two deputies of the State Duma, D. and Y.S., were present at the consulate to witness the repudiation. On the same day they recorded an interview with V. in which he explained that S. had persuaded him to make false statements against the applicant.
35. On 4 February 2002 the Meshchanskiy District Court of Moscow began examining the charges against the applicant. The applicant pleaded not guilty. At the trial he challenged the admissibility of the recording of his conversation with V. and of all other evidence obtained through the covert operation. He alleged that the police interference had been unlawful and that he had been induced into self-incrimination. Furthermore, he claimed that the recording had involved unauthorised intrusion into his home. He contested the interpretation of the recording by the experts and alleged that nothing in his dialogue with V. disclosed prior knowledge of a murder conspiracy.
36. During the trial the court dismissed the applicant's objection to the covert operation and admitted as lawfully obtained evidence the

recording with its transcript, the linguistic expert report, V.'s statements, and the evidence showing that the applicant had accepted the feasibility study and the watches from V. It dismissed the argument that there had been an unauthorised intrusion into the applicant's premises, having found, firstly, that the applicant had expressed no objection to V.'s visit and, secondly, that their meeting had taken place in the "guest house", which was intended for business meetings and therefore did not encroach on the applicant's privacy. The court refused to admit as evidence the official records of the search at the applicant's estate because the officers who had conducted the search on 4 October 2000 had not been covered by the authorisation.

37. The following persons were examined in the oral proceedings before the court:

S. explained his relations with the applicant and their conflict of interests in the aluminium industry. He confirmed that he had participated in the covert operation; he also confirmed that in 2001 V. had told him that he had been paid off to withdraw his statements against the applicant.

Twenty-five witnesses answered questions concerning the business links of the applicant, V. and S. with the aluminium plant and other businesses in Krasnoyarsk; the relations and connections between them; the existence of the conflict of interests between the applicant and S.; the events of 3 October 2000, namely the arrival of V. at the "guest house", his conversation with the applicant and the handing of the documents and the watches to the applicant; and the circumstances surrounding V.'s attempted withdrawal of his statements against the applicant.

Seven experts were examined: a technical expert gave explanations about the recording of data received by way of a radio-transmitting device; a sound expert explained how a transcript of the recording of the applicant's conversation with V. had been produced; two expert linguists submitted that they had used both the tape and the recording transcript in their examination; an expert psychologist answered questions concerning his findings (evidence subsequently excluded as obtained unlawfully – see paragraph 43 below); and two corroborative experts upheld the conclusions of the expert linguists and the sound experts.

Seven attesting witnesses answered ques-

tions concerning their participation in various investigative measures: the receipt of the gun handed in by V., the copying of the video and audio tapes, the treatment of the material exhibits with a chemical agent, the "discovery of the corpses" in the operative experiment, and the house search.

Four investigation officers were examined: an FSB officer submitted that on 18 September 2000 V. had written a statement in his presence that the applicant had ordered him to kill S., and had handed in the gun; he also explained how the operative experiment had been carried out; two officers of the prosecutor's office and one officer of the Interior Ministry also described the operative experiment and explained how the copies of the recording of the applicant's conversation with V. had been made.

38. On 15 May 2002 during the court hearing the prosecutor requested to read out the records of the questioning of five witnesses not present at the hearing. The statements made by V. during the pre-trial investigation were among them.

39. The applicant's counsel said that he had no objections. The court decided to grant the request, having noted that "the court took exhaustive measures to call these witnesses to the court hearing and found that... V.'s whereabouts could not be established and he could not be called to the courtroom even though a number of operational search measures were taken by the FSB and an enquiry was made to the National Central Bureau of Interpol by the Ministry of the Interior...". These statements were admitted as evidence.

40. The court also examined evidence relating to V.'s attempted withdrawal of his statements against the applicant. It established that during the investigation V. had already complained that pressure had been exerted on him to repudiate his statements against the applicant. It also established that the witness D., who was present at the consulate when V. had repudiated his statements, was a close friend of the applicant. The other witness, Y.S., had arrived at the consulate late and did not see the document before it was certified.

41. It was also noted that both the applicant and V. had undergone a psychiatric examination during the investigation and both had been found fit to participate in the criminal proceedings.

42. Other evidence examined by the court included: expert reports produced by chemical, ballistics, linguistic, sound and technical experts; written reports on the operative experiment; V.'s written statement of 18 September 2000; a certified description of the gun handed in by V.; and records of the applicant's confrontation with V. on 20 October 2000.
43. The applicant challenged a number of items of evidence, claiming that they had been obtained unlawfully. The court excluded some of them, in particular the expert report by a psychologist who had examined the recording of the applicant's conversation with V. and the police report on the search carried out on 4 October 2000. The attempt to challenge the audio tape containing the recording of the applicant's conversation with V., and the copies of the tape, was not successful and they were admitted as lawfully obtained evidence.
44. On 19 June 2002 the Meshchanskiy District Court of Moscow gave judgment, finding the applicant guilty of conspiracy to murder and conspiracy to acquire, possess and handle firearms. The finding of guilt was based on the following evidence: the initial statement by V. that the applicant had ordered him to kill S.; the gun V. had handed in; the statements V. had made in front of the applicant when they had been confronted during the questioning on 10 October 2000; numerous witness statements confirming the existence of a conflict between the applicant and S.; and the physical evidence obtained through the covert operation, namely the watches and the feasibility study. Although the recording of the applicant's conversation with V. was played at the hearing, its contents did not feature among the evidence or as part of the court's reasoning. In so far as the record was mentioned in the judgment, the court relied solely on the conclusions of the linguistic experts (see paragraph 30 above) and on several reports confirming that the tape had not been tampered with.
45. The court sentenced the applicant to six and a half years' imprisonment and, having deducted the time already spent in pre-trial detention, conditionally released him on five years' probation.
46. The applicant appealed against the judgment, challenging, *inter alia*, the admissibility of the evidence obtained through the covert operation and the court's interpretation of the physical evidence and the witnesses' testimonies.
47. On 1 October 2002 the Moscow City Court upheld the applicant's conviction and dismissed his appeal, including the arguments relating to the admissibility of evidence.
48. On 22 June 2004 the Supreme Court of the Russian Federation examined the applicant's case in supervisory proceedings. It modified the judgment of 19 June 2002 and the appeal decision of 1 October 2002, redefining the legal classification of one of the offences committed by the applicant. It found the applicant guilty of "incitement to commit a crime involving a murder", and not "conspiracy to murder". The rest of the judgment, including the sentence, remained unchanged.

II. RELEVANT DOMESTIC LAW

A. Pre-trial detention

49. Until 1 July 2002 criminal-law matters were governed by the Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic (CCrP).
50. "Preventive measures" or "measures of restraint" included an undertaking not to leave a town or region, personal security, bail and detention on remand (Article 89). A decision to detain someone on remand could be taken by a prosecutor or a court (Articles 11, 89 and 96).
1. *Grounds for detention on remand*
51. When deciding whether to remand an accused in custody, the competent authority was required to consider whether there were "sufficient grounds to believe" that he or she would abscond during the investigation or trial or obstruct the establishment of the truth or reoffend (Article 89). It also had to take into account the gravity of the charge, information on the accused's character, his or her profession, age, state of health, family status and other circumstances (Article 91).
52. Before 14 March 2001, detention on remand was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Article 96). On 14 March 2001 the CCrP was amended to permit defendants to be remanded in custody if the charge carried a sentence of at least two years' imprisonment or if they had previously defaulted or had no permanent residence in Russia or if their identity could not be ascertained. The amendments of 14 March

2001 also repealed the provision that permitted defendants to be remanded in custody on the sole ground of the dangerous nature of the criminal offence committed.

2. Time-limits for detention on remand

53. The CCrP provided for a distinction between two types of detention on remand: the first being “during the investigation”, that is, while a competent agency – the police or a prosecutor’s office – was investigating the case, and the second being “before the court” (or “during the judicial proceedings”), at the judicial stage. Although there was no difference in practice between them (the detainee was held in the same detention facility), the calculation of the time-limits was different.
54. From the date the prosecutor referred the case to the trial court, the defendant’s detention was classified as “before the court” (or “during the judicial proceedings”).
55. Before 14 March 2001 the CCrP did not set any time-limit for detention “during the judicial proceedings”. On 14 March 2001 a new Article 239-1 was inserted which established that the period of detention “during the judicial proceedings” could not generally exceed six months from the date the court received the file. However, if there was evidence to show that the defendant’s release might impede a thorough, complete and objective examination of the case, a court could – of its own motion or on a request by a prosecutor – extend the detention by no longer than three months. These provisions did not apply to defendants charged with particularly serious criminal offences.

B. Operative experiments

56. The Operational-Search Activities Act of 12 August 1995 (no. 144-FZ) provides, in so far as relevant, as follows:

Section 6: Operational-search activities

“In carrying out investigations the following measures may be taken:

...

9. supervision of postal, telegraphic and other communications;
10. telephone interception;
11. collection of data from technical channels of communication;

...

14. operative experiments.

...

Operational-search activities involving supervision of postal, telegraphic and other communications, telephone interception through [telecommunication companies], and the collection of data from technical channels of communication are to be carried out by technical means by the Federal Security Service and the agencies of the Interior Ministry in accordance with decisions and agreements signed between the agencies involved.

...”

Section 8: Conditions governing the performance of operational-search activities

“Operational-search activities involving interference with the constitutional right to privacy of postal, telegraphic and other communications transmitted by means of wire or mail services, or with the privacy of the home, may be conducted, subject to a judicial decision, following the receipt of information concerning:

1. the appearance that an offence has been committed or is ongoing, or a conspiracy to commit an offence whose investigation is mandatory;
2. persons conspiring to commit, or committing, or having committed an offence whose investigation is mandatory;

...

Operative experiments may only be conducted for the detection, prevention, interruption and investigation of a serious crime, or for the identification of persons preparing, committing or having committed it.

...”

Section 9: Grounds and procedure for judicial authorisation of operational-search activities involving interference with the constitutional rights of individuals

“The examination of requests for the taking of measures involving interference with the constitutional right to privacy of correspondence and telephone, postal, telegraphic and other communications transmitted by means of wire or mail services, or with the right to privacy of the home, shall fall within the competence of a court at the place where the requested measure is to be carried out or at the place where the requesting body is located. The request must be examined immediately

by a single judge; the examination of the request may not be refused.

...

The judge examining the request shall decide whether to authorise measures involving interference with the above-mentioned constitutional right, or to refuse authorisation, indicating reasons.

..."

Section 11: Use of information obtained through operational-search activities

"Information gathered as a result of operational-search activities may be used for the preparation and conduct of the investigation and court proceedings... and used as evidence in criminal proceedings in accordance with legal provisions regulating the collection, evaluation and assessment of evidence...."

C. Evidence in criminal proceedings

57. Article 69 of the CCRP provided as follows:

"...

Evidence obtained in breach of the law shall be considered to have no legal force and cannot be relied on as grounds for criminal charges."

The 2001 Code of Criminal Procedure of the Russian Federation, which replaced the CCRP of the Russian Soviet Federative Socialist Republic from 1 July 2002, provides as follows, in so far as relevant:

Article 75: Inadmissible evidence

"1. Evidence obtained in breach of this Code shall be inadmissible. Inadmissible evidence shall have no legal force and cannot be relied on as grounds for criminal charges or for proving any of the [circumstances for which evidence is required in criminal proceedings].

..."

Article 235

"...

5. If a court decides to exclude evidence, that evidence shall have no legal force and cannot be relied on in a judgment or other judicial decision, or be examined or used during the trial.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

58. The applicant complained that his pre-trial detention had been excessively long and that it had been successively extended without any indication of relevant and sufficient reasons. He relied on Article 5 § 3 of the Convention, which provides as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

59. The Government submitted that the applicant's detention had not been excessively long and argued that the investigation of his case had taken time because of its complexity and scale. They also claimed that, given his personality, there had been an obvious risk that the applicant might evade prosecution, influence witnesses and obstruct the course of justice, which justified his continued detention.

60. The applicant maintained his complaint, claiming that the grounds given for his detention and its repeated extension had been unsupported by any reasoning or factual information.

61. According to the Court's settled case-law, the presumption under Article 5 is in favour of release. As established in *Neumeister v. Austria* (27 June 1968, § 4, Series A no. 8), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.

62. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § § 110 et seq., ECHR 2000-XI).

63. The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, *Weinsztal v. Poland*, no. 43748/98, § 50, 30 May 2006, and *McKay v. the United Kingdom* [GC], no. 543/03, § 43, ECHR 2006-X).
64. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings (see, among other authorities, *Letellier v. France*, 26 June 1991, § 35, Series A no. 207, and *Yağcı and Sargin v. Turkey*, 8 June 1995, § 50, Series A no. 319-A). In this connection, the Court reiterates that the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release (see *Ilijkov v. Bulgaria*, no. 33977/96, § 85, 26 July 2001).
65. Turning to the instant case, the Court observes that the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained

valid at the advanced stage of the proceedings. Moreover, from 7 September 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial.

66. As regards the Government's argument that the circumstances of the case and the applicant's personality were self-evident for the purpose of justifying his pre-trial detention, the Court does not consider that this in itself absolved the courts from the obligation to set out reasons for coming to this conclusion, in particular in the decisions taken at later stages. It reiterates that where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention (see *Panchenko v. Russia*, no. 45100/98, § 99 and 105, 8 February 2005, and *Ilijkov*, cited above, § 86).
67. The Court therefore finds that the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, eight months and 15 days.
68. There has therefore been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The applicant complained that the covert operation had involved an unlawful intrusion into his home and that the interception and recording of his conversation with V. had interfered with his private life. He alleged a violation of Article 8 of the Convention, which reads as follows:

“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 freedoms of others.”

70. The Government maintained that the covert operation, and in particular the interception and recording of the applicant's conversation with V., had been conducted in accordance with the Operational-Search Activities Act. They claimed that it constituted an "operative experiment" within the meaning of the Act. They further argued that no judicial authorisation had been required for the purposes of the present case because pursuant to section 8 of the Act, it was only required for the interception of communications transmitted by means of wire channels or mail services, none of which had been employed in the covert operation at issue. They also denied that there had been an intrusion into the applicant's home since the "guest house" could not be considered his home, and in any case he had let V. in voluntarily. They further claimed that in the circumstances of the case the covert operation had been indispensable because without the interception of the applicant's conversation with V. it would have been impossible to verify the suspicion that he had committed a serious crime. They contended that the measures taken to investigate the crime had been proportionate to the seriousness of the offence in question.
71. The applicant maintained, on the contrary, that the covert operation had involved an unlawful and unjustified interference with his right to respect for his private life and home. He claimed that there had been an unlawful intrusion into his home and contested the Government's argument that he had not objected to V.'s entry because his consent had not extended to accepting a police agent on his premises. He also claimed that the recording of his conversation with V. had interfered with his privacy and had therefore required prior judicial authorisation.
72. The Court notes that it is not in dispute that the measures carried out by the police in the conduct of the covert operation amounted to an interference with the applicant's right to respect for his private life under Article 8 § 1 of the Convention (see *Wood v. the United Kingdom*, no. 23414/02, § 29, 16 November 2004; *M.M. v. the Netherlands*, no. 39339/98, § 36-42, 8 April 2003; and *A. v. France*, 23 November 1993, Series A no. 277-B). The principal issue is whether this interference was justified under Article 8 § 2, notably whether it was "in accordance with the law" and "necessary in a democratic society", for one of the purposes enumerated in that paragraph.
73. In this connection, the Court notes that the domestic authorities put forward two arguments in support of the view that the covert operation had been lawful. The first-instance court found that there had been no "intrusion" or breach of the applicant's privacy because of the absence of objections to V.'s entry into the premises and because of the "non-private" purpose of these premises. The prosecutor's office, in addition to that, maintained that the covert operation had been lawful because it had not involved any activity subject to special legal requirements and the police had thus remained within the domain of their own discretion.
74. The Court observes that the Operational-Search Activities Act is expressly intended to protect individual privacy by requiring judicial authorisation for any operational-search activities that could interfere with it. The Act specifies two types of protected privacy: firstly, privacy of communications by wire or mail services and, secondly, privacy of the home. As regards the latter, the domestic authorities, notably the Meshchanskiy District Court of Moscow, argued that V.'s entering the "guest house" with the applicant's consent did not constitute an intrusion amounting to interference with the privacy of the applicant's home. As to the question of privacy of communications, it was only addressed as a separate issue in the prosecutor's decision dismissing the applicant's complaint. In his opinion, the applicant's conversation with V. remained outside the scope of protection offered by the Act because it did not involve the use of "wire or mail services". The same argument was put forward by the Government, who considered that the requirement of judicial authorisation did not extend to the use of the radio-transmitting device and that the covert operation could not therefore be said to have breached domestic law.
75. Having regard to the above, it is clear that the domestic authorities did not interpret the Operational-Search Activities Act as requiring prior judicial authorisation in the circumstances of the case at hand, since the case was found not to involve the applicant's "home" or the use of wire or mail services within the meaning of section 8 of the Act. The measure was considered to be an investigative step within the domain of the investigating authorities' own discretion.
76. The Court reiterates that the phrase "in accordance with the law" not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be com-

patible with the rule of law. In the context of covert surveillance by public authorities, in this instance the police, domestic law must provide protection against arbitrary interference with an individual's right under Article 8. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures (see *Khan v. the United Kingdom*, no. 35394/97, § 26, ECHR 2000-V).

77. The Court further observes that the Operational-Search Activities Act permitted so-called "operative experiments" to be conducted for the investigation of serious crime. While the law itself did not define what measures such "experiments" could involve, the national authorities took the view that there existed no statutory system in Russian law regulating the interception or recording of private communications through a radio-transmitting device. The Government argued that the existing regulations on telephone tapping were not applicable to radio-transmitting devices and could not be extended to them by analogy. On the contrary, they emphasised the difference between the two by indicating that no judicial authorisation for the use of a radio-transmitting device was required, for the reason that this technology fell outside the scope of any existing regulations. Thus, the Government considered that the use of technology not listed in section 8 of the Operational-Search Activities Act for the interception was not subject to the formal requirements imposed by the Act.
78. The Court has consistently held that when it comes to the interception of communications for the purpose of a police investigation, "the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence" (see *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82). In particular, in order to comply with the requirement of the "quality of the law", a law which confers discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. The degree of precision required of the "law" in this connection will depend upon the particular subject-matter. Since

the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Huvig v. France*, 24 April 1990, § 29 and 32, Series A no. 176-B; *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II; and *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V).

79. In the Court's opinion, these principles apply equally to the use of a radio-transmitting device, which, in terms of the nature and degree of the intrusion involved, is virtually identical to telephone tapping.
80. In the instant case, the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. In particular, the legal discretion of the authorities to order the interception was not subject to any conditions, and the scope and the manner of its exercise were not defined; no other specific safeguards were provided for. Given the absence of specific regulations providing safeguards, the Court is not satisfied that, as claimed by the Government, the possibility for the applicant to bring court proceedings seeking to declare the "operative experiment" unlawful and to request the exclusion of its results as unlawfully obtained evidence met the above requirements.
81. It follows that in the absence of specific and detailed regulations, the use of this surveillance technique as part of an "operative experiment" was not accompanied by adequate safeguards against various possible abuses. Accordingly, its use was open to arbitrariness and was inconsistent with the requirement of lawfulness.
82. The Court concludes that the interference with the applicant's right to respect for private life was not "in accordance with the law", as required by Article 8 § 2 of the Convention. In the light of this conclusion, the Court is not required to determine whether the interference was "necessary in a democratic society" for one

of the aims enumerated in paragraph 2 of Article 8. Nor is it necessary to consider whether the covert operation also constituted an interference with the applicant's right to respect for his home.

83. Accordingly, there has been a violation of Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

84. The applicant complained that he had been tricked by the police into making self-incriminating statements in his conversation with V. and that the court had admitted the record of this conversation as evidence at the trial. He alleged a violation of Article 6 § 1, which provides, in so far as relevant:

"In the determination of... any criminal charge against him, everyone is entitled to a fair... hearing... by [a]... tribunal..."

85. The Government submitted that the criminal proceedings against the applicant had been conducted lawfully and with due respect for the rights of the accused. They pointed out that the applicant's conviction had been based on an ample body of evidence of which only part had been obtained through the covert operation. The evidence relied on by the courts had included statements by more than 40 witnesses, expert opinions, and various items of physical and documentary evidence which provided a broad and consistent basis for the finding of guilt. The Government pointed out that it had been open to the applicant to challenge in adversarial proceedings the evidence obtained through the covert operation and that he had availed himself of this possibility.
86. The Government further maintained that the collection and the use of evidence against the applicant had involved no breach of his right to silence, or oppression, or defiance of his will. They pointed out that at the time when the recording was made the applicant had not been in detention and had not known about the investigation. In his conversation with V. he had acted freely and had been on an equal footing with his interlocutor, who had not been in a position to put any pressure on him. The Government contended that the evidence obtained through the covert operation had been perfectly reliable and that there had been no grounds to exclude the recording or other related evidence. In this connection, they argued

that the present case should be distinguished from the case of *Allan v. the United Kingdom* (no. 48539/99 48539/99, ECHR 2002-IX), where the covert operation had taken place in a detention facility at a time when the applicant had been particularly vulnerable, and the Court had described this as "oppressive".

87. The applicant, on the contrary, maintained that his conviction had been based on illegally obtained evidence, in breach of his right to remain silent and the privilege against self-incrimination. He alleged that his conversation with V. had in fact constituted a concealed interrogation, unaccompanied by any procedural guarantees. Finally, he denied that the record of this conversation had any probative value and claimed that it should not have been admitted as evidence at trial.

A. General principles established in the Court's case-law

88. The Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, Reports 1998-IV; and *Jalloh v. Germany* [GC], no. 54810/00, § § 94-96, ECHR 2006-IX).
89. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see, among other authorities, *Khan*, cited above, § 34; *P.G. and J.H. v. the United Kingdom*, no. 44787/98 44787/98, § 76,

ECHR 2001-IX; *Heglas v. the Czech Republic*, no. 5935/02, § § 89-92, 1 March 2007; and *Allan*, cited above, § 42).

90. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, among other authorities, *Khan*, cited above, § § 35 and 37, and *Allan*, cited above, § 43).
91. As regards, in particular, the examination of the nature of the Convention violation found, the Court observes that notably in the cases of *Khan* (cited above, § § 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, § § 37-38) it found the use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for their private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.
92. As regards the privilege against self-incrimination or the right to remain silent, the Court reiterates that these are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports* 1996-I). The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saun-*

ders v. the United Kingdom, 17 December 1996, § § 68-69, *Reports* 1996-VI; *Allan*, cited above, § 44; *Jalloh*, cited above, § § 94-117; and *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § § 53-63, ECHR 2007-...). In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court must examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Heaney and McGuinness v. Ireland*, no. 34720/97, § § 54-55, ECHR 2000-XII, and *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III).

93. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, *mutatis mutandis*, *Heaney and McGuinness*, cited above, § § 57-58).

B. Application of those principles to the present case

94. The Court observes that in contesting at his trial the use of the material obtained through the "operative experiment", the applicant put forward two arguments. Firstly, he argued that the evidence obtained from the covert operation, in particular the recording of his conversation with V., was unreliable and open to a different interpretation from that given by the domestic courts. Secondly, he alleged that the use of such evidence ran counter to the privilege against self-incrimination and his right to remain silent.
95. As regards the first point, the Court reiterates that where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see *Allan*, cited above, § 47). In the present case, the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal. The grounds for the challenge were the alleged unlawfulness and trickery in obtaining evidence and the alleged misinterpretation of the conversation recorded on the tape. Each of these points was addressed by the courts and

- dismissed in reasoned decisions. The Court notes that the applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence.
96. The Court further observes that the impugned recording, together with the physical evidence obtained through the covert operation, was not the only evidence relied on by the domestic court as the basis for the applicant's conviction. In fact, the key evidence for the prosecution was the initial statement by V., who had reported to the FSB that the applicant had ordered him to kill S., and had handed in the gun (see paragraph 10 above). This statement, which gave rise to the investigation, was made by V. before, and independently from, the covert operation, in his capacity as a private individual and not as a police informant. Furthermore, he reiterated his incriminating statements during his subsequent questioning on several occasions and during the confrontation between him and the applicant at the pre-trial stage.
97. While it is true that V. was not cross-examined at the trial, the failure to do so was not imputable to the authorities, who took all necessary steps to establish his whereabouts and have him attend the trial, including by seeking the assistance of Interpol. The trial court thoroughly examined the circumstances of V.'s withdrawal of his incriminating statements and came to a reasoned conclusion that the repudiation was not trustworthy. Moreover, the applicant was given an opportunity to question V. on the substance of his incriminating statements when they were confronted during the questioning on 10 October 2000. Some importance is also to be attached to the fact that the applicant's counsel expressly agreed to having V.'s pre-trial testimonies read out in open court. Finally, V.'s incriminating statements were corroborated by circumstantial evidence, in particular numerous witness testimonies confirming the existence of a conflict of interests between the applicant and S.
98. In view of the above, the Court accepts that the evidence obtained from the covert operation was not the sole basis for the applicant's conviction, corroborated as it was by other conclusive evidence. Nothing has been shown to support the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary.
99. It remains for the Court to examine whether the covert operation, and the use of evidence obtained thereby, involved a breach of the applicant's right not to incriminate himself and to remain silent. The applicant argued that the police had overstepped the limits of permissible behaviour by secretly recording his conversation with V., who was acting on their instructions. He claimed that his conviction had resulted from trickery and subterfuge incompatible with the notion of a fair trial.
100. The Court recently examined similar allegations in the case of *Heglas* (cited above). In that case the applicant had admitted his participation in a robbery in the course of a conversation with a person who had been fitted by the police with a listening device hidden under her clothes. The Court dismissed the applicant's complaint under Article 6 of the Convention concerning the use of the recording, finding that he had had the benefit of adversarial proceedings, that his conviction had also been based on evidence other than the impugned recording, and that the measure had been aimed at detecting a serious offence and had thus served an important public interest. The applicant, before the recording was made, had not been officially questioned about, or charged with, the criminal offence.
101. The circumstances of the covert operation conducted in the *Heglas* case were essentially different from those of the *Allan* case (cited above), where a violation of Article 6 was found. In the latter case the applicant was in pre-trial detention and expressed his wish to remain silent when questioned by the investigators. However, the police primed the applicant's cellmate to take advantage of the applicant's vulnerable and susceptible state following lengthy periods of interrogation. The Court, relying on a combination of these factors, considered that the authorities' conduct amounted to coercion and oppression and found that the information had been obtained in defiance of the applicant's will.
102. The Court notes that in the present case the applicant had not been under any pressure to receive V. at his "guest house", to speak to him, or to make any specific comments on the matter raised by V. Unlike the applicant in the *Allan* case (cited above), the applicant was not detained on remand but was at liberty on his own premises attended by security and other per-

sonnel. The nature of his relations with V. – subordination of the latter to the applicant – did not impose any particular form of behaviour on him. In other words, the applicant was free to see V. and to talk to him, or to refuse to do so. It appears that he was willing to continue the conversation started by V. because its subject matter was of personal interest to him. Thus, the Court is not convinced that the obtaining of evidence was tainted with the element of coercion or oppression which in the *Allan* case the Court found to amount to a breach of the applicant's right to remain silent.

103. The Court also attaches weight to the fact that in making their assessment the domestic courts did not directly rely on the recording of the applicant's conversation with V., or its transcript, and did not seek to interpret specific statements made by the applicant during the conversation. Instead they examined the expert report drawn up on the conversation in order to assess his relations with V. and the manner in which he involved himself in the dialogue. Moreover, at the trial the recording was not treated as a plain confession or an admission of knowledge capable of lying at the core of a finding of guilt; it played a limited role in a complex body of evidence assessed by the court.
104. Having examined the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation was put, the Court finds that the proceedings in the applicant's case, considered as a whole, were not contrary to the requirements of a fair trial.
105. It follows that there has been no violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

107. The applicant claimed compensation for the pecuniary and non-pecuniary damage sus-

tained as a result of the alleged violations of the Convention.

108. As regards pecuniary damage, the applicant claimed 4,059,061.80 Russian roubles (119,089.25 euros (EUR)), which represented his loss of earnings during his pre-trial detention. As regards non-pecuniary damage, the applicant claimed that he had suffered emotional distress and a diminished quality of life and requested compensation for this in an amount to be determined by the Court.
109. The Government contested these claims as manifestly ill-founded. They considered that any finding by the Court of a violation would constitute sufficient just satisfaction in the present case.
110. The Court notes that the applicant's claim for pecuniary damage relates to the complaint about his pre-trial detention, in respect of which a violation of Article 5 § 3 has been found (see paragraph 68 above). It reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see *Barberà, Messegue and Jabardo v. Spain* (Article 50), 13 June 1994, § § 16-20, Series A no. 285-C; see also *Berktaş v. Turkey*, no. 22493/93, § 215, 1 March 2001). The Court does not discern any causal link between the authorities' failure to adduce relevant and sufficient reasons for the applicant's continued detention and the loss of income he alleged (see *Dzelili v. Germany*, no. 65745/01 65745/01, § § 107-13, 10 November 2005).
111. On the other hand, it considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Considering the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 under this head.

A. Costs and expenses

112. In the proceedings before the Chamber the applicant claimed EUR 93,246.25 in respect of costs and expenses. For his legal representation before the domestic courts the applicant paid the equivalent of EUR 60,691.61 to Mr G. Padva, his defence counsel in the criminal proceedings. He submitted a full set of receipts confirming the payment of this sum to Mr Padva's office. In the proceedings before the Court, the applicant was also represented by Mr Krauss

and Mr J. Pastille, to whom he paid an aggregate amount of EUR 69,839.64 (EUR 32,554.64 in the proceedings before the Chamber and EUR 37,285 before the Grand Chamber). In respect of their services he provided an invoice for 25,583.70 United States dollars, indicating the number of hours and the hourly rates used as a basis, plus various expenses. Two further invoices – by Mr Pastille for EUR 5,000 and by a law firm, “Rusanovs, Rode, Buss”, for EUR 7,500 – did not contain any particulars. Following the public hearing before the Grand Chamber the applicant supplemented the claims and provided an invoice for EUR 37,285 which comprised EUR 30,600 in respect of lawyers’ fees, indicating the number of hours spent by each counsel and adviser, and EUR 6,685 for travel expenses.

113. The Government claimed that these expenditures had not been incurred necessarily and were unreasonable as to quantum. They considered that the number of legal counsel engaged in the case was not justified by the circumstances or the complexity of the case. Commenting on specific sums, they pointed out that Mr Padva’s invoice contained no itemised list of services rendered to the applicant under the legal services agreement. They also disputed the hourly rates charged by Mr Krauss, Mr Pastille and their associates, claiming that they were unreasonable and in excess of the average legal rates. They also challenged the invoices for EUR 5,000 and for EUR 7,500, claiming that in the absence of any itemised list of services or financial receipts there was no proof that these expenses had actually been incurred. The Government considered that a sum of EUR 3,000 would be sufficient under this head.

114. According to the Court’s case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Furthermore, legal costs are recoverable only in so far as they relate to the violation found (see, for example, *I.J.L. and Others v. the United Kingdom* (just satisfaction), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). In the instant case, the Court considers the amount claimed excessive, given that a number of the applicant’s complaints were either declared inadmissible or did not result in a finding of a violation of the Convention (see *Bykov v. Russia* (dec.), no. 4378/02, 7 September 2006, and paragraph 105 above). Moreo-

ver, the applicant’s submissions contain no information on the specific services covered by the invoices. Thus, the Court considers that a significant reduction is necessary on both accounts. Having regard to all relevant factors, the Court considers it reasonable to award the sum of EUR 25,000 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

B. Default interest

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

FOR THESE REASONS, THE COURT

1. **Holds unanimously that there has been a violation of Article 5 § 3 of the Convention;**
2. **Holds unanimously that there has been a violation of Article 8 of the Convention;**
3. **Holds by eleven votes to six that there has been no violation of Article 6 of the Convention;**
4. **Holds**
 - a.
 - (i) **by twelve votes to five that the respondent State is to pay the applicant, within three months, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount**
 - (ii) **unanimously that the respondent State is to pay the applicant, within three months, EUR 25,000 (twenty-five thousand euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement plus any tax that may be chargeable to the applicant on that amount;**
 - b. **unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable**

on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 March 2009.

Michael O'Boyle, *Deputy Registrar*

Jean-Paul Costa, *President*

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

- (a) concurring opinion of Judge Cabral Barreto;
- (b) concurring opinion of Judge Kovler;
- (c) partially dissenting opinion of Judge Costa;
- (d) partially dissenting opinion of Judge Spielmann, joined by Judges Rozakis, Tulkens, Casadevall and Mijović.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I agree with the majority's finding that there was no violation of Article 6 of the Convention in the present case.

However, to my mind it is not enough to say, as the majority do, that the proceedings, considered as a whole, were not contrary to the requirements of a fair trial.

I find it regrettable that the Grand Chamber missed the opportunity to clarify once and for all an issue on which the Court has long been divided: whether the use in criminal proceedings of evidence obtained in breach of Article 8 of the Convention undermines the fairness of a trial as protected by Article 6.

1. The Court's case-law on this subject dates back to *Schenk v. Switzerland* (12 July 1988, Series A no. 140).

In concluding by a majority that the use of the disputed recording in evidence had not deprived the applicant of a fair trial, the Court mainly relied on the fact that the rights of the defence had not been disregarded.

This finding shaped the development of our case-law; even where the manner in which evidence has been obtained has breached Article 8, a violation of Article 6 has been ruled out if the trial as a whole has been fair, and in particular if the rights of the defence have been respected. Moreover, in principle, whether the evidence was the sole or a subsidiary basis for the conviction is not in itself decisive (see *Khan v. the United Kingdom*, no. 35394/97, § 26, ECHR 2000-V).

Similarly, it is immaterial whether the violation of Article 8 results from failure to comply with "domestic law" or with the Convention.

More recently, the Court applied these principles in *Heglas v. the Czech Republic* (no. 5935/02, 1 March 2007).

2. The case-law on this subject was last refined in *Jalloh v. Germany* (IGC, no. 54810/00, ECHR 2006-IX).

In that judgment the Court ruled that the use in criminal proceedings of evidence obtained through torture raised serious issues as to the fairness of such proceedings, even if the admission of the evidence in question had not been decisive in securing the suspect's conviction

Consequently, the use of evidence obtained through torture will always breach Article 6 of the Convention, regardless of whether or not the evidence was a decisive factor in the conviction.

However, the Court has never really stated a position on the question of evidence obtained by means of inhuman or degrading treatment.

In certain circumstances, for example if an applicant is in detention, improper compulsion by the authorities to obtain a confession will contravene the principles of the right not to incriminate oneself and the right to remain silent (see *Allan v. the United Kingdom*, no. 48539/99, ECHR 2000-IX).

As regards the question of direct concern to us – and the *Heglas* judgment is a very recent example of this – where Article 8 is breached as a result of the way in which evidence was gathered, the decisive factor for a finding of a

violation or no violation of Article 6 is whether the proceedings as a whole were fair, whether the rights of the defence were respected.

3. I personally would have liked the Grand Chamber to have adopted a new approach revising and clarifying its case-law.
- 3.1 Firstly, the Grand Chamber should have reaffirmed the position taken in *Jalloh* regarding evidence obtained through torture. The mere recourse to torture is sufficient in itself to render the trial unfair, even if the evidence thereby obtained is not decisive in securing the accused's conviction; Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations, lends sufficient force to this argument.

However, we should also go a step further by stating unequivocally that the use of evidence obtained by means of an act classified as inhuman or degrading treatment automatically undermines the fairness of a trial, since the difference between torture and inhuman treatment is often difficult to establish and the nuances are sometimes tiny; furthermore, as a rule, both situations – torture and inhuman and degrading treatment – involve blunders by the authorities against an individual in a position of inferiority.

The Grand Chamber should in my opinion state firmly that any evidence obtained in breach of Article 3 in the course of a trial – through torture or ill-treatment – will always infringe Article 6 of the Convention, even if such evidence did not play a decisive part in the conviction, and even if the accused was able to challenge the evidence thus obtained, without leaving open the possibility of relying on the weight of public interest and the seriousness of the offence.

We must banish conduct that offends against civilised values and ensure that there is some form of severe punishment for acts which undermine our society's most deeply held values as protected by Article 3 of the Convention.

- 3.2 The four dissenting judges in the *Schenk* case (cited above), whose opinion was more or less followed by Judges Loucaides (in *Khan*, cited above) and Tulkens (in *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX), considered that a trial could not be described as "fair" where evidence obtained in breach of a fundamental right guaranteed by the Convention had

been admitted

The "dissenters" could not accept that a trial could be "fair", as required by Article 6, if a person's guilt for any offence was established through evidence obtained in breach of the human rights guaranteed by the Convention.

The fairness required by Article 6 of the Convention also entails a requirement of lawfulness; a trial which has been conducted in breach of domestic law or the Convention can never be regarded as "fair".

The exclusion of evidence obtained in breach of, for example, the right to respect for private life guaranteed by the Convention should be considered an essential corollary of that right.

In the "dissenters'" view, evidence amounting to interference with the right to privacy can be admitted in court proceedings and can lead to a conviction for a crime only if the securing of such evidence satisfies the requirements of the second paragraph of Article 8, including the one at issue in the present case, that of being "in accordance with the law".

However, what is prohibited under one provision (Article 8) cannot be accepted under another (Article 6).

Lastly, there is a real danger to be averted, as Judge Loucaides stressed in the *Khan* case (cited above), and I quote: "If violating Article 8 can be accepted as 'fair' then I cannot see how the police can be effectively deterred from repeating their impermissible conduct."

- 3.3 I must say that I have a good deal of sympathy with this approach, which has the merit of clarity since the violation of Article 6 will be "automatic" once the violation of Article 8 has been found.

Nevertheless, I believe that if such an approach is adopted, certain considerations will arise as regards the consequences of the finding of a violation of Article 6.

Following this approach, once a violation has been found in cases where the accused's conviction was not solely or mainly based on the evidence in dispute, inferences will have to be drawn regarding the execution of the judgment if the evidence in question played only a subsidiary role in the conviction.

Furthermore, as regards the execution of judgments, not all violations of Article 6 will carry the same weight.

I am thinking of violations arising from a failure to comply with provisions concerning substantive rights as opposed to procedural rules.

Here, with regard to unlawful evidence, I wish to emphasise the distinction made by some legal experts between prohibited evidence – which relates to substantive law – and improper evidence – which relates to procedural rules.

We must distinguish between what strikes at the heart of a fair trial, what shocks the sensibilities of a democratic society, what runs counter to the fundamental values embodied in a State based on the rule of law, and a breach of procedural rules in the gathering of evidence.

For example, a breach of the right to confer freely with one's lawyer seems to me to be completely different from a breach resulting from the lack of judicial authorisation for telephone tapping of a suspect, where this flaw is subsequently redressed.

If a recording of the accused's conversation with his lawyer is used as a basis for convicting him, a more serious violation will result, calling for a more forceful attitude on the part of the Court, which may, for example, demand a new trial at which the use of the evidence in issue will be prohibited, and also award an appropriate sum for the damage sustained.

In the other scenario mentioned above, however, the finding of a violation should in itself be sufficient.

- 3.4 These considerations lead me to a more detailed examination of other aspects of the procedure, moving away from an "automatic" finding of a violation of Article 6 once a violation of Article 8 has been found: a violation of the latter provision does not automatically entail a violation of Article 6, but simply the presumption of a violation.

A finding of a violation or no violation will depend on the particular circumstances of the case at hand and the weighing up of the values protected by domestic law and the Convention and those in issue in the criminal proceedings.

It is true that such an approach would weaken the notion of a fair trial, which would become a variable-geometry concept.

However, this approach would have the advantage of not treating all situations on the same footing, since, as I have already observed, some violations of Article 8 are worse than others.

I will readily admit that there are risks in such an approach; the choice of the right criteria for finding a violation, and their subsequent application to the particular case, especially where the factual circumstances are difficult to establish, will be a hazardous exercise.

Situations will thus arise when the presumption could be rebutted where the rights of the defence have been respected and where the weight of public interest in the applicant's conviction or other relevant grounds so require

However, limits will always have to be set.

I would again refer to everything that strikes at the heart of a fair trial, shocks the sensitivities of a democratic society or runs counter to the fundamental values embodied in a State based on the rule of law. Once these values have been undermined, the presumption must be confirmed and a violation of Article 6 found; the public interest at stake or the question whether the rights of the defence have been respected will be immaterial.

The case-law of the Supreme Court of the United States refers in this connection to the falsehoods crucial to the facts of the case that can always result from interrogation techniques "so offensive to a civilized system of justice" that "they must be condemned" in the name of due process.

The Supreme Court of Canada makes a distinction between "dirty tricks" (which the community finds shocking) and mere "ruses", concluding that "*What should be repressed vigorously is conduct on [the authorities'] part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would... pretending to be a truck driver to secure the conviction of a trafficker"* (Judge Lamer, individual opinion, in *R. v. Rothman*, [1981] 1 SCR 640; approved by the majority of the Supreme Court in *R. v. Collins*, [1987] 1 SCR 265, § 52, and *R. v. Oickle*, [2000] 2 SCR 3, § 66).

I must acknowledge, nevertheless, that all this

involves a somewhat empiricist approach and a perhaps excessively discretionary power; however, I wonder how we can draw a firm, clear and distinct line between what might be acceptable and what cannot.

Here, I would return to the distinction between substantive and procedural.

I would say, generally speaking, that the use of any evidence that is not admissible under the member States' domestic law and the Convention will "automatically" entail a violation of the right to a fair trial.

The question whether or not the rights of the defence have been respected, the public interest at stake and all other circumstances are immaterial: a trial in which evidence thus obtained has served as a basis for a conviction will always be an unfair trial.

In that connection I would cite the example of the recording of the accused's conversation with his lawyer.

The gathering of evidence by this means must be discouraged at all costs, even where the evidence in question was merely additional or subsidiary and where a new trial is perhaps not warranted.

On the other hand, where procedural rules have not been complied with in respect of evidence that is normally admissible in member States and under international law – either because domestic law does not provide for such evidence or because, notwithstanding the fact that such evidence is admissible at domestic level, the conditions governing its use in the case at hand were not observed – in certain circumstances, particularly where the rights of the defence have been respected, and where the public interest must prevail over the interests of the individual, in view of the nature and seriousness of the offence, I would tend to conclude that there has been no breach of the rules of a fair trial.

In the present case, I consider that there was no violation because there was only a formal breach ("*in accordance with the law*") in obtaining evidence that, in principle, was admissible in a democratic society and the rights of the defence were, moreover, respected.

CONCURRING OPINION OF JUDGE KOVLER

(Translation)

I agree with the conclusions reached by the majority. I should nevertheless like to clarify my position on the complaints under Article 8 of the Convention as submitted by the applicant.

Before relinquishing jurisdiction on 22 November 2007 in favour of the Grand Chamber, the Chamber of seven judges, of which I was a member, summarised the complaints under Article 8 as follows in its admissibility decision of 7 September 2006: "*The applicant complained that the police conducting the covert operation unlawfully intruded into his home and interfered with his private life and correspondence by intercepting and recording his conversation with V. in violation of Article 8 of the Convention...*" This complaint was declared admissible in its entirety.

According to the text of the Grand Chamber's judgment, "*the applicant complained... about the covert recording made at his home*" (see paragraph 3). The statements of the facts (see paragraphs 35-36) and, above all, of the applicant's allegations thus portray the intrusion into his home as an unlawful and unjustified interference with his right to respect for his private life and home (see paragraphs 70-71). However, to my regret the Grand Chamber confines its conclusions to the finding that an "operative experiment" was not accompanied by adequate legal safeguards (see paragraph 81), before stating quite simply: "*Nor is it necessary to consider whether the covert operation also constituted an interference with the applicant's right to respect for his home*" (see paragraph 82). This was a missed opportunity to undertake a more nuanced assessment of all the applicant's complaints under Article 8, on the basis of the Court's substantial body of case-law in this area.

PARTLY DISSENTING OPINION OF JUDGE COSTA

(Translation)

1. I consider that there was a breach of Article 6 § 1 of the Convention in this case. The applicant's complaint that the criminal proceedings resulting in his conviction were unfair was mainly based on two arguments:

- that police trickery had caused him to incriminate himself; and
 - that the instrument of such trickery – the recording of his conversation with V. – had been admitted in evidence.
2. Both these points may give rise to some uncertainty.
 3. The police and the Federal Security Service (FSB) conducted a covert operation in which the central agent was V., who had allegedly been ordered by the applicant to kill the latter's former business associate, S., but had not carried out the murder, instead reporting the applicant to the FSB. The covert operation, aimed at obtaining evidence against the applicant, consisted in sending V. to the applicant's home and instructing V. to say that he had carried out the order to kill; at the same time, their conversation would be secretly recorded by a police officer stationed outside the house.

V.'s visit was itself preceded by the macabre staging several days earlier of the discovery of two dead bodies at S.'s home, spuriously identified as S. and his business partner, I. This was widely publicised.

4. This ploy, despite its specific characteristics, is not in itself far removed from the ruses, traps and stratagems used by the police to obtain confessions from persons suspected of criminal offences or to establish their guilt, and it would be naïve, indeed unreasonable, to seek to disarm the security forces, faced as they are with the rise in delinquency and crime.
5. Even so, not all methods used by the police are necessarily compatible with the rights guaranteed by the Convention. Thus, in a different context, the Court did not accept that a police ruse (nevertheless described by the Government as a "little ruse") was compatible with the right to liberty within the meaning of Article 5 (see *Čonka v. Belgium*, no. 51564/99, § § 41-46, ECHR 2002-I). And in the present case the Court found that the unlawful interception of Mr Bykov's conversation with V. breached Article 8 of the Convention.
6. With regard to Article 6 § 1, I would not go so far as to take the view that the use of any evidence breaching the Convention as a basis for establishing the accused's guilt renders the trial unfair (as was argued by Judge Loucaides in his separate opinion in *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V). However, I do believe that the Court should undertake a careful examination of whether a trial based on such evidence complies with Article 6 § 1, a point to which I shall return later.
7. As regards the right not to incriminate oneself, an inherent aspect of the rights of the defence as affirmed in *John Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996-I), it normally entails the right for a person suspected of an offence to remain silent, including during police questioning. Although the Court accepts that the right not to contribute to incriminating oneself is not absolute, it attaches considerable importance to it and has sometimes pointed out that it originates in Article 14 of the International Covenant on Civil and Political Rights (see *Funke v. France*, 25 February 1993, § 42, Series A no. 256-A).
8. The right to remain silent would be truly "theoretical and illusory" if it were accepted that the police had the right to "make a suspect talk" by using a covert recording of a conversation with an informer assigned the task of entrapping the suspect.
9. Yet that was exactly the case here. V. was in practice an "agent" of the security forces, and I can see similarities between the *Bykov* case and that of *Ramanauskas v. Lithuania* ([GC], no. 74420/01, ECHR 2008-...), in which the Grand Chamber unanimously found a violation of Article 6 § 1. The facts were different, but both cases involved simulation and provocation instigated by the security forces. By telling the applicant that he had carried out the killing, V. sought to induce the applicant, who was unaware that his conversation could be heard, to confirm that he had entered into a "contract" with him, in the criminal sense of the term.
10. The Court is obviously not, and should not become, a fourth-instance court. It does not have to decide (that is the task of the national courts) whether Mr Bykov was guilty of incitement to commit murder. Nor does it have to speculate on what the outcome of the trial would have been had it been fair. But it is precisely its task to rule on the fairness issue; and the use of this elaborately staged ploy (including the "fake" corpses) causes me to harbour strong doubts as to whether the presumption of innocence, the rights of the defence and, ultimately, the fairness of the trial were secured.
11. My doubts are entirely dispelled when I note that the evidence obtained in breach of Article

- 8 of the Convention played a decisive role in this context. I shall not expand on this point, which I consider is addressed very eloquently in the partly dissenting opinion of Judge Spielmann joined by Judges Rozakis, Tulkens, Casadevall and Mijović.
12. In my view, this decisive aspect is very important in law. If, besides the recording in issue (and the initial complaint against Mr Bykov by V., but that could have been one man's word against another), the Russian judges had based their findings on other evidence, there would still have been cause for uncertainty. A criminal trial is often complex, and the large number of items of evidence on which the judges' verdict is based may sometimes decontaminate the dubious evidence by absorbing it. That was not the case in this instance.
 13. All in all, while I fully understand the reasons why the Court did not find a violation of Article 6, I was unable to make the leap that would have allowed me to share the majority's view.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN JOINED BY JUDGES ROZAKIS, TULKENS, CASADEVALL AND MIJOVIĆ

(Translation)

1. I do not agree with the Court's conclusion that there was no violation of Article 6 of the Convention.
2. The question of respect for the right to a fair hearing arises in my opinion under two headings: the admission in criminal proceedings of evidence obtained in breach of Article 8, and the right to remain silent and not to incriminate oneself.

I. ADMISSION IN CRIMINAL PROCEEDINGS OF EVIDENCE OBTAINED IN BREACH OF ARTICLE 8

3. I would observe that, having regard to the general principles set out in paragraphs 88-93 of the judgment, the Court reached a unanimous

finding that the covert operation was conducted in breach of Article 8 of the Convention.

4. The simulation staged by the authorities, described in more detail in the part of the judgment concerning the circumstances of the case under the heading "Covert operation", was unlawful. As the Court observed in paragraph 80, the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. It accordingly found a violation of Article 8 of the Convention.

(a) The question of principle and the missed opportunity to strengthen practical and effective rights

5. After the Chamber had relinquished jurisdiction, the present case was sent to the Grand Chamber, which was afforded the opportunity to clarify and spell out its case-law on the use of unlawful evidence at a trial. The question of the admission in criminal proceedings of evidence obtained in breach of Article 8 is a question of principle that deserved an answer of principle, particularly as regards the need to ensure consistency between the Court's findings under the two Articles of the Convention (what is prohibited under Article 8 cannot be permitted under Article 6) and the need to stress the importance of the Article 8 rights at stake (bearing in mind the growing need to resort to unlawful investigative methods, especially in fighting crime and terrorism). As far as this question of principle is concerned, I would reiterate the arguments which my colleague Françoise Tulkens put forward in her partly dissenting opinion in *P.G. and J.H. v. the United Kingdom*.¹
6. In the present case the violation of Article 8 was a particularly serious one, representing a manifest infringement of the fundamental rights protected by that provision. The use during a trial of evidence obtained in breach of Article 8 should have called for an extremely rigorous examination by the Court of the fairness of the proceedings. As the Court has already had occasion to emphasise, the Convention is to be read as a coherent whole.² I agree with the partly concurring, partly dissenting opinion expressed by Judge Loucaides in *Khan v. the United Kingdom*³ and reiterated by Judge Tulkens in her above-mentioned partly dissenting opinion in *P.G. and J.H. v. the United Kingdom*.⁴

"It is my opinion that the term 'fairness', when

examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a 'fair' trial if it is conducted in breach of the law."

7. In the present case the violation of Article 8 of the Convention found by the Court results, and indeed results exclusively, from the unlawfulness of the evidence in issue (see paragraph 82 of the judgment). Yet the fairness required by Article 6 of the Convention also entails a requirement of lawfulness.⁵ Fairness presupposes respect for lawfulness and thus also, *a fortiori*, respect for the rights guaranteed by the Convention, which it is precisely the Court's task to supervise.

8. As regards the nature and scope of the Court's supervision, the Court rightly notes in the judgment that "*in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention*" (see paragraph 88). It follows, and I strongly agree with this observation, that

"it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention".

9. Similarly, while it is not the role of the Court

"to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible" (see paragraph 89 of the judgment),

the position is, however, different where, as in the present case, the evidence was obtained in breach of a right guaranteed by the Convention, seeing precisely that, where the taking of evidence is concerned, the Court must ensure observance by the Contracting States of their obligations under the Convention.

10. The judgment in the present case could have dispelled the uncertainties resulting from the Court's case-law on the subject by making clear that what is prohibited by one provision (Article 8) cannot be accepted under another (Article 6).

11. In finding that there was no violation of Article

6, the Court has undermined the effectiveness of Article 8. Yet the rights enshrined in the Convention cannot remain purely theoretical or virtual, since

"the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective".⁶

12. The majority's view seems to me, moreover, to entail a real danger, one which has already been noted in the above-mentioned separate opinion in *Khan*⁷ and reiterated in the above-mentioned separate opinion in *P.G. and J.H. v. the United Kingdom*:⁸

"If violating Article 8 can be accepted as 'fair' then I cannot see how the police can be effectively deterred from repeating their impermissible conduct."

13. However, the Court has itself emphasised

"the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action..., including the guarantees contained in Articles 5 and 8 of the Convention".⁹

14. The judgment fails to provide a response to the questions raised in the partly dissenting opinion cited above:

"Will there come a point at which the majority's reasoning will be applied where the evidence has been obtained in breach of other provisions of the Convention, such as Article 3, for example? Where and how should the line be drawn? According to which hierarchy in the guaranteed rights? Ultimately, the very notion of fairness in a trial might have a tendency to decline or become subject to shifting goalposts."¹⁰

15. So much, then, for the principles and for the (missed) opportunity afforded to the Grand Chamber to strengthen practical and effective rights.

(b) The decisive influence of the evidence obtained in breach of Article 8 of the Convention

16. Beyond the question of principle addressed above, I consider that the evidence obtained in breach of Article 8 caused the proceedings to be fatally flawed, since it decisively influenced the guilty verdict against the applicant.

17. Admittedly, it appears that the court in the present case based its decision on other items of evidence. Besides the evidence obtained by

means of the covert operation, the following items unconnected with the operation seem to have been taken into account: the initial statement by V. that the applicant had ordered him to kill S.; the gun V. handed in to the FSB; and the records of the questioning of V. on subsequent occasions during the investigation. These items of evidence – all produced by V. – were challenged during the trial by the applicant, who for his part relied on V.'s subsequent withdrawal of his statements. However, the doubts as to the reliability of V.'s statements could not be dispelled since V. was absent and the authorities were unable to trace him and call him to appear in court, with the result that he could not be cross-examined during the trial (see paragraphs 38-40 of the judgment). The court eventually admitted the statements by V. as written evidence and, after examining the contradictory remarks he had made, concluded that the withdrawal appeared to have resulted from a subsequent arrangement between V. and the applicant. Accordingly – leaving aside the evidence obtained in breach of Article 8 of the Convention – the court reached its finding solely on the basis of V.'s initial statements incriminating the applicant.

18. Admittedly, the applicant had the opportunity to examine V. when they were brought face to face during the investigation, but I must emphasise that this meeting took place before V. withdrew his statements. Consequently, the applicant's lawyer was unable to cross-examine V. in the light of his withdrawal of the statements, either during the investigation or during the court hearings. However, as the Court emphasised in *Lucà v. Italy*, where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.11

(c) The need for the subsequent use of anonymous sources to be accompanied by adequate and sufficient guarantees

19. The fact that it was impossible to cross-examine V. in court also raises an issue in terms of the procedural right to challenge the evidence obtained as a result of the covert operation.
20. As the Court pointed out in the *Ramanauskas* judgment,¹² admittedly in an entirely different

context, involving police incitement,

“the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (see *Khudobin v. Russia*, no. 59696/00, § 135, 26 October 2006, and, *mutatis mutandis*, *Klass and Others v. Germany*, 6 September 1978, § 5 52-56, Series A no. 28). While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11).”¹³

21. Admittedly, the other evidence used during the trial included numerous witness statements referring to the existence of a conflict of interests between the applicant and S., and other items confirming the accuracy of the description of the covert operation set out in the reports on the investigation. However, the probative value of such evidence was relatively minor. The fact that it was impossible to cross-examine V. in court therefore prevented the applicant from having full enjoyment of his procedural right to challenge the evidence obtained through the covert operation.
22. In short, I consider that the use of the evidence in issue irreparably impaired the applicant's defence rights. Such a conclusion would in itself have justified the finding of a violation of Article 6 of the Convention.

II. RESPECT FOR THE RIGHT TO REMAIN SILENT AND NOT TO INCRIMINATE ONESELF

23. Lastly, the covert operation in my opinion infringed the applicant's right to remain silent and not to incriminate himself. None of the Court's case-law corresponds exactly to the facts of the present case. Once again, I regret

that the Grand Chamber did not seize the opportunity to clarify the principles emerging, in particular, from its judgments in the cases of *Jalloh*,¹⁴ *Allan*¹⁵ and, to a lesser extent, *Ramonauskas*.¹⁶

24. In its *Jalloh* judgment of 11 July 2006 the Court reiterated the principle that

“... the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent”.¹⁷

25. In the case of *Jalloh* the authorities obtained real evidence against the applicant's will. The Court declared that the privilege against self-incrimination was applicable, stating the following:

“... the principle against self-incrimination is applicable to the present proceedings.

In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.”¹⁸

26. These criteria are applicable in the present case, given that the substance of the matter concerns the recording of evidence obtained in breach of the privilege against self-incrimination. Concerning more specifically the public interest in securing the applicant's conviction, I do not consider that this can in any circumstances justify the use in evidence of recordings found to have been unlawful for the purposes of Article 8 of the Convention.¹⁹
27. The present case is similar to the case of *Allan*, in which the Court found a violation of Article 6.20 Admittedly, unlike in *Allan*, the applicant in the present case was not in pre-trial detention but at liberty in his own property. It is also true that in *Allan* the applicant chose to remain silent.
28. However, those particular aspects are in my opinion not decisive, seeing that the informer V. was *de facto* an agent working for the authorities at the time when he recorded the conversation in issue.
29. In paragraph 51 of the *Allan* judgment the Court stated the following, referring to the case-law of the Supreme Court of Canada:²¹

“Whether the right to silence is undermined to such an extent as to give rise to a violation of Article 6 of the Convention depends on all the circumstances of the individual case. In this regard, however, some guidance may be found in the decisions of the Supreme Court of Canada,... in which the right to silence, in circumstances which bore some similarity to those in the present case, was examined in the context of section 7 of the Canadian Charter of Rights and Freedoms. There, the Canadian Supreme Court expressed the view that, where the informer who allegedly acted to subvert the right to silence of the accused was not obviously a State agent, the analysis should focus on both the relationship between the informer and the State and the relationship between the informer and the accused: the right to silence would only be infringed where the informer was acting as an agent of the State at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Whether an informer was to be regarded as a State agent depended on whether the exchange between the accused and the informer would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused.”

30. In the present case the informer who acted on State instructions, subverting the applicant's right to remain silent, was obviously a State agent. The question arises whether the conversation between him and the accused would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. The answer is no, and the recorded conversation was thus the functional equivalent of an interrogation. The purpose of this ruse was, in particular, to reveal the existence of a particular offence, namely “conspiracy to murder”. Among the constituent elements of this offence, the *mens rea* or element of intent plays a crucial, if not predominant, role. The grossly unlawful ruse staged by the authorities was aimed precisely at “uncovering” this essential element of the offence.
31. The fact that the applicant had not been charged is not decisive in my opinion either. In the *R. v. Hebert* decision (cited above) the Supreme Court of Canada stated the following:

"The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory. As Ratushny writes (*Self-Incrimination in the Canadian Criminal Process* (1979), at p. 253):

'Furthermore, our system meticulously provides for a public trial only after a specific accusation and where the accused is protected by detailed procedures and strict evidentiary rules. Ordinarily he is represented by a lawyer to ensure that he in fact received all of the protections to which he is entitled. The accused is under no legal or practical obligation to respond to the accusation until there is an evidentiary case to meet. There is a hypocrisy to a system which provides such protections but allows them all to be ignored at the pre-trial stage where interrogation frequently occurs in secret, after counsel has been denied, with no rules at all and often where the suspect or accused is deliberately misled about the evidence against him.'

...

The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities.²²

32. However, in the present case, the applicant spoke without having given his free and informed consent.
 33. I would add that to deny the right to remain silent and the right not to incriminate oneself simply because the applicant had not been charged or had not undergone initial questioning would leave the way open for abuses of procedure. The person concerned would be deprived of the opportunity to choose to speak or to remain silent at a later stage, for example during such questioning, and the principle would thus become devoid of all substance.
 34. It is true that in the *R. v. Hebert* decision the Supreme Court of Canada also based its ruling on the fact that the person concerned was in detention:

"[The rule] applies only after detention. Undercover operations prior to detention do not
- raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the *Charter* extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected."
35. However, I consider that the criterion applied by the Supreme Court in the context of detention is applicable *mutatis mutandis* to a situation where the person concerned is *de facto* under the authorities' control. This was so in the present case; the applicant was an unwitting protagonist in a set-up entirely orchestrated by the authorities. I would draw attention here to the very particular circumstances of the covert operation, which began with the staged discovery of two bodies and the announcement in the media that S. and I. had been shot dead. By the time V. arrived at the applicant's "guest house", the applicant was already under the influence of the erroneous information that a serious crime had been committed, and his belief was reinforced by V.'s admission that he had been the perpetrator. The applicant's conduct was therefore not solely, or mainly, guided by events which would have taken place under normal circumstances, but above all by the appearances created by the investigating authorities. To that extent, seeing that he was the victim of a ruse, his statements and reaction cannot reasonably be said to have been voluntary or spontaneous.
 36. In the case of *Ramanauskas*, concerning police incitement, the Court reached the conclusion in its judgment of 5 February 2008 that

"the actions... had the effect of inciting the applicant to commit the offence of which he was convicted[,] that there is no indication that the offence would have been committed without their intervention [and that i]n view of such intervention and its use in the impugned criminal proceedings, the applicant's trial was deprived of the fairness required by Article 6 of the Convention".²³ (my italics)
 37. In the present case the purpose of the staged events was to make the applicant talk. The covert operation undermined the voluntary nature

of the disclosures to such an extent that the right to remain silent and not to incriminate oneself was rendered devoid of all substance. As in the *Ramanauskas* case, the applicant was entrapped by a person controlled from a distance by the authorities, who staged a set-up using a private individual as an undercover agent. I thus consider that the information thereby obtained was disclosed through entrapment, against the applicant's will.²⁴

III. ARTICLE 41 OF THE CONVENTION

38. Lastly, I voted against point 4 (a) of the operative provisions. I consider that the award of 1,000 euros for non-pecuniary damage is insufficient, given the Court's finding of two violations.

ECHR

ECJ

FOURTH SECTION

CASE OF IORDACHI AND OTHERS v MOLDOVA

(Application no. 25198/02)

JUDGMENT

STRASBOURG
10 February 2009

FINAL
14/09/2009

SURVEILLANCE, TELEPHONE, TAPPING, PRIVATE LIFE, INTERFERENCE, INTERCEPTION, LEGISLATION, CORRESPONDENCE, MISUSE OF POWER

IN THE CASE OF IORDACHI AND OTHERS V. MOLDOVA,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 20 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 25198/02) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Vitalie Iordachi, Mr Vitalie Nagacevschi, Ms Snejana Chitic, Mr Victor Constantinov and Mr Vlad Gribincea ("the applicants"), on 23 May 2002.
2. The Moldovan Government ("the Government") were represented by their Agent at the time, Mr V. Pârlog and subsequently by his successor Mr V. Grosu.
3. The applicants alleged, in particular, under Article 8 of the Convention that their right to freedom of correspondence had not been respected since the domestic law governing telephone tapping did not contain sufficient guarantees against abuse by the national authorities.
4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber

that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 5 April 2005, the Court declared the application admissible and joined the question of victim status to the merits of the case.
6. The applicants and the Government each filed further written observations (Rule 59 § 1), the Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1972, 1965, 1980, 1961 and 1980 respectively and live in Chişinău. They are members of "Lawyers for Human Rights", a Chişinău-based non-governmental organisation specialised in the representation of applicants before the Court.
8. According to the applicants, after the coming to power of the Communist Party the number of violations of human rights increased considerably. In that context their organisation was created, whose sole purpose was the protection of human rights by assisting persons who sought to introduce applications with the European Court of Human Rights.
9. As a result, the applicants considered that they had caused the Government serious harm in terms of damage to their image and financial loss as a result of the findings of violation in cases they had helped to bring before this Court.
10. The applicants maintained that they ran a serious risk of having their telephones tapped as a result of their activity, due to the state of the legislation in force. They did not claim to have been victims of any specific interception of their communications, whether by telephone or post, and they had not instituted any domestic proceedings in that respect.
11. The Government disputed the allegation concerning the increase of the number of violations of human rights after the Communist Party had won the elections.
12. On 17 January 2008 one of the applicants

wrote to the President of the Supreme Court of Justice and asked for statistical information concerning, *inter alia*, the number of applications lodged by the investigating bodies with courts for interception of telephone conversations and the number of successful and unsuccessful applications.

13. In a letter of 6 February 2008 the Head of the President's Office of the Supreme Court of Justice replied that in 2005 of a total of 2,609 applications for interception lodged, 98.81% had been successful; in 2006 of the 1,931 applications lodged, 97.93% had been successful; and in 2007 of the 2,372 applications lodged, 99.24% had been successful.

II. RELEVANT DOMESTIC LAW

14. The Operational Investigative Activities Act of 12 April 1994 reads as follows:

"Section 2. The aims of operational investigative activities

a)revealing attempts to commit crime; preventing, suppressing or discovering criminal offences and the persons who organise, commit or have already committed offences; and ensuring compensation for damage caused by a criminal offence;

b)searching for persons who are evading the preliminary investigative authorities, the preliminary investigation or the court, or who are fleeing from a criminal sanction, or for persons who have disappeared;

c)collecting information on events or actions which endanger the State or the military, economic or environmental security of the Republic of Moldova.

...

Section 4. The legal basis for operational investigative activities

(1)The Constitution, the present Law and other regulations enacted in accordance with them constitute the legal basis for operational investigative activities.

(2)The authorities which are entitled to conduct operational investigative activities may issue, within the limits of their competence, in accordance with the law and with the consent of the Supreme Court of Justice and the General Prosecutor's Office, regulations governing the organisation, methods and tactics of carrying out operational investigative measures.

Section 5. Respect for human rights and liberties in conducting operational investigative activities

...

(2)Anyone who considers that the actions of the authority which has carried out investigative measures have infringed his or her rights and liberties may lodge a complaint with the hierarchically superior authority, the General Prosecutor's Office or the courts.

(3)In order to ensure a full and thorough examination of the complaint lodged by a person against whom operational investigative measures have been applied without due grounds, the authorities which have applied such measures shall, at the request of the prosecutor, present the latter with a record of every operational action taken on duty. Data concerning persons who have confidentially contributed to the conduct of operational investigative measures shall be presented only at the request of the General Prosecutor.

(4)Should the authority (the official) exercising the operational investigative activity have infringed the legitimate rights and interests of natural and legal persons, the hierarchically superior authority or prosecutor shall take measures restoring such legitimate rights and interests, and afford compensation for the damage caused, in accordance with the law.

Section 6. Operational investigative measures

(1)Operational investigative measures shall be carried out only in accordance with the law and only when it is otherwise impossible to achieve the aims provided for in section 2.

(2)For the purpose of accomplishing the stated aims, the authorities carrying out operational investigative measures are entitled, with due observance of the rules of secrecy, to: ...

(c)intercept telephone and other conversations; ...

The operational investigative measures provided for under ..., (l), ... may be carried out only by the Ministry of Internal Affairs and the Information and Security Service under the statutory conditions and only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of offences, and the protection of health, morals, and the rights and interests of others. ..."

In 2003 this section was amended as follows

(amendment in bold):

“Section 6. Operational investigative measures

(1)Operational investigative measures shall be carried out only in accordance with the law on criminal procedure and only when it is otherwise impossible to achieve the aims provided for in section 2.

(2)For the purpose of accomplishing the stated aims, the authorities carrying out operational investigative measures are entitled, with due observance of the rules of secrecy, to: ...

(c)intercept telephone and other conversations; ...

The operational investigative measures provided for under ..., (l), ... may be carried out only by the Ministry of Internal Affairs and the Information and Security Service under the statutory conditions and only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of very serious offences and the protection of health, morals, and the rights and interests of others. ...”

The section was further amended in 2007 and currently reads as follows (amendment in bold):

“Section 6. Operational investigative measures

(1)Operational investigative measures shall be carried out only in accordance with the law on criminal procedure and only when it is otherwise impossible to achieve the aims provided for in section 2.

(2)For the purpose of accomplishing the stated aims, the authorities carrying out operational investigative measures are entitled, with due observance of the rules of secrecy, to: ...

(c)intercept telephone and other conversations; ...

The operational investigative measures provided for under ..., (l), ... may be carried out only by the Ministry of Internal Affairs and the Information and Security Service under the statutory conditions and only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of serious, very serious and exceptionally serious offences, and the protection of health, morals, and the rights and interests of others. ...”

Under Article 16 of the Criminal Code the serious offences are considered to be those offences which are punishable with imprisonment of up to fifteen years; very serious offences are intentional offences punishable with imprisonment of over fifteen years; and exceptionally serious offences are those intentional offences punishable with life imprisonment. Approximately 59% of all offences provided for in the Moldovan Criminal Code fall into the category of serious, very serious and exceptionally serious offences.

“Section 7. The grounds for carrying out operational investigative activities

“(1)The grounds for carrying out operational investigative activities are:

(a)unclear circumstances concerning the institution of criminal proceedings;

(b)information of which the authority carrying out an operational investigative activity has become aware in connection with:

- an illegal act that is being prepared, committed or has already been committed, or persons who are preparing, committing or have already committed such an act, where the basis for instituting criminal proceedings is insufficient;

- persons who are fleeing from a criminal investigation or the courts, or who are avoiding a criminal sanction; ...

(c)instructions given by a criminal investigator, investigative body, prosecutor or court in pending criminal cases;

(d)requests from the bodies carrying out an operational investigative activity based on the grounds provided for in the present section. ...”

In 2003 this section was amended as follows (amendment in bold):

“Section 7. The grounds for carrying out operational investigative activities

(1)The grounds for carrying out operational investigative activities are:

(a)unclear circumstances concerning the institution of criminal proceedings;

(b)information of which the authority carrying out an operational investigative activity has become aware in connection with:

- an illegal act that is being prepared, committed or has already been committed, or

persons who are preparing, committing or have already committed such an act, where the basis for instituting criminal proceedings is insufficient;

- persons who are fleeing from a criminal investigation or the courts, or who are avoiding a criminal sanction; ...

(c) instructions given by an officer of criminal investigation, investigative body, prosecutor or court in pending criminal cases;

(d) requests from the bodies carrying out an operational investigative activity based on the grounds provided for in the present section. ...

Section 8. The conditions and manner of carrying out operational investigative activities

(1) Operational investigative measures which infringe lawful rights - the secrecy of correspondence, telephone and other conversations, telegraphic communications, and the inviolability of the home - shall be permitted only for the purpose of collecting information about persons who are preparing or attempting to commit serious offences or are committing or have already committed serious offences, and only with the authorisation of the prosecutor pursuant to a reasoned decision of one of the heads of the relevant authority. ...

(2) In urgent cases where otherwise there would be a risk of commission of serious criminal offences, it shall be permitted, on the basis of a reasoned conclusion of one of the heads of the authority carrying out the operational investigative activity, to carry out operational investigative measures. The prosecutor must be notified within 24 hours.

(3) Should danger to the life, health or property of certain persons become imminent, interception of their telephone conversations or other means of communication shall be permitted, following the request or written consent of such persons on the basis of a decision approved by the head of the authority carrying out the investigative activity, and the prosecutor shall be notified."

In 2003 this section was amended as follows (amendment in bold):

"Section 8. The conditions and manner of carrying out operational investigative activities

(1) Operational investigative measures which infringe lawful rights - the secrecy of correspondence, telephone and other conversations, telegraphic communications, and the inviolability of the home - shall be permitted only for the purpose of collecting information

about persons who are preparing or attempting to commit very serious offences or are committing or have already committed very serious offences, and only with the authorisation of the investigating judge pursuant to a reasoned decision of one of the heads of the relevant authority. ...

(2) In urgent cases where otherwise there would be a risk of commission of serious criminal offences, it shall be permitted, on the basis of a reasoned conclusion of one of the heads of the authority carrying out the operational investigative activity, to carry out operational investigative measures. The investigating judge shall be informed within 24 hours. He shall be presented with the reasons and shall verify the legality of the measures taken.

(3) Should danger to the life, health or property of certain persons become imminent, interception of their telephone conversations or other means of communication shall be permitted, following the request or written consent of such persons on the basis of a decision approved by the head of the authority carrying out the investigative activity, and the investigating judge shall give his authority."

The section received further amendments in 2007 and currently reads as follows (amendment in bold):

"Section 8. The conditions and manner of carrying out operational investigative activities

(1) Operational investigative measures which infringe lawful rights - the secrecy of correspondence, telephone and other conversations, telegraphic communications, and the inviolability of the home - shall be permitted only for the purpose of collecting information about persons who are preparing or attempting to commit serious, very serious and exceptionally serious offences or are committing or have already committed such offences, and only with the authorisation of the investigating judge pursuant to a reasoned decision of one of the heads of the relevant authority. ...

(2) Should danger to the life, health or property of certain persons become imminent, interception of their telephone conversations or other means of communication shall be permitted, following the request or written consent of such persons on the basis of a decision approved by the head of the authority carrying out the investigative activity, and the investigating judge shall give his authority. ...

Section 9. The conduct of operational control

(1) In cases envisaged under section 7, bodies

exercising operational investigative activities are entitled to carry out operational control. A record must be kept of any measure of operational control.

(2)Operational control shall be carried out with the authorisation and under the supervision of the head of the body conducting it. The results of operational investigative measures applied shall be reflected in duly filed official operational documents. ...

(3)Official operational documents shall be submitted to the prosecutor in order to obtain approval for carrying out operational investigative measures.

(4)The operational control shall be suspended when the specific aims of the operational investigative activity set out in section 2 are accomplished or when circumstances are established proving that it is objectively impossible to accomplish the aim."

In 2003 paragraph 3 of this section was repealed.

"Section 10. Use of the results of operational investigative activities

(1)The results of operational investigative activity may be used for preparing and carrying out criminal investigative activities and for carrying out operational investigative measures in order to prevent, stop or discover criminal offences, and as evidence in criminal cases.

(2)Data obtained during operational control shall not constitute a reason for limiting the rights, liberties and legitimate interests of natural and legal persons.

(3)Information about the persons, means, sources (with the exception of the persons who may provide assistance to the authorities carrying out such measures), methods, plans and results of the operational investigative activity, and about the organisation and the tactics of carrying out the operational investigative measures which constitute State secrets, may be disclosed only in accordance with the conditions provided by law.

Section 11. The authorities which may carry out operational investigative activities

(1)Operational investigative activity shall be exercised by the Ministry of Internal Affairs, the Ministry of Defence, the Information and Security Service, the Protection and State Security Service, the Department of Customs Control attached to the Ministry of Finance and the Prison Department attached to the Ministry of Justice. ...

...

Section 18. Parliamentary scrutiny

Scrutiny, on behalf of Parliament, of operational investigative activity shall be exercised by the relevant permanent parliamentary commissions. The authorities which exercise operational investigative activities shall submit information to these commissions in accordance with the law.

Section 19. Supervision by the prosecutor

(1)Enforcement of the laws by the authorities carrying out operational investigative activities and the lawfulness of the decisions adopted by these authorities shall be supervised by the General Prosecutor, his or her deputy, and the municipal and county prosecutors..."

15. On 29 June 2007 the Ministry of Internal Affairs, the Secret Services and the Centre for Combating Organised Crime and Corruption enacted special instructions in accordance with section 4 (2) of the above Law. The instructions regulated the co-operation between the intercepting bodies and the telephone operators. In particular it obliged the operators to co-operate with the intercepting bodies in order to facilitate the interception of telephone conversations and to provide them with all the necessary information and with unlimited access to their networks.
16. The Code of Criminal Procedure in force until 12 June 2003 read as follows:

"Article 156 § 1. Grounds for intercepting telephone and other conversations

The interception of telephone conversations or other means of communication used by a suspect, defendant or other person involved in a criminal offence may be carried out in connection with criminal proceedings instituted in accordance with a decision of the authority conducting the preliminary investigation or the criminal investigator with the authorisation of the prosecutor, or in accordance with a court decision, where such a measure is deemed necessary in a democratic society in the interests of national security, public order, the economic welfare of the country, the maintenance of order and the prevention of crimes, or the protection of the health, morals, rights and liberties of others. The interception of telephone or other conversations may not last more than six months. ... Conversations held over the telephone or other means of communication may be recorded.

Article 156 § 2. Manner of interception and recording

The interception and recording of telephone conversations or other means of communication shall be carried out by the criminal investigator unless the task is entrusted to the authority in charge of the preliminary investigation. In this case, the criminal investigator shall draw up a warrant and a decision concerning the interception, which shall be sent to the authority in charge of the preliminary investigation. At the same time the criminal investigator shall liaise with the authority in charge of the preliminary investigation or specify in the warrant the circumstances and manner of interception of the conversations and recording, modification and disposal of the information obtained. ...

Article 156 § 3. Record of the interception and recording

Following the interception and recording, a record shall be drawn up giving a summary of the content of the taped conversations relevant to the case. The tape shall be attached to the record and the part which does not relate to the case shall be destroyed once the judgment becomes final."

17. The Code of Criminal Procedure, in force after 12 June 2003, in so far as relevant, reads as follows:

"Article 41. Competence of the investigating judge

The investigating judge ensures judicial supervision during the criminal prosecution by:

...

5. authorising the interception of communications, seizure of correspondence, video recordings;..."

...

Article 135. Interception of communications

(1) The interception of communications (telephone conversations, or communications by radio or using other technical means) is carried out by the prosecution body on the basis of an authorisation issued by the investigating judge issued on the basis of a reasoned warrant of a prosecutor charged with the examination of very serious and exceptionally serious crimes.

(2) In case of urgency, when a delay in obtaining an authorisation as stipulated in paragraph (1) could cause serious harm to the evidence-

gathering procedure, the prosecutor may issue a reasoned warrant for the interception and recording of communications. She or he is obliged to inform the investigating judge about this immediately and no later than 24 hours after issuing the warrant. The latter is required to take a decision within 24 hours regarding the warrant issued by the prosecutor. When she or he confirms it, she or he authorises the further interception if necessary. When he or she does not confirm it, she or he orders its immediate suspension and the destruction of records already made.

(3) The interception of communications may be carried out at the request of the victim of a crime, a witness and members of his/her family, in case of threats of violence, extortion or commission of other crimes affecting such parties, based on a reasoned warrant of the prosecutor.

(4) The interception of communications during a criminal investigation is authorised for a maximum of 30 days. The interception may be extended on the same conditions if justified. Each extension cannot however exceed 30 days. The total duration cannot exceed 6 months. In any case, it cannot last longer than the criminal prosecution.

(5) The interception of communications may be stopped before the end of the period for which it has been authorised, if the grounds initially justifying it no longer exist.

(6) During a criminal prosecution, after the end of an authorised interception, and after having asked the opinion of the prosecutor who supervises and carries out the criminal prosecution, the investigating judge shall inform in writing the persons whose conversations were intercepted and recorded. This shall be done within a reasonable time, and must be done before the termination of the criminal prosecution.

Article 136. Interception and recording and their authorisation

(1) The interception of communications is carried out by the criminal prosecution body. Persons whose responsibility is technically to facilitate the interception and recording of communications are obliged to preserve the secrecy of the procedure and the confidentiality of correspondence. They are liable in the event of a violation of their obligations under the provisions of articles 178 and 315 of the Criminal Code. A note must be made to the effect that they have been informed of these obligations.

(2) A record of the interceptions and recording carried out by the prosecution body must be drawn up in conformity with the provisions of articles 260 and 261. It must record information about the authorisation given by the investigating judge, the intercepted telephone number or numbers and their addresses, together with details of the radio or other technical equipment used for conversations. The record must also indicate the name (where known) of the parties and the date and time of each separate conversation and the number assigned to the tape used for the recording.

(3) Recorded communications must be fully transcribed and annexed to the record along with the authorisation of the criminal prosecution body, after its verification and signature by the prosecutor carrying out or supervising the criminal prosecution. Communications in languages other than the one in which the criminal prosecution is carried out shall be translated with the assistance of an interpreter. The tape containing the original recorded communications shall also be annexed to the record after having been sealed and after the stamp of the criminal investigation body has been applied.

(4) The tape of the recorded communications, the transcript and the records of the interception and recording of communications shall be handed over to the prosecutor within 24 hours. The prosecutor shall assess which parts of the collected information are important for the case in question and draw up a record in this regard.

(5) Original copies of the tapes along with the complete written transcript and copies of the records shall be handed over to the investigating judge who authorised interception of the communications for further storage in a special place in a sealed envelope.

(6) The court shall adopt a decision regarding the destruction of records which are not important for the criminal case. All the other records shall be kept up to the moment when the file is deposited in the archive.

Article 138. Verification of interception recording

Evidence collected under the provisions of articles 135 and 137 may be verified through technical expert examination by the court at the request of the parties or *ex officio*."

18. Under section 15(5) of the Advocacy Act of 13 May 1999, a lawyer's professional correspondence can be intercepted only under the conditions provided for by law. Section 15 (13)

provides that the confidentiality of a lawyer's correspondence with his client is guaranteed and that such correspondence cannot be intercepted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

19. The applicants complained under Article 8 of the Convention that their right to freedom of correspondence had not been respected since the domestic law governing telephone tapping did not contain sufficient guarantees against abuse by the national authorities. They did not claim to have been victims of any specific interception of their telephone communications. Article 8 of the Convention reads as follows:

"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 freedoms of others."

A. The parties' submissions

20. The applicants submitted that they had victim status and that there had therefore been interference with their rights guaranteed by Article 8 of the Convention. Even though they did not all possess licences to practise issued by the Ministry of Justice, they all represented applicants before the European Court of Human Rights. They were all members of the Lawyers for Human Rights organisation, which was considered by the Government as a subversive organisation acting against the interests of the State. The Lawyers for Human Rights organisation represented many persons who met the criteria for the application of the interception measures referred to by the Government both in domestic proceedings and in proceedings before the Court. The applicants gave the example of such persons as P. Popovici, who had been sentenced to life imprisonment, P. Stici and M. Ursu, who were accused of having

- killed the son of the Speaker of the Parliament, and C. Becciev and E. Duca, both accused of very serious crimes. They also referred to many persons who had disputes with the leaders of the ruling Communist Party as well as two persons who had brought proceedings against the Secret Services of Moldova. The applicants submitted that, even though not all the members of their organisation worked on serious cases, all members used the telephones of the organisation and therefore risked interception.
21. The applicants argued that the legislation in force both at the time of the introduction of their application and now violated their right to respect for their correspondence. They submitted that neither legislative regime satisfied the requirement of foreseeability as neither provided for sufficient safeguards against arbitrary interception and abuse.
 22. According to the applicants, when examining a request for telephone interception, the investigating judge was not bound by legislation to balance the interests involved. The judge was only bound to check whether formalities had been observed. In making this submission, the applicants relied on official statistics concerning telephone interception which indicated that in 2007 99.24% of a total of 2,372 requests for interception had been granted by investigating judges. In the applicants' opinion the statistics proved that the investigating judges did not examine the reasons advanced in support of the measure of interception and that manifestly ill-founded criminal charges could serve as a basis for interception. The applicants further argued that approximately 60% of the criminal offences provided for in the Criminal Code were eligible for interception warrants. The limitation in time of telephone interception warrants was only theoretical because in practice, after the expiry of a period of six months, a new authorisation could be issued by an investigating judge. According to the applicants, the provision in Article 135 of the Code of Criminal Procedure, concerning the obligation of the investigating judge to inform individuals whose telephone calls had been intercepted about the investigative measures taken, was not working in practice and no investigating judge had ever complied with that provision.
 23. The Government submitted that the applicants could not claim to be victims of the state of the law. They considered the applicants' case to be distinguishable from the case of *Klass and Others v. Germany* (6 September 1978, Series A no. 28) where three of the applicants were lawyers and one was a judge. In the present case only two applicants were lawyers with licences to practise issued by the Ministry of Justice. Moreover, the applicants had not adduced any evidence that among their clients there were persons who belonged to the categories of persons to whom the relevant law applied and in respect of whom there was a reasonable likelihood that their conversations would be intercepted. In fact, at the time of introduction of the present application there had only been one judgment in respect of the Republic of Moldova, and the applicants had not been representatives in that case. All of the applicants' clients who could have been subjected to interception of telephone communications (see paragraph 20 above) had introduced their applications after 2003 and 2004. The only exception was E. Duca, but she had ultimately been acquitted. Therefore the applicants' complaint amounted to an *actio popularis* and must be declared inadmissible.
 24. The Government further submitted that no interception of the applicants' correspondence had taken place. They could not claim to be even potential victims since the legislation in force clearly established the category of persons susceptible of being subjected to interception measures and not every person within the jurisdiction of the Republic of Moldova was targeted by that legislation.
 25. According to the Government, the pertinent legislation in force contained sufficient safeguards. The interception of telephone communications was regulated by the Operational Investigative Activities Act and by the Code of Criminal Procedure. Article 6 of the Operational Investigative Activities Act provided that interception could be carried out only in accordance with the law. The interception measures were authorised in a public manner. However, the methods and techniques of surveillance were secret.
 26. The category of persons liable to have their correspondence intercepted in accordance with the Moldovan legislation was limited. Only persons involved in serious offences were targeted by the legislation. As to interception of correspondence of other persons, it was necessary to have their written consent and there had to be plausible reasons for ordering interception.

27. In the Government's view, the interception of correspondence was not carried out arbitrarily but only on the basis of a warrant issued by the investigating judge pursuant to a reasoned decision of one of the heads of the bodies carrying out the interception. In urgent cases interception measures could be carried out on the basis of a decision of a prosecutor, who had to inform the investigating judge within not more than twenty-four hours. In such cases the investigating judge had the right to order the cessation of the interception measures and the destruction of the materials obtained by way of interception. Any person who considered that his or her rights had been infringed by interception measures had the right to complain to the hierarchically superior authority, the prosecutor or the investigating judge.
28. As to the regulations issued in accordance with section 4(2) of the Operational Investigative Activities Act, in their pre-admissibility observations the Government submitted that they constituted State secrets in accordance with the State Secrets Act.

B. The Court's assessment

1. *Whether there was an interference*

29. The Court reiterates that telephone communications are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (see *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 77, 29 June 2006, and the cases cited therein).
30. It further reiterates that in *Klass v. Germany* (cited above, § § 34 and 35) it was called upon to examine the question whether an individual could lodge an application with the Convention organs, concerning secret surveillance measures, without being able to point to any concrete measure specifically affecting him. The Court held that:

"the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

The Court therefore accepts that an individual may, under certain conditions, claim to be the

victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.

...

The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.

...

The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25, since otherwise Article 8 runs the risk of being nullified."

31. The Court notes that under the Operational Investigative Activities Act the authorities are authorised to intercept communications of certain categories of persons provided for in section 6 of that Act. In their capacity as human rights lawyers the applicants represent and thus have extensive contact with such persons.
32. The Court cannot disregard the fact that at the time when the present case was declared admissible Lawyers for Human Rights acted in a representative capacity in approximately fifty percent of the Moldovan cases communicated to the Government. Nor can it overlook its findings in *Colibaba v. Moldova* (no. 29089/06, § § 67-69, 23 October 2007) where the Prosecutor General had threatened the Moldovan Bar Association with criminal proceedings against lawyers who damaged the image of the Republic of Moldova by complaining to international organisations specialising in the protection of human rights. It also recalls that

the Government endorsed the actions of the Prosecutor General and further accused the applicant of slandering the Moldovan authorities by lodging a complaint under Article 34 of the Convention.

33. In such circumstances, and bearing in mind the Court's finding in paragraph 50 below, the Court considers that it cannot be excluded that secret surveillance measures were applied to the applicants or that they were at the material time potentially at risk of being subjected to such measures.
34. The mere existence of the legislation entails, for all those who might fall within its reach, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunications services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for correspondence (see *Klass v. Germany*, cited above, § 41).
35. Accordingly, there has been an interference with the applicants' rights guaranteed by Article 8 of the Convention and the Government's objection concerning their lack of victim status must be dismissed.

2. Whether the interference was justified

36. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see *Weber and Saravia*, cited above, § 80).
3. Whether the interference was "in accordance with the law"

(a) General principles

37. The expression "in accordance with the law" under Article 8 § 2 requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him (see, among other authorities, *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A; *Huvig v. France*, 24 April 1990, § 26, Series A no. 176-B; *Lambert v. France*, 24 August 1998, § 23, *Reports of Judgments and Decisions* 1998-V; *Perry v. the United Kingdom*, no. 63737/00, § 45,

ECHR 2003-IX (extracts); *Dumitru Popescu v. Romania* (no. 2), no. 71525/01, § 61, 26 April 2007; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, § 71, 28 June 2007; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008).

38. It is not in dispute that the interference in question had a legal basis under domestic law. The applicants, however, contended that this law, both pre-2003 and later, was not sufficiently detailed and precise to meet the "foreseeability" requirement of Article 8 § 2, as it did not provide for sufficient guarantees against abuse and arbitrariness.
39. The Court points out that recently, in its admissibility decision in *Weber and Saravia*, cited above, § § 93-95, the Court summarised its case-law on the requirement of legal "foreseeability" in this field as follows:

"93. foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see, *inter alia*, *Leander v. Sweden*, judgment of 26 August 1987, Series A no. 116, p. 23, § 51). However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident (see, *inter alia* *Huvig*, cited above, pp. 54-55, § 29; and *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V). It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated (see *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports* 1998-II, pp. 542-43, § 72, and *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, *Reports* 1998-V, pp. 1924-25, § 46). The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Kopp*, cited above, § 64; *Huvig*, cited above, § 29; and *Valenzuela Contreras*, *ibid.*).

94. Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law

must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Leander*, cited above, § 51; and *Huvig*, cited above, § 29).

95. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (see, *inter alia*, *Huvig*, cited above, § 34; *Valenzuela Contreras*, cited above, § 46; and *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003)."

40. Moreover, the Court recalls that in *Dumitru Popescu v. Romania* (cited above, paragraphs 70-73) the Court expressed the view that the body issuing authorisations for interception should be independent and that there must be either judicial control or control by an independent body over the issuing body's activity.

(b) Application of the general principles to the present case

41. The Court finds that the legislation prior to 2003 lacked both clarity and detail and did not satisfy the minimum safeguards contained in the Court's case-law (see paragraph 39 above). Indeed, there was no judicial control over the grant and application of a measure of interception and, as regards the persons capable of being caught by its provisions, the legislation was very open-ended in its reach. The circumstances in which a warrant of interception could be issued lacked precision. The Court notes with satisfaction that some major improvements were carried out after 2003.

42. The Court recalls that in the *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (cited above, § 84) it distinguished between two stages of interception of telephone communications: authorising the surveillance and the actual carrying out of the surveillance.

43. In so far as the initial stage of the procedure of

interception is concerned, the Court notes that after 2003 the Moldovan legislation appears to be clearer in respect of the interception of communications of persons suspected of criminal offences. Indeed, it is made explicit that someone suspected of a serious, very serious or exceptionally serious offence risks in certain circumstances having the measure applied to him or her. Moreover, the amended legislation now provides that interception warrants are to be issued by a judge.

44. Still, the nature of the offences which may give rise to the issue of an interception warrant is not, in the Court's opinion, sufficiently clearly defined in the impugned legislation. In particular, the Court notes that more than one half of the offences provided for in the Criminal Code fall within the category of offences eligible for interception warrants (see paragraph 14 above). Moreover, the Court is concerned by the fact that the impugned legislation does not appear to define sufficiently clearly the categories of persons liable to have their telephones tapped. It notes that Article 156 § 1 of the Criminal Code uses very general language when referring to such persons and states that the measure of interception may be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation has been given as to who exactly falls within the category of "other person involved in a criminal offence".

45. The Court further notes that the legislation in question does not provide for a clear limitation in time of a measure authorising interception of telephone communications. While the Criminal Code imposes a limitation of six months (see paragraph 17 above), there are no provisions under the impugned legislation which would prevent the prosecution authorities from seeking and obtaining a new interception warrant after the expiry of the statutory six months' period.

46. Moreover, it is unclear under the impugned legislation who – and under what circumstances – risks having the measure applied to him or her in the interests of, for instance, protection of health or morals or in the interests of others. While enumerating in section 6 and in Article 156 § 1 the circumstances in which tapping is susceptible of being applied, the Law on Operational Investigative Activities and the Code of Criminal Procedure fails, nevertheless, to define "national security", "public order", "protection of health", "protection of morals", "protection

- of the rights and interests of others”, “interests of ... the economic situation of the country” or “maintenance of legal order” for the purposes of interception of telephone communications. Nor does the legislation specify the circumstances in which an individual may be at risk of having his telephone communications intercepted on any of those grounds.
47. As to the second stage of the procedure of interception of telephone communications, it would appear that the investigating judge plays a very limited role. According to Article 41 of the Code of Criminal Procedure, his role is to issue interception warrants. According to Article 136 of the same Code, the investigating judge is also entitled to store “the original copies of the tapes along with the complete written transcript ... in a special place in a sealed envelope” and to adopt “a decision regarding the destruction of records which are not important for the criminal case”. However, the law makes no provision for acquainting the investigating judge with the results of the surveillance and does not require him or her to review whether the requirements of the law have been complied with. On the contrary, section 19 of the Law on Operational Investigative Activities appears to place such supervision duties on the “Prosecutor General, his or her deputy, and the municipal and county prosecutors”. Moreover, in respect of the actual carrying out of surveillance measures in the second stage, it would appear that the interception procedure and guarantees contained in the Code of Criminal Procedure and in the Law on Operational Investigative Activities are applicable only in the context of pending criminal proceedings and do not cover the circumstances enumerated above.
48. Another point which deserves to be mentioned in this connection is the apparent lack of regulations specifying with an appropriate degree of precision the manner of screening the intelligence obtained through surveillance, or the procedures for preserving its integrity and confidentiality and the procedures for its destruction (see, as examples *a contrario*, *Webber and Saravia*, cited above, § § 45-50).
49. The Court further notes that overall control of the system of secret surveillance is entrusted to the Parliament which exercises it through a specialised commission (see section 18 of the Law on Operational Investigative Activities). However, the manner in which the Parliament effects its control is not set out in the law and
- the Court has not been presented with any evidence indicating that there is a procedure in place which governs the Parliament’s activity in this connection.
50. As regards the interception of communications of persons suspected of offences, the Court observes that in *Kopp* (cited above, § 74) it found a violation of Article 8 because the person empowered under Swiss secret surveillance law to draw a distinction between matters connected with a lawyer’s work and other matters was an official of the Post Office’s legal department. In the present case, while the Moldovan legislation, like the Swiss legislation, guarantees the secrecy of lawyer-client communications (see paragraph 18 above), it does not provide for any procedure which would give substance to the above provision. The Court is struck by the absence of clear rules defining what should happen when, for example, a phone call made by a client to his lawyer is intercepted.
51. The Court notes further that in 2007 the Moldovan courts authorised virtually all the requests for interception made by the prosecuting authorities (see paragraph 13 above). Since this is an uncommonly high number of authorisations, the Court considers it necessary to stress that telephone tapping is a very serious interference with a person’s rights and that only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it. The Court notes that the Moldovan legislation does not elaborate on the degree of reasonableness of the suspicion against a person for the purpose of authorising an interception. Nor does it contain safeguards other than the one provided for in section 6(1), namely that interception should take place only when it is otherwise impossible to achieve the aims. This, in the Court’s opinion, is a matter of concern when looked at against the very high percentage of authorisations issued by investigating judges. For the Court, this could reasonably be taken to indicate that the investigating judges do not address themselves to the existence of compelling justification for authorising measures of secret surveillance.
52. The Court is of the view that the shortcomings which it has identified have an impact on the actual operation of the system of secret surveillance which exists in Moldova. In this connection, the Court notes the statistical information contained in the letter of the Head of the President’s Office of the Supreme Court of Justice

(see paragraph 13 above). According to that information, in 2005 over 2,500 interception warrants were issued, in 2006 some 1,900 were issued and over 2,300 warrants were issued in 2007. These figures show that the system of secret surveillance in Moldova is, to say the least, overused, which may in part be due to the inadequacy of the safeguards contained in the law (see *Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria*, cited above, § 92).

53. In conclusion, the Court considers that the Moldovan law does not provide adequate protection against abuse of power by the State in the field of interception of telephone communications. The interference with the applicants' rights under Article 8 was not, therefore, "in accordance with the law". Having regard to that conclusion, it is not necessary to consider whether the interference satisfied the other requirements of the second paragraph of Article 8.
54. It follows that there has been a violation of Article 8 in this case.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

55. The applicants argued that they did not have an effective remedy before a national authority in respect of the breach of Article 8 of the Convention and alleged a violation of Article 13, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority"

56. The Court reiterates that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention in their domestic legislation (see *Ostrovar v. Moldova*, no. 35207/03 35207/03, § 113, 13 September 2005). In these circumstances, the Court finds no breach of Article 13 of the Convention taken together with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

"If the Court finds that there has been a

violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

58. The applicants did not make any claim for pecuniary or non-pecuniary damage.

B. Costs and expenses

59. The applicants claimed EUR 5,475 for the costs and expenses incurred before the Court. They submitted a detailed time-sheet.
60. The Government argued that since the applicants represented themselves they should not be entitled to any payment under this head. Alternatively, the Government considered the amount claimed excessive and disputed the number of hours worked by the applicants.
61. The Court awards an overall sum of EUR 3,500 for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds that there has been no violation of Article 13 of the Convention, taken together with Article 8 of the Convention;
3. Holds
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, an overall sum of EUR 3,500 (three thousand five hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-men-

tioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 February 2009, pursuant to Rule 77 § § 2 and 3 of the Rules of Court.

Lawrence Early, *Registrar*

Nicolas Bratza, *President*

ECHR

ECJ

FOURTH SECTION

CASE OF KVASNICA v SLOVAKIA

(Application no. 72094/01)

JUDGMENT

STRASBOURG

9 June 2009

FINAL

09/09/2009

TELEPHONE, TAPPING, SURVEILLANCE, INTERFERENCE, INTERCEPTION, SECRET, CORRESPONDENCE, PRIVATE LIFE

IN THE CASE OF KVASNICA V. SLOVAKIA,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and **Lawrence Early**, *Section Registrar*,

Having deliberated in private on 16 April 2009 and 19 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 72094/01) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovakian national, Mr Roman Kvasnica ("the applicant"), on 11 July 2001.
2. The applicant was represented by Mr J. Drgonec, a lawyer practising in Bratislava. The Slovak Government ("the Government") were represented by their Agent, Mrs M. Pirošíková.
3. The applicant alleged, in particular, that his telephone communications had been interfered with in breach of Article 8 of the Convention.
4. By a decision of 26 September 2006 the Court declared the application partly admissible.
5. The applicant and the Government each submitted further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1962 and lives in Piešťany.

A. Factual background

7. The applicant is a lawyer. He used to be a public prosecutor and is now a practising member of the Slovak bar association.
8. Between August 1999 and March 2001 the applicant acted as the legal representative of several industrial companies belonging to a group associated with a strategic steelworks in eastern Slovakia. For a period of time starting on 18 April 2001 he was on the board of directors of the company owning the works.
9. In 1999 the Minister of the Interior set up a special team of investigators to investigate large-scale organised criminal activities of a financial nature which were supposedly being committed in connection with a company belonging to the above group. The team was composed of officers from the financial police.
10. On an unspecified date the investigators charged an individual, I.C., with aggravated fraud.

B. Interference with the applicant's telephone communications

11. On an unspecified date the investigators applied for judicial authorisation to tap the applicant's telephone. At an unspecified time a judge of the Bratislava Regional Court granted the authorisation. The applicant's professional mobile phone was subsequently tapped.
12. In November 2000 the applicant learned that calls from his phone were being intercepted; that the interception was being carried out by the financial police; and that the contents of his telephone communications were known outside the police.
13. On 5 January 2001 the applicant received an anonymous letter confirming the above information and advising him that the interception had taken place from October to December 2000 and had been carried out at the request of opponents of his clients.
14. On 31 May 2001 and 1 June 2001 a daily paper

published interviews with the Minister of the Interior and the chief of the Police Corps. From those interviews the applicant understood that there had been confirmation that the interception had actually taken place.

15. Verbatim records of the applicant's calls had been leaked to various interest groups, politicians and journalists, as well as to representatives of several legal persons.
16. Thus in September 2001 the daily *Sme* received by mail a transcript of the applicant's telephone conversation with a journalist of *Radio Free Europe*. On 13 October 2001 *Sme* published a statement by a politician who had declared at a press conference that he possessed approximately 300 pages of copies of transcripts of the applicant's telephone conversations.
17. In summer 2002 the applicant was informed that verbatim records of his conversations with third persons which had been made by the financial police were freely accessible on a website. They included conversations with his colleagues, clients, the representative of the other party in a case, and friends. The records had been manipulated in that they included statements which the applicant and the other persons involved had not made.

C. Investigation of the interference with the applicant's telephone communications

1. Complaints by the applicant and a police director

18. On 15 and 29 January 2001 the applicant informed the Inspection Service of the Ministry of the Interior ("the Inspection Service") that he had been warned in a letter signed "member of the Financial Police" about the interception of his telephone. He claimed that the interception was unlawful and unjustified and accused one or more unknown police officers of having abused their official authority. The applicant stated that an appropriate investigation should be carried out into the matter in accordance with the law.
19. The director of the special division of the financial and criminal police (*odbor zvláštnych úloh správy kriminálnej a finančnej polície*) lodged a criminal complaint as, on the basis of his own examination of the case file, he had come to the conclusion that the interception contravened sections 36 and 37 (1) of the Police Corps Act 1993 (see Relevant domestic law

and practice below). This was so in particular because it had not been based on any specific suspicion against the person being targeted and no specific purpose had been indicated. In his view, the members of the special investigative team had abused their official authority within the meaning of Article 158 of the Criminal Code.

20. On 10 May 2001 the judge who had authorised the interception made a written statement to the President of the Regional Court. The judge stated that the request for the authorisation had met all formal and substantive requirements. In his view, the police director had no authority to challenge the authorisation. The judge therefore considered it inappropriate to address the substance of the director's objections. He nevertheless remarked, in general, that requests for authorisation were made in writing, but were submitted in person. The officer submitting the request had presented the case orally and the oral presentation was usually more comprehensive than the written request. As requests for authorisation had to be handled with the utmost urgency, judges had had no realistic opportunity to examine the case file or to check that the request for authorisation corresponded to the contents of the case file. Furthermore, the information in the case file was often obtained from unverifiable sources. Judges therefore had to rely on the information in the request for authorisation, which presupposed a certain element of trust. The judge further observed that there had been an enormous increase in the workload concerning tapping and that this was due, *inter alia*, to an inter-agency agreement which had been reached under the auspices of the Ministry of Justice (see Relevant domestic law and practice below) and had extended the jurisdiction of the Bratislava Regional Court in this area. In his view, questions of jurisdiction should not be regulated by "agreements" but by statute, which was not the case in relation to tapping. The judge stated that telephone tapping had been authorised on three previous occasions in the course of the investigation into the suspected extensive criminal transactions within the industrial group mentioned above. He had thus had sufficient and detailed knowledge about the applicant's case. The judge associated himself completely with the decision taken, although the suspicion against the applicant might later have been dispelled. This was nothing unusual and happened in 10-20% of cases.

21. On 22 May 2001 the applicant asked the General Prosecutor to take measures with a view to eliminating unlawful interception and recording of telephone conversations.
22. On 20 June 2001 the Inspection Service questioned the applicant in connection with his complaint. According to the applicant, since then there has been no official communication concerning his complaint and he has not been informed of the outcome of the investigation.
23. On 21 June and 2 July 2001 the Inspection Service requested that the Ministry of the Interior discharge members of the special investigative team from the obligation of confidentiality in respect of the subject matter of the investigation. The Ministry agreed on 9 and 10 July 2001 respectively.
24. On 31 August 2001 the General Prosecutor's Office informed the applicant, in reply to his above request of 22 May 2001, that the framework for the interference was defined by Article 22 § 2 of the Constitution and the relevant statutory provisions including the Police Corps Act 1993. Decree no. 66/1992 defined the court's jurisdiction in such matters in cases where criminal proceedings had not been brought. The fact that the relevant issue was not governed by a law was only a formal shortcoming. Moreover, a draft law had been prepared to cover the relevant issue.
25. Between 5 and 20 September 2001 the Inspection Service questioned four members of the investigative team. Their depositions included, *inter alia*, the information that the operative part of the team had been colluding with the applicant; that the applicant had been in close contact with I.C. (see paragraph 10 above); that the applicant had been involved in several contractual transactions within the group, which had eventually harmed the interests of the steelworks; that the request for authorisation to tap the applicant's phone had been based on the suspicion that he had committed the offences of aggravated fraud (Article 250 of the Criminal Code) and money laundering (Article 255 of the Criminal Code); that the request had been drafted without consultation of the case file; that the interception had been necessary because it had not been possible to move the investigation forward without it; and that after the interception had been compromised the case file had been made available to various officials, including the Minister of Justice, who at that time also acted as the Minister of the

Interior *ad interim*.

26. On 21 September 2001 the Inspection Service dismissed the criminal complaint by the police director. It noted that a "committee of experts specialising in operational tasks" had been set up and "had detected no breach of the applicable regulations". The interception had been authorised by a judge and had thus been lawful. There was no basis for scrutinising the judge's decision. In conclusion, there was no case to answer. The decision has never been served on the applicant.
27. According to the applicant, he had lodged some ten criminal complaints between 2001 and 2003 about the interception of his telephone conversations and mishandling of the verbatim records. Without submitting further details the applicant indicated that those complaints had been rejected without an appropriate examination of the facts.

2. Complaint by chief editor of *Sme*

28. The chief editor of the daily *Sme* filed a criminal complaint after receipt of a transcription of the applicant's telephone conversation with a journalist of *Radio Free Europe*. In the context of the proceedings a journalist of *Sme* was heard. On 14 November 2001 the police also heard the politician who had stated that he possessed 300 pages of copies of transcripts of the applicant's telephone conversations. The applicant was involved in the proceedings as the injured party.
29. The parties have not informed the Court about the outcome of the proceedings.

3. Complaint by police officer B.

30. In 2003 lieutenant colonel B., attached to the Inspection Service's department specialised in combating corruption and organised crime, contacted the applicant and informed him that there was a general order within the Police Corps to reject all the applicant's complaints. The police officer had been obliged to leave the police after he had started criminal proceedings upon one of the applicant's complaints. In February and March 2003 that officer had complained to the Bratislava Higher Military Prosecutor's office and to the General Prosecutor's office about abuse of authority in the context of examination of the applicant's complaints.
31. The Government submitted a standpoint of the General Prosecutor dated 8 February 2007.

It indicates that the above decision of the Inspection Service of 21 September 2001 had been taken in accordance with the law. As to the criminal complaints which officer B. had lodged in 2003, an investigator had set the case aside, on 19 July 2006, on the ground that no offence had been committed in the context of examination of the applicant's complaints. Finally, reference was made to the reply which the General Prosecutor's Office had sent to the applicant on 31 August 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution (Constitutional Law no. 460/1992 460/1992 Coll., as applicable at the relevant time) and practice of the Constitutional Court

32. Pursuant to Article 19, everybody has the right to protection against unjustified interference with his or her private and family life (§ 2) and against the unjustified collection, publication or other misuse of personal data (§ 3).
33. Article 22 guarantees the secrecy of correspondence, other communications and written messages delivered by post, and of personal information (§ 1). The privacy of letters, other communications and written messages kept privately or delivered by post or otherwise, including communications made by telephone, telegraph and other means, cannot be violated by anyone except in cases specified by law (§ 2).
34. In proceedings no. II. ÚS 254/03 an individual alleged, *inter alia*, a breach of Article 8 of the Convention in that his telephone had been tapped unlawfully. On 17 December 2003 the Constitutional Court dismissed the complaint as being manifestly ill-founded. It established that the interception had been authorised by a regional court judge in accordance with the relevant provisions of the Police Corps Act 1993.
35. In proceedings no. I. ÚS 274/05 (judgment of 14 June 2006) the Constitutional Court found a breach of an individual's rights under Article 8 of the Convention on the ground that, contrary to the statutory requirement, two judicial decisions to authorise the interception of the plaintiff's telephone contained no specific reasons

justifying the interference.

B. Code of Criminal Procedure (Law no. 141/1961 Coll., as in force at the relevant time)

36. The Code distinguishes between the procedure before the formal institution (commencement) of a criminal prosecution, which is governed by the provisions of Chapter 9, the procedure after the commencement of the prosecution but before the filing of the bill of indictment, known as the "preliminary proceedings" and governed by the provisions of Chapter 10, and the procedure in court which begins with the filing of the indictment and is governed by the provisions of Chapter 11.
37. The procedure before the institution of a criminal prosecution encompasses receiving and verifying information, obtaining documentation and explanations and securing evidence with a view to determining whether a criminal offence has been committed and whether it is justified to bring a formal prosecution in connection with it. As a general rule, eavesdropping and interception is not allowed at this stage of the proceedings (Article 158 § 4) unless such measures cannot be postponed or repeated within the meaning of Article 158 § 6.
38. The procedure before the commencement of a criminal prosecution ends with a formal decision either not to accept the criminal complaint (Article 158 § 2), or to refer the matter to the relevant authority dealing with minor offences or disciplinary or other matters (Article 159 § 1), or to refuse to take action (Article 159 § 1, 2 and 3), or to institute formal criminal proceedings (Article 160).
39. The scope of the jurisdiction and competence of criminal courts is defined in section 1 of Chapter 2. Proceedings at first instance are to be conducted before a district court unless the law provides otherwise (Article 16).

C. Police Corps Act 1993 (Law no. 171/1993 Coll., as in force at the relevant time)

40. The Act governs the organisation and powers of the police. Section 2 (1) defines the tasks of the police. These include serving (a) to protect fundamental rights and freedoms, life, health, personal safety and property; (b) to detect criminal offences and to identify the culprits; (c) to detect illegal financial operations and money laundering; (d) to investigate criminal offences and to examine criminal complaints;

and (e) to combat terrorism and organised crime. The provisions relevant in the present case read as follows:

"Information technology devices

Section 35

For the purpose of this Act information technology devices are, in particular, electro-technical, radio-technical, photo-technical, optical and other means and devices or their combinations secretly used for

- a) search for, opening and examination of consignments and their evaluation while using forensic methods,
- b) interception and recording of telecommunications,
- c) obtaining image, sound or other recordings.

Section 36

1. The Police Corps is entitled to use information technology devices when complying with its tasks in the fight against terrorism, money laundering in the context of the most serious forms of criminal activities, in particular organised crime, ... tax evasion and unlawful financial operations, ... The preceding provision does not apply to contacts between an accused person and his or her defence counsel.

2. The Police Corps can use information technology devices also in respect of criminal activities other than those mentioned in subsection 1 subject to the agreement of the person whose rights and freedoms will thereby be interfered with.

Conditions of use of information technology devices

Section 37

1. The Police Corps can use information technology devices only where the use of other means would render the investigation of criminal activities mentioned in section 36, identification of their perpetrators or securing evidence necessary for the purpose of criminal proceedings ineffective or considerably difficult.

2. Information technology devices can only be used subject to a prior written consent of a judge and for a period strictly necessary which however cannot exceed six months. That period starts running on the day when such consent has been given.

3. The judge who approved of use of informa-

tion technology devices can, on the basis of a fresh request, extend the period, but for no longer than six months each time.

4. In exceptional cases, where no delay is possible and a written consent of a judge cannot be obtained, information technology devices can be used without such consent. However, the Police Corps must apply for a written approval by a judge without delay. If such consent is not given within 24 hours from the moment when the use of devices started or if the judge refuses to give his or her consent, the Police Corps must put an end to the use of information technology devices. Information thus obtained cannot be used by the Police Corps and they must be destroyed in the presence of the judge competent to decide on the request.

5. The Police Corps shall submit a request for approval of the use of information technology devices to a judge in writing; it must contain data about the person concerned, specify the device to be used, place, duration and reasons for its use.

6. The judge who gave consent to the use of information technology devices must examine on a continuous basis whether the reasons for their use persist; where such reasons no longer exist, the judge is obliged to immediately order that the use of the devices be stopped.

7. The Police Corps can use information technology devices without prior consent of a judge ... where the person whose rights and freedoms are to be interfered with has consented to such in writing...

Section 38

1. When using information technology devices the Police Corps must constantly examine whether the reasons for such use persist. Where those reasons are no longer valid, the Police Corps must immediately put an end to the use of an information technology device.

2. The Police Corps must inform the judge who gave consent to the use of information technology devices of the termination of such use.

3. Information obtained by means of information technology devices can be used exclusively for attaining the aim set out in section 36.

4. The use of information technology devices can restrict the inviolability of one's home, the privacy of correspondence and the privacy of information communicated only to the extent that it is indispensable.

5. Information obtained by means of information technology devices can exceptionally be used as evidence, namely where such information constitutes the only proof indicating that a criminal offence listed in section 36 was committed by a specific person and where such proof cannot be obtained by other means. In such case the relevant recording must be accompanied by minutes indicating the place, time, means and contents of the recording and the reason for which it was made.”
41. Section 69 deals with police information systems and databases. The police are entitled to set up and operate information systems and databases containing information about persons and facts which are relevant for their work (subsection 1). The police have the duty to protect the data stored in such systems from disclosure, abuse, damage and destruction (subsection 2). If the data are no longer needed, they must be destroyed or stored so that they are not accessible to anyone except a court (subsection 3).
- D. Privacy Protection Act 2003**
42. Sections 35, 36(2), 37 and 38 of the Police Corps Act 1993 were repealed by Act 166/2003 Coll. on Protection of Privacy against Unjustified Use of Information Technology Devices (“Privacy Protection Act 2003”) which entered into force on 21 May 2003.
43. The Act governs the use of information technology devices without the prior consent of the person concerned. It does not extend to the use of such devices in the context of criminal proceedings which is governed by the Code of Criminal Procedure (section 1).
44. Section 2 defines the authorities entitled to use such devices (Police Corps, Slovak Intelligence Service, Military Intelligence Service, Railways Police, Corps of Prison and Justice Guards and Customs Administration). The devices used must be secured against tampering. Personnel involved in using the devices must undergo a lie-detector test at intervals fixed by the head of the authority concerned.
45. Section 3 allows for use of information technology devices only where it is necessary in a democratic society for ensuring the safety or defence of the State, prevention or investigation of crime or for the protection of the rights and freedoms of others. The information thus obtained cannot be used for purposes other than one of those enumerated above.
46. Pursuant to section 4, such devices can be used subject to prior approval by a judge within whose jurisdiction the case falls. Their use should be limited to a period which is strictly necessary and it should not exceed six months unless the judge grants an extension. The judge involved is obliged to examine on a continuing basis whether the reasons for the use of such devices persist.
47. In exceptional cases specified in section 5 the police can use the devices without the prior consent of a judge. In such cases, the judge must be notified within one hour after the use of the devices has started and a request for authorisation of such use must be submitted within 6 hours. In case of disapproval by the judge of such interference the data obtained must be destroyed.
48. Sections 7 and 8 govern the use and disposal of data obtained and the liability of the State in case of failure by the authorities concerned to comply with the law.
49. Pursuant to section 9 the National Council of the Slovak Republic (the Parliament) shall examine at its plenary meeting, twice a year, a report of its committee set up for the purpose of supervising the use of information technology devices. The report must indicate any unlawful use of the devices established. The report can be made available to the media. The authorities entitled to use information technology devices must make available to the above committee all relevant information within ten working days following the committee’s request.
- E. Decree of the Minister of Justice on the Rules of Procedure before District Courts and Regional Courts (Decree no. 66/1992 Coll.)**
50. The decree was issued, *inter alia*, pursuant to Article 391a § 2 of the Code of Criminal Procedure, which authorised the Minister of Justice to lay down further details of the procedure before district courts and regional courts “in dealing with criminal matters”.
51. Section 45 (1) obliged the presidents of each regional court to assign one judge to deal with matters concerning use of information technology devices.
52. The decree of 1992 was repealed by Decree no. 543/2005 with effect from 1 January

2006.

F. Other regulations

53. On 29 March 2000 a conference took place under the auspices of the Ministry of Justice. Representatives of the Ministry, the regional courts, the head office of the police and the office of the Prosecutor General took part. The participants agreed that matters concerning authorisation of wiretapping would be handled by the regional court in the judicial district in which the agency requesting it had its seat.

G. Amendment no. 185/2002 Coll. to the Courts and Judges Act (Law no. 335/1991 Coll.)

54. The amendment entered into force on 16 April 2002. It introduced, *inter alia*, subsections 2 and 3 to section 13 of the Courts and Judges Act. They provide that, as a general rule, authorisation for monitoring telecommunications falls within the jurisdiction of the regional courts. Territorial competence is conferred on the regional court in the judicial district in which the authority seeking the authorisation has its seat.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION AND THE SCOPE OF THE CASE

55. At the admissibility stage the Government objected that the applicant had not exhausted domestic remedies as he had not raised his complaint under Article 8 by way of an action for protection of his personal integrity.

56. On 26 September 2006 the Court dismissed that objection and declared admissible the complaint under Article 8 of the Convention concerning the interference with the applicant's telephone communications. The Court noted that in his reply to the observations submitted by the Government the applicant claimed that the interference had consisted not only in tapping his phone, but also in recording his phone calls, making transcripts and copies of the recordings and making the obtained information available to third parties. In that respect it invited the parties to submit information whether, apart from the tapping of the applicant's telephone, there had been other interference with his rights under Article 8.

57. The Government then raised a new objection, arguing that the applicant could have sought redress by means of a complaint under Article 127 § 1 of the Constitution enacted with effect from 1 January 2002. They relied on the Constitutional Court's decisions II. ÚS 254/03 and I. ÚS 274/05 delivered in 2003 and 2006 (see paragraphs 34 and 35 above). In a complaint to the Constitutional Court the applicant should have relied on his argument that he had officially learned about the interception from the Government's observations submitted on the present case on 25 June 2005.

58. As to the allegedly unlawful use of the transcripts of the conversations, their copying and distribution, in the Government's view the applicant could have sought redress by means of an action under Articles 11 et seq. of the Civil Code for protection of his integrity and, ultimately, before the Constitutional Court.

59. The applicant disagreed. He argued, *inter alia*, that he had introduced his application on 11 July 2001 and that no effective remedy before the Constitutional Court had been available at that time. He could not have obtained redress before the Constitutional Court.

60. The Court first notes that the Government did not raise at the admissibility stage the argument that the applicant should have sought redress before the Constitutional Court as regards the interception of his telephone. In any event, the Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it (see *Baumann v. France*, no. 33592/96 33592/96, § 47, 22 May 2001). It concurs with the applicant that at the time of introduction of the application he had been unable to effectively seek redress before the Constitutional Court (for recapitulation of the relevant domestic law see, for example, *Poláčik v. Slovakia*, no. 58707/00, §§ 33-35, 15 November 2005). Accordingly, the Government's objection must be dismissed to the extent that it concerns the interception of the applicant's telephone, including the alleged shortcomings in the legislation on which it had been based.

61. As regards the alleged interference resulting from misuse and rendering public the contents of the records, the Court notes that the applicant explicitly referred to it in his reply to the Government's observations, which was submitted to the Court on 6 September 2005.

He submitted the relevant documents and arguments to substantiate that complaint on 22 November 2006, after the decision on the admissibility of the application had been adopted and in reply to questions put by the Court.

62. Those documents indicate that the relevant part of the application concerns specific events which occurred after the introduction of the application and which were being investigated subsequently (see paragraphs 16-17 and 27-28 above). In the above circumstances, the applicant's complaint about those events and any shortcomings in the related domestic procedure must be considered as having been introduced on 6 September 2005, when the applicant for the first time made a specific reference to them before the Court.
63. The Court concurs with the Government that prior to submitting that complaint to the Court the applicant should have sought redress, after having used the other remedies available, by means of a complaint pursuant to Article 127 § 1 of the Constitution enacted with effect from 1 January 2002.
64. It follows that the complaint of misuse of the records of the applicant's telephone conversations must be rejected under Article 35 § 1 and 4 of the Convention for non-exhaustion of domestic remedies.
65. Accordingly, the Court's examination in the context of the present application will be limited to the interception of the applicant's telephone conversations.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. The applicant complained that the interference with his telephone communications had been contrary to Article 8 of the Convention, which, in so far as relevant, provides:

"1. Everyone has the right to respect for his private ... life, ... 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 freedoms of others."

A. The arguments of the parties

1. *The applicant*

67. The applicant emphasised that he had not committed any criminal or other offence and had never been charged. There could not have been any legitimate reason for interfering with his phone calls. There was no evidence showing that the request for authorisation of the interception had complied with applicable requirements.
68. The judge who had authorised the interception of his phone had acknowledged that there had been a lack of legal rules concerning the territorial competence of regional courts in matters concerning wiretapping. The rules contained in Decree no. 66/1992 Coll. did not apply to wiretapping under the Police Corps Act, and the Minister of Justice who had issued that Decree had had no legislative power to make rules relating to that Act. Furthermore, the rules adopted at the Ministry of Justice conference on 29 March 2000 did not have the form and quality of "law", *inter alia*, because they lacked the element of public accessibility.
69. The quality of the legal framework existing at the relevant time had not been sufficient in that it had not afforded the applicant adequate and effective safeguards against abuse. In particular, he had been completely excluded from the decision-making process concerning the interception of his phone calls; he had had no remedies in respect of it; and there had been no mechanism for independent scrutiny of the interception under the Police Corps Act 1993. Although the interception required the consent of a judge and the judge had the duty to examine on a continuous basis whether the grounds for it persisted, neither the judge nor the Inspection Service had any means of checking how the interception was being carried out in practice.
70. Finally, the applicant underlined that there had been no safeguards to identify telephone calls between him as a lawyer and criminal defendants as his clients.

2. *The Government*

71. The Government admitted that the applicant's phone had been tapped and that this amounted to an interference with his rights under Article 8 of the Convention.

72. In their observations submitted at the admissibility stage the Government argued that the interference had been lawful and justified. In particular, the interception had been carried out under the Police Corps Act 1993 and had been duly authorised by the appropriate judge. The matter fell within the jurisdiction of the regional courts on the basis of Ministerial Decree no. 66/1992 Coll. The fact that there was no written legal rule as to which specific regional court had territorial jurisdiction in the matter had no impact on the effectiveness and independence of the judicial supervision that had been carried out in the applicant's case. The legality of the interception had been examined and upheld by the Inspection Service.
73. There had been an extensive investigation of criminal activities within the industrial group with which the applicant had then been associated. He had been seeking inside information about the investigation and had been in active communication with I.C., who had been charged with an "extremely serious criminal offence". It had been necessary to tap his phone in the interests of conducting an effective investigation.
74. The Government further submitted that there had been a system of effective control in place in order to prevent abuse and that the applicant had had the full benefit of that system.
75. In the post-admissibility submissions, in reply to specific questions put by the Court, the Government's Agent explained that the relevant documents were classified and that the law in force did not permit her to obtain them and to submit them to the Court. For that reason the Government's Agent was not in a position to comment specifically on the merits of the case. Legislative change was envisaged with a view to preventing similar situations from recurring.

B. The Court's assessment

1. The general principles

76. Telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8. Their monitoring amounts to an interference with the exercise of one's rights under Article 8 (see, for example, *Lambert v. France*, 24 August 1998, § 21, *Reports of Judgments and Decisions* 1998-V).
77. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accord-

ance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims.

78. The expression "in accordance with the law" under Article 8 § 2 requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law (see, among other authorities, *Kruslin v. France*, 24 April 1990, § 27; or *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59-63, 1 July 2008, with further references).
79. In particular, the requirement of legal "foreseeability" in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures. The Court has also stressed the need for safeguards in this connection. In its case-law on secret measures of surveillance, it has described an overview of the minimum safeguards that should be set out in statute law in order to avoid abuses of power (see *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00 62540/00, § § 75-77, 28 June 2007 and *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-..., with further references).
80. As to the question whether an interference was "necessary in a democratic society" for achieving the legitimate aims, the Court has acknowledged that the Contracting States enjoy a certain margin of appreciation in assessing the existence and extent of such necessity, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, for example, *Barfod v. Denmark*, 22 February 1989, § 28, Series A no. 14). The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is

“necessary in a democratic society”. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded (see *Lambert v. France* cited above, § 31, with further reference).

2. Application of the general principles to the present case

81. It has not been disputed that the applicant’s telephone was tapped and that the interception of his calls amounted to an interference with his right under Article 8 to respect for his private life and correspondence.
82. That interference had a statutory basis, namely the Police Corps Act 1993. It was designed to establish facts in the context of an investigation into suspected large-scale organised criminal activities of a financial nature and therefore to prevent crime, which is a legitimate aim under the second paragraph of Article 8.
83. The applicant has contested both the compliance with the law in issue and its quality, maintaining, in particular, that it was deficient in terms of safeguards against abuse.
84. In the particular circumstances of the case the applicant’s arguments concerning the lawfulness of the interference are closely related to the question as to whether the “necessity” test was complied with in his case. Accordingly, the Court will address jointly the “in accordance with the law” and “necessity” requirements. In these circumstances, and also considering the conclusion reached below and noting that the relevant provisions of the Police Corps Act 1993 were replaced by new, more comprehensive legislation offering a broader scope of guarantees within a relatively short time after the events complained of had occurred (see paragraphs 42-49 above and also, to the contrary, *Dumitru Popescu v. Romania* (no. 2), no. 71525/01 71525/01, § 84, 26 April 2007), the Court does not consider it necessary to examine separately the applicant’s argument that the quality of the law in force at the material time had not complied with the requirements incorporated in Article 8.
85. The Court notes that authorisation of and interception of one’s telephone calls under the Police Corps Act 1993 were subjected to a number of conditions (see paragraph 40 above).
86. The respondent Government did not make available the relevant documents which were classified (see paragraph 75 above). On the basis of the documents before it the Court is not satisfied that the statutory conditions were complied with in their entirety in the applicant’s case. For example, it has not been shown that the guarantees were met relating to the duration of the interference, whether there had been judicial control of the interception on a continuous basis, whether the reasons for the use of the devices remained valid, whether in practice measures were taken to prevent the interception of telephone calls between the applicant as a lawyer and criminal defendants as his clients. Similarly it has not been shown that the interference restricted the inviolability of applicant’s home, the privacy of his correspondence and the privacy of information communicated only to an extent that was indispensable and that the information thus obtained was used exclusively for attaining the aim set out in section 36(1) of the Police Corps Act 1993.
87. In addition, statements by several police officers and the judge involved are indicative of a number of shortcomings as regards the compliance with the relevant law in the applicant’s case (see paragraphs 19, 20 and 25 above). In particular, the director of the special division of the financial and criminal police had concluded that the interference in issue had not been based on any specific suspicion against the applicant and no specific purpose had been indicated in the relevant request. In his written statement the Regional Court judge who had authorised the interception remarked that similar requests were made in writing, but were submitted by the police investigators in person. The officer submitting the request presented the case orally and the oral presentation was usually more comprehensive than the written request. As requests for authorisation had to be handled with the utmost urgency, judges had no practical opportunity to examine the case file or to verify that the request for authorisation corresponded to the contents of the case file. Depositions of the four members of the financial police investigative team involved in the case included, *inter alia*, the information that the request for authorisation of the interception of the applicant’s telephone had been drafted without a prior consultation of the case file. The documents before the Court contain no information indicating that those statements were unsubstantiated.
88. In these circumstances, the Court cannot but

conclude that the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the requirements of the relevant law and to be adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society".

89. There has therefore been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

91. The applicant stated that he sought the finding by the Court of a breach of his rights under Article 8 of the Convention which he considered appropriate satisfaction.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares inadmissible the applicant's complaint under Article 8 of the Convention about interference resulting from the copying, misuse, distribution and publication of the transcripts of his telephone conversations;
2. Dismisses the Government's preliminary objection concerning the complaint about interception of the applicant's telephone;
3. Holds that there has been a violation of Article 8 of the Convention.

Done in English, and notified in writing on 9 June 2009, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Lawrence Early, *Registrar*
Nicolas Bratza, *President*

ECHR

ECJ

FIFTH SECTION

CASE OF VOLOKHY v UKRAINE

(Application no. 23543/02)

JUDGMENT

STRASBOURG
2 November 2006

FINAL
02/02/2007

TELEPHONE, TAPPING, SURVEILLANCE, INTERFERENCE,
INTERCEPTION, PRIVATE LIFE, CORRESPONDENCE

IN THE CASE OF VOLOKH V. UKRAINE,

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

Mr **P. Lorenzen**, *President*,

Mr **K. Jungwiert**,

Mr **V. Butkevych**,

Mrs **M. Tsatsa-Nikolovska**,

Mr **R. Maruste**,

Mr **J. Borrego Borrego**,

Mrs **R. Jaeger**, *judges*,

and Mrs **C. Westerdiel**, *Section Registrar*,

Having deliberated in private on 30 August and 9 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 23543/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Ukrainian nationals, Mrs Olga Volokh ("the first applicant") and Mr Mykhaylo Volokh ("the second applicant"), on 3 June 2002.
2. The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska, of the Ministry of Justice.
3. On 27 June 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.
4. On 1 April 2006 this case was assigned to the newly constituted Fifth Section (Rule 25 § 5 and Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1933 and 1961 respectively and live in the city of Poltava.

A. Interception of the applicants' correspondence

6. In May 1996 the Poltava Regional Police Department (hereinafter – the PRPD) instituted criminal proceedings for tax evasion against Mr V., who is, respectively, the son of the first applicant and the brother of the second applicant. On 28 May 1996 the investigator placed Mr V. under an obligation not to abscond.
7. On 4 September 1996, following the failure of Mr V. to appear for interrogation and in the absence of information about his whereabouts, an arrest warrant for Mr V. was issued.
8. On 6 August 1997 the PRPD investigator issued an order for interception and seizure of the postal and telegraphic correspondence of the applicants (hereinafter – "the interception order") on the following grounds:

"The private entrepreneur Mr V., during the period between 1 January 1994 and 1 January 1996, intentionally did not pay taxes to the State budget in the amount of UAH 12,8891, having caused damage and substantial losses to the State.

On 28 May 1996 the preventive measure – obligation not to abscond – was ordered in respect of Mr V., but, having been summoned by the investigator, Mr V. did not come to him, and his whereabouts at the present are unknown. On 4 September 1996 the preventive measure – detention – was ordered in respect of Mr V.

... Mr V. may inform his mother and brother about his whereabouts, using the postal and telegraphic correspondence."

No time-limit for the interception had been fixed in the order.

9. On 11 August 1997 the President of the Zhovtnevy District Court approved the interception order by having signed it. The applicants maintained that they had learned about this order by chance at the end of 1998.
10. On 4 May 1998 the criminal case against Mr V. was terminated as being time-barred.

11. According to the applicants, Mr V. had appeared in summer 1998 and met with the investigator in his case. During this meeting he found out about the interception order.
12. On 28 May 1999 the PRPD investigator cancelled the interception order on the grounds that the criminal case against Mr V. had been closed and there were no further need to intercept the applicants' correspondence. This cancellation was approved and signed by the President of the Zhovtnevy District Court the same day.
13. By letter of 19 July 1999, the Poltava Regional Prosecutor's Office, in reply to their complaint, informed the applicants that the interception of their correspondence had been ordered lawfully and therefore the law-enforcement officers incurred no liability.
14. On 14 November 1999, according to the Government, the whereabouts of Mr V. were established by the investigation.
15. By letter of 6 January 2000 to Mr V., in reply to his complaints about the criminal proceedings against him, the General Prosecutor's Office (hereinafter "the GPO") noted, *inter alia*, that the interception order was not well-founded.
16. By letter of 1 February 2000, the first applicant was informed that on 15 August 1997 (15 September 1997 according to the Government) a letter addressed to her had been intercepted by the police but, as it contained no information about the whereabouts of Mr V., it was not seized but was forwarded to her.
20. By letter of 21 November 2000, the Poltava Regional Prosecutor's Office informed the second applicant that the issue of compensation was within the competence of the courts.
21. On 18 February 2000 the applicants lodged a claim with the Leninsky District Court of Poltava against the PDPР seeking compensation for the moral damage caused by the interference with their correspondence. In support of their claim, they referred to the letter of the GPO of 6 January 2000, where it was acknowledged that the interception order lacked grounds.
22. On 11 October 2001 the Leninsky District Court found against the applicants. The court concluded that the interception order had been lawful and well-founded, the criminal proceedings against Mr V. having been terminated on non-exonerative grounds (*нереабілітуючі обставини*), and that the applicants did not prove that they had suffered any moral damage due to the interference with their correspondence. The court held that the applicants' claim was unsubstantiated and that the GPO's letter of 6 January 2000 could not be a ground for awarding them any damages. It, therefore, rejected the applicants' claim in full.
23. On 8 January 2002 the Appellate Court of Poltava Region upheld the decision of the first instance court.
24. On 9 February 2004 the panel of three judges of the Supreme Court rejected the applicants' request for leave to appeal in cassation.

B. Proceedings for compensation

17. On 20 January 2000 the applicants claimed compensation from the Head of the PRPD for the damage caused by ordering the interception of their correspondence.
18. By letter of 27 January 2000, the Head of the PRPD informed the second applicant that the interception order had been lawful and that, therefore, there were no grounds to award damages.
19. By letter of 19 November 2000, the Head of the PRPD informed the second applicant that the seizure of correspondence had been in compliance with the law and that the applicant had no right to compensation, given that the criminal case against his brother had been terminated on non-exonerative grounds.
25. The relevant extracts of the Constitution of Ukraine (first published in the Gazette of the Verkhovna Rada of Ukraine of 23 July 1996, No. 30, article 141) read as follows:

Article 31

"Everyone shall be guaranteed privacy of mail, telephone conversations, telegraph and other correspondence. Exceptions shall be established only by a court in cases envisaged by law, with the purpose of preventing crime or ascertaining the truth in the course of the investigation of a criminal case, if it is not possible to obtain information by other means."

Article 55

"Human and citizens' rights and freedoms

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

shall be protected by the courts.

Everyone shall be guaranteed a right to challenge in court the decisions, actions or omissions of bodies of State power, bodies of local self-government, officials and officers. ...

Everyone shall have a right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law."

Article 56

"Everyone shall have a right to compensation from public or municipal bodies for losses sustained as a result of unlawful decisions, acts or omissions by public or municipal bodies or civil servants in the performance of their official duties."

Chapter XV

Transitional Provisions

"13. The existing procedure for the arrest, custody and detention of persons suspected of committing an offence, and the procedure for carrying out an examination and search of a person's home and other property, shall be retained for five years after the entry into force of the present Constitution."

B. Code of Criminal Procedure

26. At the material time Article 187 of the Code in the wording of 16 April 1984 (the relevant Amendment Law first published in the Gazette of the Verkhovna Rada of the Ukrainian SSR, 1984, No. 18, article 351) read as follows:

The interception of correspondence and its seizure in postal and telegraphic establishments

"The interception of correspondence and its seizure in postal and telegraphic establishments shall be conducted with the approval of the prosecutor or his deputy, or upon the resolution of a court.

The investigator shall issue an order for interception and seizure of postal and telegraphic correspondence. In that order, the investigator shall propose that a postal and telegraphic establishment intercept the correspondence defined in the order and inform him about it. The examination of correspondence shall be conducted in the presence of two representatives of the post office, and minutes are drawn up to this end.

The interception of correspondence shall be cancelled by an order of the investigator,

when the application of this measure is no longer required."

(This Article was substantially re-worded in June 2001)

C. The Law of Ukraine "on Search and Seizure Activities" of 18 February 1992

27. The relevant provisions of the Law (first published in the official newspaper "Golos Ukrainy", 27 March 1992, No. 56) provided as relevant:

Article 6

Grounds for conduct of the search and seizure activities

"The grounds for conduct of the search and seizure activities are:

- 1) presence of sufficient information, about ...
 - persons who are preparing or have committed a crime;
 - persons who are hiding from the investigative bodies, court or are evading the application of criminal sanctions; ...

It is prohibited to make decisions on the conduct of search and seizure activities for other purposes than the ones established by this Article."

Article 8

The rights of the departments that conduct search and seizure activities

"Operational units when executing their tasks in connection with operational searches (...) have the following rights:

- 10) to survey selectively, in accordance with particular characteristics, telegraphic and postal correspondence."

Article 9

Guarantees of lawfulness during the conduct of search and seizure activities

"...During the search and seizure activities violation of rights and freedoms of individuals and legal persons shall not be allowed. Any limitation of these rights and freedoms shall be of an exceptional and temporary nature ... in the situations stipulated by the legislation of Ukraine with the aim of protecting the rights and freedoms of other persons, the safety of the society..."

During the search and seizure activities, officers of the operational units shall be obliged to

take into account their proportionality to the level of social danger of criminal attempts and the danger to the interests of the society and the State.

In case of violation of rights and freedoms of individuals and legal persons ...the Ministry of Internal Affairs... shall restore the violated rights and compensate for the material and moral damage which had occurred."

D. The Law of Ukraine "on the procedure for the compensation of damage caused to the citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts" of 1 December 1994

28. The relevant provisions of the Law (first published in the Gazette of the Verkhovna Rada of Ukraine of 3 January 1995, No. 1, article 1) read as follows:

Article 1

"Under the provisions of this Law a citizen is entitled to compensation for damages caused by:

...3) unlawful conduct of search and seizure activities ...

Article 2

"The right to compensation for damages in the amount of and in accordance with the procedure established by this Law shall arise in cases of:

acquittal by a court;

the termination of a criminal case on grounds of the absence of proof of the commission of a crime, the absence of *corpus delicti*, or a lack of evidence of the accused's participation in the commission of the crime;

the refusal to initiate criminal proceedings or the termination of criminal proceedings on the grounds stipulated in sub-paragraph 2 of paragraph 1 of this Article;

the termination of proceedings for an administrative offence."

Article 3

"In the cases referred to in Article 1 of this Law the applicant shall be compensated for...

5) moral damage."

Article 4

"...Compensation for moral damage shall be given in cases in which unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts caused moral losses to a citizen, led to disruption of his usual life relations and required additional efforts for organisation of his or her life.

The moral damage shall be considered suffering caused to a citizen due to physical or psychological influence which led to deterioration or deprivation of possibilities to follow his or her usual habits and wishes, deterioration of relations with people around, other negative impacts of moral nature."

THE LAW

29. The applicants complained about a violation of their right to respect for their correspondence as provided in Article 8 of the Convention. Relying on Article 13 of the Convention they maintained that they had no effective domestic remedies to acknowledge unlawfulness of interference with their rights and to claim compensation. These provisions read, insofar as relevant, as follows:

Article 8

"1. Everyone has the right to respect for ... 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 freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] 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."

I. ADMISSIBILITY

A. The Government's preliminary objection

30. The Government presented a preliminary objection as to non-exhaustion of the domestic

remedies by the applicants with respect to the period between 4 May 1998 and 4 May 1999. They maintained that the compensatory proceedings instituted by the applicants had been related only to the period of interception between 6 August 1997 and 4 May 1998, since the applicants had complained also about unlawfulness of the criminal proceedings in the framework of which the interception had been ordered.

31. The applicants disagreed with this objection.
32. The Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V).
33. The Court observes that in the present case, the Government considered that the applicants' claim before the domestic judicial authorities related only to a part of and not to the totality of the period during which the interception order had been in force. The Government did not suggest or mention any other domestic remedy except the one which had been used by the applicants.
34. In the Court's opinion, it would appear more appropriate to consider the effectiveness of the last-mentioned remedy under Article 13 of the Convention which had been relied on by the applicants. The Court therefore joins this objection to the merits of the applicant's complaint under Article 13.

B. Compatibility *ratione temporis*

35. The Court notes that the decision ordering the interception of the applicants' correspondence was given on 6 August 1997 and therefore fall outside its jurisdiction *ratione temporis*. The major period of interception, however, was after 11 September 1997, the date of the entry of the Convention into force in respect of Ukraine. The Court, however, will take into account the events that took place prior to the above date, including the decision on interception, in assessing whether the interference with the applicants' correspondence satisfied the require-

ments of Article 8 § 2 of the Convention.

C. Observance of six-month rule

36. The Court observes that the applicants' complaint under Article 13 of the Convention, namely the ineffectiveness of the compensatory proceedings, suggests that there was no effective remedy to exhaust in their situation. The question therefore arises whether the application was lodged within a period of six months as required by Article 35 § 1 of the Convention.
37. The Court observes that the application was introduced on 3 June 2002. It notes that according to its well-established case-law, where no domestic remedy is available the six-month period runs from the date of the act complained of. However, special considerations could apply in exceptional cases where an applicant first avails himself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six-month period could be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (see, among others, *Laçin v. Turkey*, no. 23654/94, Commission decision of 15 May 1995, Decisions and Reports (DR) 81-B, p. 31)
38. In this respect, the Court notes that the applicants took steps to bring their complaints to the attention of the domestic authorities. In particular, on 18 February 2000 they lodged a claim with the Leninsky District Court of Poltava against the PDPR seeking compensation for the moral damage caused by the interference with their correspondence under the Law of Ukraine "on the procedure for the compensation of damage caused to the citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts". The Government maintained that this remedy was effective for the applicant's complaint under Article 8. Moreover, the domestic law, namely Article 55 and 56 of the Constitution and Article 9 of the Law "on Search and Seizure Activities" (see paragraphs 25 and 27 above) suggested that an individual could challenge the unlawful actions of investigation authorities in the domestic courts and the only mechanism, on which parties relied in their submissions to the Court, was a mechanism envisaged by the above mentioned Law "on the procedure for the compensation of damage caused to the

citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts". On 11 October 2001 the first-instance court rejected the applicant's claim as unsubstantiated, and not on the ground that law was not applicable to the applicants. On 8 January 2002, the court of appeal upheld the decision of the first-instance court (see paragraphs 22 and 23 above).

39. at that point of time, the applicants should have doubted the effectiveness of this remedy. Indeed they lodged their application with this Court within a period of six months after the decision of the appellate court, while the proceedings were still pending before the Supreme Court of Ukraine.
40. The Court considers that in the circumstances of the present case the applicants could not be reproached for pursuing the impugned remedy prior to lodging their application with this Court. The Court concludes that the applicants must be regarded as having complied with the six-month rule.

D. Conclusion

41. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Whether there has been an interference

42. It was not disputed by the parties that the decision on interception of the applicants' correspondence constituted "an interference by a public authority" within the meaning of Article 8 § 2 of the Convention with the applicants' right to respect for their correspondence guaranteed by paragraph 1 of Article 8.

B. Whether the interference was justified

43. The cardinal issue that arises is whether the above interference is justifiable under paragraph 2 of Article 8. That paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be interpreted narrowly. The Court reiterates that powers of secret surveillance of citizens in the course of criminal investigations are tolerable under the Convention only in so far as strictly necessary

(see, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 21, § 42).

44. If it is not to contravene Article 8, such interference must have been "in accordance with the law", pursue a legitimate aim under paragraph 2 and, furthermore, be necessary in a democratic society in order to achieve that aim.
45. The Government maintained that the decision on interception of the applicants' correspondence had been given in accordance with Article 187 of the Code of Criminal Procedure. The applicants did not contest this argument, but maintained that the provisions of Article 31 of the Constitution had not been respected.
46. The Court notes that Article 31 of the Constitution, Article 187 of the Code of Criminal Procedure and Article 8 of the Law "on search and seizure activities" provided for the possibility to conduct interception of the correspondence in the framework of criminal proceedings and the search and seizure activities (see paragraphs 25-27 above).
47. There was, therefore, a legal basis for the interference in domestic law.
48. As to the accessibility of the law, the Court regards that requirement as having been satisfied, seeing that all the above listed legal acts had been published (see paragraphs 25-27 above).
49. As regards the requirement of foreseeability, the Court reiterates that a rule is "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. The Court has stressed the importance of this concept with regard to secret surveillance in the following terms (see the *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, p. 32, § 67, reiterated in *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II):

"The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the 'law', requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ... The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... Especial-

ly where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...

... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

50. The "quality" of the legal rules relied on in this case must therefore be scrutinised, with a view, in particular, to ascertaining whether domestic law laid down with sufficient precision the circumstances in which the law enforcement bodies could perform the interception of the applicants' correspondence.
51. The Court notes in this connection that the requirements of proportionality of the interference, and of its exceptional and temporary nature were stipulated in Article 31 of the Constitution and Article 9 of the Law of Ukraine "on Search and Seizure Activities" of 18 February 1992 (see paragraphs 25 and 27 above). However, neither Article 187 of the Code of Criminal Procedure in its wording at the time of the events, nor any other provision of Ukrainian law contained a mechanism which would ensure that the above principles were respected in practice. The provision in question (see paragraph 26 above) contains no indication as to the persons concerned by such measures, the circumstances in which they may be ordered, the time-limits to be fixed and respected. It cannot therefore be considered to be sufficiently clear and detailed to afford appropriate protection against undue interference by the authorities with the applicants' right to respect for their private life and correspondence.
52. Furthermore, the Court must be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security and public order entails the risk of undermining or even destroying democracy on the ground of defending it (see the *Klass and Others* judgment cited above, pp. 23-24, § 49-50). Such safeguards must be equally established by law in unequivocal manner and be applied to the

supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure (see the *Klass and Others* judgment cited above, pp. 25-26, § 55).

53. In the instant case, the Court observes that the review of the decision on interception of correspondence under Article 187 of the Code of Criminal Procedure was foreseen at the initial stage, when the interception of correspondence was first ordered. The relevant legislation did not provide, however, for any interim review of the interception order in reasonable intervals or for any time-limits for the interference. Neither did it require or authorise more involvement of the courts in supervising interception procedures conducted by the law-enforcement authorities. As a result, the interception order in the applicants' case remained valid for more than one year after the criminal proceedings against their relative Mr V. had been terminated and the domestic courts did not react to this fact in any way.
54. The Court concludes that the interference cannot therefore be considered to have been "in accordance with the law" (see paragraph 49 above) since Ukrainian law does not indicate with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power in the area under consideration and does not provide sufficient safeguards against abuse of this surveillance system.

It follows that there has been a violation of Article 8 of the Convention arising from the interception of the applicants' correspondence.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

55. The applicants complained about a lack of domestic remedies to seek redress for the unlawful interference with their correspondence. They relied on Article 13 of the Convention.
56. The Government contested that argument. They referred to their preliminary objection

and to Article 55 of the Constitution that guarantees a right to challenge any action of public authorities in the courts.

57. The applicants maintained that they could not challenge the interception order, since the State authorities were not obliged to inform them about having imposed such measure.
58. The Court recalls its reasoning in the *Klass* case (cited above, § § 68-70), in which it observed that it was the secrecy of the measures which rendered it difficult, if not impossible, for the person concerned to seek any remedy of his own accord, particularly while surveillance was in progress. Nevertheless, in the *Klass* case it was established that the competent authority was bound to inform the person concerned as soon as the surveillance measures were discontinued and notification could be made without jeopardising the purpose of the restriction, and such person had a number of remedies available to him or her. Moreover, in the *Klass* case the Court took into account the existence of a system of proper control over surveillance measures and found no violation of Article 13.
59. From the Government's submissions, it does not appear that the Ukrainian legal system offered sufficient safeguards to persons under surveillance, because there was no obligation to inform a person that he or she was under surveillance. Even when the persons concerned learned about the interference with their correspondence, like in the present case, the right to question the lawfulness of the decision on interception as guaranteed by the domestic law (see paragraphs 25 and 27 above) appears to be limited in practice, since the only implementing mechanism is provided by the Law of Ukraine "on the procedure for the compensation of damage caused to the citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts". In the Court's opinion, this Law, which is worded in very general terms at least in so far as persons other than the accused are concerned, could have a remedial effect in situations comparable to the one of the applicants, touched by surveillance measures in the context of criminal proceedings against a third person. However, its application and interpretation by the domestic courts, as in the present case, does not appear to be sufficiently broad to encompass complaints of persons other than the accused.
60. The foregoing considerations are sufficient to enable the Court to conclude that the ap-

plicants did not have an effective domestic remedy, as required by Article 13, in relation to their complaints under Article 8 of the Convention about the surveillance measures involving their postal and telegraphic correspondence.

61. The Court therefore dismisses the Government's preliminary objection and holds that there has been a breach of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

63. The first applicant claimed 75,000 euros (EUR) and the second applicant EUR 50,000 in respect of damages, without any further specification.
64. The Government maintained that the impact of the interference on the applicants' rights had been minimal. In their opinion, the applicants' claims were unspecified and exorbitant, therefore, finding of a violation, if any, would constitute sufficient just satisfaction in the present case.
65. The Court, on an equitable basis, awards each of the applicants EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

66. The applicants did not make any claims under this head and the Court, therefore, makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Decides to join to the merits the Govern-

ment's preliminary objection;

2. Declares the application admissible;
3. Holds that there has been a violation of Article 8 of the Convention;
4. Dismisses the Government's preliminary objection and holds that there has been a violation of Article 13 of the Convention;
5. Holds
 - (a) that the respondent State is to pay Mrs Olga Volokh, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;
 - (b) that the respondent State is to pay Mr Mykhaylo Volokh, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;
 - (c) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 November 2006, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Claudia Westerdiek, *Registrar*
Peer Lorenzen, *President*

ECHR

ECJ

SECOND SECTION

CASE OF TAYLOR-SABORI v THE UNITED KINGDOM

(Application no. 47114/99)

JUDGMENT

STRASBOURG
22 October 2002

FINAL
22/01/2003

TAPING, SURVEILLANCE, PAGER, PRIVATE LIFE, CORRESPONDENCE, INTERFERENCE, INTERCEPTION, COMMUNICATION

IN THE CASE OF TAYLOR-SABORI V. THE UNITED KINGDOM,

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

Mr **J.-P. Costa**, *President*,

Sir **Nicolas Bratza**,

Mr **L. Loucaides**,

Mr **C. Birsan**,

Mr **K. Jungwiert**,

Mr **V. Butkevych**,

Mrs **W. Thomassen**, *judges*,

and Mrs **S. Dollé**, *Section Registrar*,

Having deliberated in private on 29 May 2001 and 1 October 2002,

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

PROCEDURE

- The case originated in an application (no. 47114/99 47114/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Sean Marc Taylor-Sabori ("the applicant"), on 1 October 1998.
- The applicant, was granted legal aid, but never actually claimed it. He was represented by Bobbetts Mackan, a firm of solicitors practising in Bristol. The United Kingdom Government ("the Government") were represented by their Agent, Mr C.A. Whomersley, of the Foreign and Commonwealth Office.
- The applicant complains, principally, under Articles 8 and 13 of the Convention that the interception of his pager messages by the police and subsequent reference to them at his trial amounted to an unjustified interference with his private life and correspondence which was not "in accordance with the law" and in respect of which there was no remedy under English law.
- The application was originally allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.
- On 27 June 2000 the Court declared the applicant's complaint under Article 6 § 1 of the Convention inadmissible. On 29 May 2001 it declared his complaints under Articles 8 and 13 admissible. The Court decided, after consulting the parties, to dispense with a hearing (Rule 59 § 2 *in fine*).
- The applicant and the Government each filed observations on the merits (Rule 59 § 1).
- On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

- The facts of the case, as submitted by the parties, may be summarised as follows.
- Between August 1995 and the applicant's arrest on 21 January 1996, he was the target of surveillance by the police. Using a "clone" of the applicant's pager, the police were able to intercept messages sent to him. The pager system used by the applicant and intercepted by the police operated as follows: The sender, whether in the United Kingdom or overseas, would telephone the pager bureau in the United Kingdom via the public telephone network. The pager operator would key the message into a computer and read it back to the sender to confirm its accuracy. The computer message was transmitted via the public telephone system to the pager terminal, from where it was relayed by radio to one of four regional base stations and thence, again by radio, simultaneously to the applicant's and the police's clone pagers, which displayed the message in text.
- The applicant was arrested and charged with conspiracy to supply a controlled drug. The prosecution alleged that he had been one of

the principal organisers of the importation to the United Kingdom from Amsterdam of over 22,000 ecstasy tablets worth approximately GBP 268,000. He was tried, along with a number of alleged co-conspirators, at Bristol Crown Court in September 1997.

11. Part of the prosecution case against the applicant consisted of the contemporaneous written notes of the pager messages which had been transcribed by the police. The applicant's counsel submitted that these notes should not be admitted in evidence because the police had not had a warrant under section 2 of the Interception of Communications Act 1985 ("the 1985 Act") for the interception of the pager messages. However, the trial judge ruled that, since the messages had been transmitted via a private system, the 1985 Act did not apply and no warrant had been necessary.
12. The applicant pleaded not guilty. He was convicted and sentenced to ten years' imprisonment.
13. The applicant appealed against conviction and sentence. One of the grounds was the admission in evidence of the pager messages. The Court of Appeal, dismissing the appeal on 13 September 1998, upheld the trial judge's ruling that the messages had been intercepted at the point of transmission on the private radio system, so that the 1985 Act did not apply and the messages were admissible despite having been intercepted without a warrant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. By section 1 (1) of the 1985 Act, anyone who intentionally intercepts a communication in the course of its transmission by means of a public communications system is guilty of a criminal offence, unless the interception is carried out pursuant to a warrant issued in compliance with the Act.
15. At the time of the applicant's trial there was no provision in British law governing the interception of communications on a private system.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

16. The applicant complained that the interception by the police of messages on his pager violated Article 8 of the Convention, which provides:

"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 freedoms of others."

He submitted that the police action amounted to an interference with his private life and correspondence, which was not "in accordance with the law" or "necessary in a democratic society".

17. The Government conceded that the interception by the police of messages sent to the applicant's pager was inconsistent with Article 8 in that it was not "in accordance with the law", although they added that this should not be taken as a concession that the action was not justified in the circumstances.
18. The Court notes that it is not disputed that the surveillance carried out by the police in the present case amounted to an interference with the applicant's rights under Article 8 § 1 of the Convention. It recalls that the phrase "in accordance with the law" not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. In the context of covert surveillance by public authorities, in this instance the police, domestic law must provide protection against arbitrary interference with an individual's right under Article 8. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures (see *Khan v. the United Kingdom*, no. 35394/97, § 26, ECHR 2000-V).

19. At the time of the events in the present case there existed no statutory system to regulate the interception of pager messages transmitted via a private telecommunication system. It follows, as indeed the Government have accepted, that the interference was not “in accordance with the law”. There has, accordingly, been a violation of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

20. The applicant also contended there was no remedy available to him at national level in respect of his Article 8 complaint, contrary to Article 13, which provides:

“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.”

He relied on the above-mentioned *Khan* judgment as authority for the position that section 78 of the Police and Criminal Evidence Act 1985 (“PACE”), which allows the trial judge to exclude evidence in certain circumstances, could not provide an effective remedy to deal with all aspects of his complaint about unlawful surveillance.

21. The Government alleged that there had been no violation of the applicant’s Article 13 rights, submitting that under section 78 of PACE the judge could have regard to Article 8 of the Convention when exercising his discretion to exclude evidence from trial proceedings. However, it did not appear that the applicant had ever submitted during his trial that the intercepted messages should be excluded from the evidence under section 78 on the basis that they had been obtained in breach of Article 8, and added that in the circumstances it cannot be said that such a submission would necessarily have failed. In this way, the Government claimed that the present case was distinguishable from the above-mentioned *Khan* case.
22. The Court recalls that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of

the relevant Convention complaint and to grant appropriate relief, without, however, requiring incorporation of the Convention (see the above-mentioned *Khan* judgment, § 44).

23. The Court recalls its finding in the *Khan* judgment that, in circumstances similar to those of the applicant, the courts in the criminal proceedings were not capable of providing a remedy because, although they could consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant’s right to respect for his private life was not “in accordance with the law”; still less was it open to them to grant appropriate relief in connection with the complaint (*ibid.*).
24. It does not appear that there was any other effective remedy available to the applicant for his Convention complaint, and it follows that there has been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Non-pecuniary damage

26. The applicant claimed non-pecuniary damage for the invasion of his privacy. He drew attention to the facts that the interceptions took place over a long period of time (August 1995-January 1996) and were indiscriminate, in that every message on his pager was copied. He pointed out, furthermore, that since the *Malone v. the United Kingdom* judgment of 2 August 1984 (Series A no. 95), the Government had been aware of the need to regulate covert surveillance by the police.
27. The Government submitted that a finding of violation would constitute ample just satisfaction, since there was no evidence to suggest that, had proper procedures been in place at the relevant time, as they now were, the interceptions in question would not have been

authorised.

28. The Court recalls that the violations it has found in this case relate to the fact that the interceptions by the police were not properly controlled by law. It considers that the findings of violation constitute sufficient just satisfaction for any non-pecuniary loss caused to the applicant by this failure.

B. Costs and expenses

29. The applicant claimed legal costs and expenses as follows: GBP 918.00, exclusive of value added tax ("VAT"), for his solicitors, and the fees of two counsel, amounting to GBP 2,680.00 and GBP 3348.20, both exclusive of VAT.
30. The Government considered that the sums claimed were excessive, given that the application had not progressed beyond the written stage, that the Article 6 § 1 complaint was declared inadmissible on 27 June 2000 and that the Article 8 complaint did not raise any new issues not already established in the Court's case-law. The Government questioned whether it had been necessary to have engaged both leading and junior counsel to work on the case in addition to a solicitor, and whether it had been necessary for both barristers and the solicitor to visit the applicant in prison at a total cost of nearly GBP 4,700.00. The Government suggested that GBP 1,500, plus VAT, would be a reasonable sum.
31. The Court recalls that it will award legal costs and expenses only if satisfied that these were necessarily incurred and reasonable as to quantum. It agrees with the Government that this was a straightforward case, raising virtually identical issues to the above-mentioned *Khan* judgment. It awards EUR 4,800 in respect of costs and expenses, plus any VAT that may be payable.

C. Default interest

32. The Court considers that the default interest should be fixed at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds that there has been a violation of Arti-

cle 13 of the Convention;

3. Holds that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
4. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 4,800 (four thousand eight hundred euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into pounds sterling at the rate applicable on the date of settlement;
 - (b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;
5. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 October 2002, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

S. Dollé, *Registrar*

J.-P. Costa, *President*

ECHR

ECJ

SECOND SECTION

CASE OF AMANN v SWITZERLAND

(Application no. 27798/95)

JUDGMENT

STRASBOURG
16 February 2000

INTERFERENCE, PRIVATE LIFE, COMMUNICATION, TELEPHONE, TAPPING, SURVEILLANCE, INTERCEPTION, SECRET

IN THE CASE OF AMANN V. SWITZERLAND,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11, and the relevant provisions of the Rules of Court², as a Grand Chamber composed of the following judges:

Mrs **E. Palm**, *President*,

Mr **L. Wildhaber**,

Mr **L. Ferrari Bravo**,

Mr **Gaukur Jörundsson**,

Mr **L. Caflisch**,

Mr **I. Cabral Barreto**,

Mr **J.-P. Costa**,

Mr **W. Fuhrmann**,

Mr **K. Jungwiert**,

Mr **M. Fischbach**,

Mr **B. Zupančič**,

Mrs **N. Vajić**,

Mr **J. Hedigan**,

Mrs **W. Thomassen**,

Mrs **M. Tsatsa-Nikolovska**,

Mr **E. Levits**,

Mr **K. Traja**,

and also of Mr **M. de Salvia**, *Registrar*,

Having deliberated in private on 30 September 1999 and 12 January 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 2 November 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 27798/95) against the Swiss Confederation lodged with the Commission under former Article 25 by a Swiss na-

tional, Mr Hermann Amann, on 27 June 1995. Having been designated before the Commission by the initials H.A., the applicant subsequently agreed to the disclosure of his name.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 of the Convention.

2. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr L. Wildhaber, the judge elected in respect of Switzerland and President of the Court (Articles 27 § § 2 and 3 of the Convention and Rule 24 § 3), Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § § 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr Gaukur Jörundsson, Mr I. Cabral Barreto, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panțiru, Mr E. Levits and Mr K. Traja (Rule 24 § 3).
3. Before the Court the applicant was represented by Mr L.A. Minelli, of the Zürich Bar, who was given leave by the President of the Grand Chamber, Mrs Palm, to use the German language (Rule 34 § 3). The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division, Federal Office of Justice.
4. After consulting the Agent of the Government and the applicant's lawyer, the Grand Chamber decided that it was not necessary to hold a hearing.
5. The Registrar received the Government's memorial and documents on 15 and 22 April and the applicant's memorial and documents on 11 May 1999, and the Government's and applicant's memorials and observations in reply on 10 and 14 June 1999 respectively.
6. As Mr Panțiru was unable to attend delibera-

tions on 12 January 2000, Mr L. Cafilisch, substitute judge, replaced him as a member of the Grand Chamber (Rule 24 § 5 (b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, who was born in 1940, is a businessman living in Switzerland. In the early 1980s he imported depilatory appliances into Switzerland which he advertised in magazines.
8. On 12 October 1981 a woman telephoned the applicant from the former Soviet embassy in Berne to order a "Perma Tweez" depilatory appliance.
9. That telephone call was intercepted by the Federal Public Prosecutor's Office (*Bundesanwaltshaft* – "the Public Prosecutor's Office"), which then requested the Intelligence Service of the police of the Canton of Zürich to carry out an investigation into the applicant and the goods he sold.
10. The report drawn up by the police of the Canton of Zürich in December 1981 stated that the applicant, who had been registered in the Commercial Registry since 1973, was in the aerosols business. It stated that "Perma Tweez" was a battery-operated depilatory appliance; a leaflet describing the appliance was appended to the report.
11. On 24 December 1981 the Public Prosecutor's Office drew up a card on the applicant for its national security card index on the basis of the particulars provided by the police of the Canton of Zürich.
12. In 1990 the public learned of the existence of the card index being kept by the Public Prosecutor's Office and many people, including the applicant, asked to consult their card.
13. Various laws on accessing and processing the Confederation's documents were then enacted.
14. On 12 September 1990 the special officer in charge of the Confederation's national security documents ("the special officer") sent the applicant, at his request, a photocopy of his card.
15. The applicant's card, which was numbered (1153 : 0) 614 and on which two passages had been blue-pencilled ..., contained the following information:

"from the Zürich Intelligence Service: A. identified as a contact with the Russian embassy according to A. does business of various kinds with the [A.] company. Appendices: extract from the Commercial Registry and leaflet. ..."
16. As soon as he received his card, the applicant asked the Ombudsman at the Public Prosecutor's Office to disclose the blue-pencilled passages.
17. On 9 October 1990 the Ombudsman replied that the censored passage at the end of the card rightly concealed the initials of the federal police officers who had obtained the information on the card. The other censored passage related to a technical surveillance measure ordered against a third party; the Ombudsman stated that he would be recommending that the special officer disclose that information, since – in his view – the applicant's interest prevailed over the public interest in keeping it secret.
18. On 19 April 1991 the special officer decided, on the basis of Article 5 § 1 of the Order of 5 March 1990 on the Processing of Federal National Security Documents, that the initials at the end of the card could not be disclosed. He also considered that the other censored passage contained counter-intelligence which, pursuant to Article 5 § 3 (a) of the Order, should not be disclosed. On the basis of those considerations, the disclosure of the applicant's card was extended to one word ("report"):

"from the Zürich Intelligence Service: A. identified as a contact with the Russian embassy according to report ... A. does business of various kinds with the [A.] company. Appendices: extract from the Commercial Registry and leaflet. ..."
19. On 26 October 1991 the applicant filed a request for compensation with the Federal Department of Finance. His request was refused on 28 January 1992.
20. On 9 March 1992 the applicant filed an administrative-law action with the Federal Court claiming compensation from the Confederation of 5,000 Swiss francs for the unlawful entry of his particulars in the card index kept by the Public Prosecutor's Office. He also requested that his file and card be sent immediately to the Federal Archives with a prohibition on making any copies and that they be ordered to

store the information under lock and key and not disclose any of it without his agreement.

21. On being invited to submit its written observations, the Confederation stated, in its memorial of 26 May 1992, that according to the information provided by the Public Prosecutor's Office and the special officer the record of the surveillance was no longer in the federal police's files. It pointed out in that connection that, pursuant to section 66(1 *ter*) of the Federal Criminal Procedure Act ("FCPA"), documents which were no longer necessary had to be destroyed ("*Das Protokoll der technischen Ueberwachung ist gemäss Auskunft der Bundesanwaltschaft und des Sonderbeauftragten ... in den Akten der Bundespolizei nicht mehr vorhanden. In diesem Zusammenhang ist anzumerken, dass nicht mehr benötigte Akten gemäss Art. 66 Abs. 1ter BStP ... vernichtet werden müssen*").
22. The Federal Court held hearings on 27 October 1993 and 14 September 1994.

The applicant's lawyer pointed out that the case number of the card, namely (1153 : 0) 614, was a code meaning "communist country" (1), "Soviet Union" (153), "espionage established" (0) and "various contacts with the Eastern bloc" (614).

The Confederation's representative stated that where someone (*jemand*) at the former Soviet embassy was under surveillance, on every telephone call both parties to the conversation were identified, a card drawn up on them and a telephone monitoring report (*Telefon-Abhör-Bericht*) made. In that connection she stated that most of the reports had been destroyed and that those which had not been were now stored in bags; the intention had been to destroy them as well, but when the post of special officer had been instituted everything had had to be maintained "in its present state". She went on to state that she did not know whether the telephone monitoring report in respect of the applicant had or had not been destroyed. According to information she had received from the special officer, the reports had not been sorted and it would require about five people and one year's work to examine the contents of all the bags still in existence.

23. In a judgment of 14 September 1994, which was served on 25 January 1995, the Federal Court dismissed all the applicant's claims.
24. Regarding the issue whether there was a legal basis for the measures complained of, the Fed-

eral Court referred first to section 17(3) FCPA and Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office. However, it considered it unnecessary to examine whether those provisions could have provided a lawful basis for the alleged infringement of the applicant's personality rights, since one of the conditions for awarding compensation had not been met.

25. The court then referred to sections 66 et seq., and particularly section 72 FCPA on the monitoring of telephone communications and postal correspondence, and to Articles 265 et seq. of the Criminal Code, which govern "crimes or major offences against the State," and reiterated that information could lawfully be gathered – even before a prosecution was brought – in order to prevent an offence being committed against the State or national security if there was evidence that such an offence was being prepared.

26. In that connection the Federal Court found:

"... a card was drawn up on the plaintiff in connection with the then monitoring of telephone communications with the Soviet embassy for counter-intelligence reasons. As he had contacts with a male or female employee of the Soviet embassy and it was not immediately clear that the 'Perma Tweez' appliance which he sold was a harmless depilatory instrument, the authorities acted correctly in investigating his identity, his circumstances and the 'Perma Tweez' appliance in question and recording the result."

27. The Federal Court held, however, that it did not have to rule on whether those provisions, particularly section 66(1 *ter*) FCPA, allowed the information thus obtained to be kept after it had become apparent that no criminal offence was being prepared ("*Fraglich ist, ob die Aufzeichnungen weiter aufbewahrt werden durften, nachdem sich offenbar herausgestellt hatte, dass keine strafbare Handlung vorbereitet wurde*"), since the applicant had not suffered a serious infringement of his personality rights.
28. In that connection the Federal Court reiterated that, pursuant to section 6(2) of the Federal Liability Act of 14 March 1958, the Swiss Confederation had a duty to pay compensation in cases of serious infringement of personality rights, but considered that in this case that condition had not been met. The Federal Court held that the mere fact that the applicant had been

named in the file as a “contact with the Russian embassy” could hardly be considered as an infringement of his personality rights. Moreover, even if part of the case number meant “espionage established”, there was nothing to indicate that the authorities had considered the applicant to be a spy and although the expression “contact with the Russian embassy” could conceivably imply that the applicant had effectively had regular contact with the embassy, his card had to be seen, not in isolation, but in the wider context of the card index as a whole and the other circumstances of the case; in particular, the fact that no other entry had been made on his card suggested that the authorities did not suspect the applicant of having illegal contacts with the embassy. Furthermore, it could not be presumed that the applicant had been subject to surveillance on other occasions or that the recorded information had been disclosed to third parties. Taken as a whole, the applicant’s file thus appeared to be of minor importance and there was nothing to indicate that it had been used for other purposes or unlawfully disclosed.

29. Lastly, the Federal Court held that the applicant’s administrative-law action, which he had filed with it on 9 March 1992, was an “effective remedy” within the meaning of Article 13 of the Convention. It also pointed out that the applicant could have instituted proceedings challenging certain data in the Public Prosecutor’s card index and requesting that they be amended. In that connection the Federal Court referred to, *inter alia*, the Federal Council’s Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration (section 44), to the Federal Decree of 9 October 1992 on the Consultation of Documents of the Federal Public Prosecutor’s Office (Article 7 § 1) and to the Federal Council’s Order of 20 January 1993 on the Consultation of Documents of the Federal Public Prosecutor’s Office (Article 11 § 1).
30. In 1996 the applicant’s card was removed from the card index and transferred to the Federal Archives where it cannot be consulted for fifty years.

II. RELEVANT DOMESTIC LAW

A. The Federal Constitution

31. The relevant provisions of the Federal Constitution in force at the material time were worded as follows:

Article 102

“The powers and duties of the Federal Council, as referred to in the present Constitution, are the following, among others:

...

9. It shall ensure that Switzerland’s external security is protected and its independence and neutrality maintained;

10. It shall ensure that the Confederation’s internal security is protected and that peace and order are maintained;

...”

B. The Federal Council’s Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor’s Office

32. The relevant provisions of the Federal Council’s Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor’s Office are worded as follows:

Article 1

“The Police Service of the Federal Public Prosecutor’s Office (Federal Police) shall provide an investigation and information service in the interests of the Confederation’s internal and external security. That service shall comprise:

1. The surveillance and prevention of acts liable to endanger the Confederation’s internal or external security (*police politique*);

2. Police investigations in the prosecution of offences against the internal or external security of the Confederation (*police judiciaire*).”

C. The Federal Criminal Procedure Act

33. The relevant provisions of the Federal Criminal Procedure Act in force at the material time were worded as follows:

Section 17

“... ”

3. The Federal Public Prosecutor’s Office shall be provided with the personnel necessary to enable it to run a uniform investigation and information service in the interests of the Confederation’s internal and external security. The Public Prosecutor’s Office shall, as a general rule, act in concert with the relevant police authorities of the cantons. It shall in each case inform those police authorities of the results of its investigations as soon as the aim of and stage reached in the proceedings make it possible to do so.”

Section 66

"1. The investigating judge may order monitoring of the accused's or suspect's postal correspondence and telephone and telegraphic telecommunications if

(a) the criminal proceedings concern a crime or major offence whose seriousness or particular nature justifies intervention or a punishable offence committed by means of the telephone; and if

(b) specific facts cause the person who is to be monitored to be suspected of being a principal or accessory in the commission of the offence; and if

(c) without interception, the necessary investigations would be significantly more difficult to conduct or if other investigative measures have produced no results.

1 *bis*. Where the conditions justifying the monitoring of the accused or suspect are satisfied, third parties may also be monitored if specific facts give rise to the presumption that they are receiving or imparting information intended for the accused or suspect or sent by him ... The telephone connection of third parties may be monitored at any time if there are reasons to suspect that it is being used by the accused.

1 *ter*. Recordings which are not needed for the conduct of an investigation shall be kept in a separate place, under lock and key, and shall be destroyed at the end of the proceedings."

Section 66 bis

"1. Within twenty-four hours of his decision, the investigating judge shall submit a copy of it, accompanied by the file and a brief statement of his reasons, for approval by the President of the Indictment Division.

2. The decision shall remain in force for not more than six months; the investigating judge may extend its validity for one or more further periods of six months. The order extending its validity, accompanied by the file and the statement of reasons, must be submitted, not later than ten days before expiry of the time-limit, for approval by the President of the Indictment Division.

3. The investigating judge shall discontinue the monitoring as soon as it becomes unnecessary, or immediately if his decision is rescinded."

Section 66 ter

"1. The President of the Indictment Division shall scrutinise the decision in the light of the statement of reasons and the file. Where he finds that there has been a breach of federal law, including any abuse of a discretionary power, he shall rescind the decision.

2. He may authorise monitoring provisionally; in that case, he shall lay down a time-limit within which the investigating judge must justify the measure, either by adding any relevant material to the file or orally."

Section 66 quater

"1. The procedure shall be kept secret even from the person concerned. The President of the Indictment Division shall give brief reasons for his decision and notify the investigating judge thereof within five days of the date when the monitoring began or, where the period of validity has been extended, before the further period begins.

2. The President of the Indictment Division shall ensure that the interception measures are discontinued on expiry of the time-limit."

Section 72

"1. Before the opening of a preliminary investigation the Principal Public Prosecutor may order interception of postal correspondence and telephone and telegraphic communications and prescribe the use of technical appliances...

2. He may also order those measures in order to prevent the commission of a punishable offence justifying such intervention where particular circumstances give rise to the presumption that such an offence is being prepared.

3. Sections 66 to 66 *quater* shall be applicable by analogy."

D. Legislation on the processing and consultation of the Confederation's documents

34. The relevant provisions of the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration are worded as follows:

4 General principles**41 Principles governing data processing**

"411. There must be a legal basis for the processing of personal data.

412. Personal data may be processed only for very specific purposes. The data and technique used to process them must be appropriate and necessary to the performance of the task to be carried out.

413. Inaccurate or incomplete data must be rectified having regard to the purpose of the processing.

414. Data which are of no foreseeable further use or which have evidently been processed illegally must be destroyed.

The obligation to store them in the Federal Archives is reserved.

..."

43 Information

"431. As regards personal data files the federal offices and other administrative units having the same status must take the necessary measures to ensure that they can supply information on the legal basis and aim of the files, the nature of the processed data and the lawful recipients thereof to anyone requesting the same.

432. On request, they must indicate in a comprehensible manner to anyone who has disclosed his identity whether – and which – data on him from a particular file have been processed.

..."

44 Rectification or destruction following a request

"If it emerges, on a request, that the data on the person making the request are inaccurate or incomplete, or inappropriate to the purpose for which they have been recorded, or that processing is illegal for another reason, the organ in question must rectify or destroy such data immediately, and at the latest when the file is next accessed."

35. The relevant provisions of the Federal Council's Order of 5 March 1990 on the Processing of Federal National Security Documents are worded as follows:

Article 1

"1. The present Order shall guarantee that persons in respect of whom the federal police possess documents compiled on grounds of national security can defend their personality rights without hindering the performance of national security tasks.

2. Federal documents compiled on grounds of national security shall be placed in the custody of a special officer..."

Article 4

"1. The special officer shall have custody of all documents belonging to the Police Service of the Federal Public Prosecutor's Office.

2. He shall then sort the documents and withdraw those which serve no further purpose..."

Article 5

"1. The special officer shall allow applicants to consult their cards by sending them a photograph thereof.

2. He shall conceal data relating to persons who have processed the cards and to foreign intelligence and security services.

3. Furthermore, he may refuse or restrict the consultation if it

(a) reveals details of investigative procedures in progress or of knowledge relating to the fight against terrorism, counter-intelligence or the fight against organised crime;

..."

Article 13

"1. The ombudsman appointed by the Federal Council shall examine, at the request of the person concerned, whether the present Order has been complied with.

..."

Article 14

"1. Anyone claiming that his request to consult his card has not been dealt with in accordance with the present Order may contact the ombudsman within thirty days.

2. If the ombudsman considers that the Order has been complied with, he shall inform the applicant accordingly. The applicant may lodge an appeal with the Federal Council within thirty days of receiving the ombudsman's decision.

3. If the ombudsman considers that the Order has not been complied with, he shall inform the special officer and the applicant accordingly. The special officer shall then give a fresh decision, which is subject to appeal."

36. The relevant provisions of the Federal Decree of 9 October 1992 on the Consultation of Documents of the Federal Public Prosecutor's

Office provide:

Article 4

"1. Authorisation to consult documents shall be granted to persons who submit a prima facie case that they have sustained pecuniary or non-pecuniary damage in connection with information transpiring from documents held by the Police Service or with acts by officers of the Federal Public Prosecutor's Office.

..."

Article 7

"1. The special officer shall sort the documents placed in his custody and eliminate those which are no longer necessary for national security and are no longer the subject of a consultation process.

2. Documents relating to criminal proceedings shall be eliminated if

(a) the time-limit for prosecuting the offence has expired following a stay of the proceedings;

(b) the proceedings have been closed by an enforceable judgment.

3. The eliminated documents shall be stored in the Federal Archives. They can no longer be consulted by the authorities and access to them shall be prohibited for fifty years."

37. The relevant provisions of the Federal Council's Order of 20 January 1993 on the Consultation of Documents of the Federal Public Prosecutor's Office are worded as follows:

Article 11

"1. A person who contests the accuracy of certain data may request that an appropriate annotation be marked on the documents or appended thereto.

2. Documents which are manifestly erroneous shall be rectified at the request of the person concerned.

..."

E. The Parliamentary Commission of Inquiry set up to investigate the so-called "card index" affair

38. A Parliamentary Commission of Inquiry ("PCI") was set up to investigate the so-called "card index" affair. In its report published in the Federal Gazette (*Feuille fédérale* (FF) 1990, I, pp. 593 et seq.) it noted, among other things, in connec-

tion with the monitoring of telephone conversations (pp. 759 and 760):

"According to various sources, a number of people feared that their telephone conversations were being monitored for political reasons. The PCI has conducted a thorough examination of the technical surveillance measures ordered by the Federal Public Prosecutor's Office. In the course of that examination it requested from the Federal Public Prosecutor's Office a full and detailed list of the persons whose telephones were tapped and the telephone connections which were monitored; that list was then compared with the list requested independently from the Post, Telecommunications and Telegraph Office. The PCI was then able to satisfy itself, partly with the help of certain documents and also following an interview with the President of the Indictment Division of the Federal Court, that there were no differences between the lists drawn up by the authorities ordering the telephone tapping and the authorities implementing those orders.

...

The federal investigating judge and, before the preliminary investigation begins, the Federal Public Prosecutor have power to order a surveillance measure. A decision taken to this effect is valid for no more than six months but may be extended if necessary. It requires in all cases the approval of the President of the Indictment Division of the Federal Court. That approval procedure has been considerably formalised over recent years and is now applied by means of a pre-printed form. The PCI noted that all decisions had been submitted to the President of the Indictment Division and that he had approved all of them without exception..."

PROCEEDINGS BEFORE THE COMMISSION

39. Mr Amann applied to the Commission on 27 June 1995. Relying on Articles 8 and 13 of the Convention, he complained that a telephone call he had received had been intercepted, that the Public Prosecutor's Office had filled in a card on him and kept it in the resulting federal card index and that he had had no effective remedy in that connection.
40. The Commission (First Chamber) declared the application (no. 27798/95) admissible on 3 December 1997. In its report of 20 May 1998 (for-

mer Article 31 of the Convention) it concluded, by nine votes to eight, that there had been a violation of Article 8 and, unanimously, that there had been no violation of Article 13. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT

41. In their memorials the Government asked the Court to find that the applicant had not repeated his complaint of a violation of Article 13 of the Convention and that there was therefore no need to examine it. With regard to the merits, the Government asked the Court to hold that the facts which gave rise to the application introduced by Mr Amann against Switzerland had not amounted to a violation of the Convention.
42. The applicant asked the Court to find that there had been a violation of Articles 8 and 13 of the Convention and to award him just satisfaction under Article 41.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ARISING FROM THE INTERCEPTION OF THE TELEPHONE CALL OF 12 OCTOBER 1981

43. The applicant complained that the interception of the telephone call he had received from a person at the former Soviet embassy in Berne had breached Article 8 of the Convention, which is worded as follows:

"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 freedoms of others."

A. Applicability of Article 8

44. The Court reiterates that telephone calls received on private or business premises are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 § 1 (see the Halford v. the United Kingdom judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1016, § 44). This point was not in fact disputed.

B. Compliance with Article 8

1. Whether there was any interference

45. The Court notes that it is not disputed that the Public Prosecutor's Office intercepted and recorded a telephone call received by the applicant on 12 October 1981 from a person at the former Soviet embassy in Berne. There was therefore "interference by a public authority", within the meaning of Article 8 § 2, with the exercise of a right guaranteed to the applicant under paragraph 1 of that provision (see the Kopp v. Switzerland judgment of 25 March 1998, *Reports* 1998-II, p. 540, § 53).

2. Justification for the interference

46. Such interference breaches Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is, in addition, "necessary in a democratic society" to achieve those aims.

C. Whether the interference was "in accordance with the law"

47. The applicant submitted that there was no legal basis for the interference in Swiss law. In particular, he asserted that the Government could not rely on sections 66 to 72 FCPA as a basis for the measure complained of since they had not produced any evidence to prove that criminal proceedings had been brought against a third party or that the authorities had complied with the procedure laid down by those provisions. He argued in that connection that the Government's claim that the documents were no longer available lacked credibility. It transpired from the report of the Parliamentary Commission of Inquiry set up to investigate the so-called "card index" affair that lists had been kept relating to the telephone tapping ordered by the Public Prosecutor's Office and carried out by the Post, Telecommunications and Telegraph Office; furthermore, the Indictment Division of the Federal Court

had kept registers recording the authorisations issued by its President; moreover, the Government could not claim that an employee at the former Soviet embassy in Berne was being monitored unless they had documents to support that assertion; lastly, the fact that the recording had not been destroyed “at the end of the proceedings” (section 66(1 *ter*) FCPA) showed that there had not been an investigation within the meaning of sections 66 et seq. FCPA.

The applicant maintained that all the telephone lines at the former Soviet embassy in Berne had been systematically tapped without any specific person being suspected of committing an offence or judicial proceedings being instituted in accordance with the law. He submitted that this presumption was confirmed by the fact that during the proceedings before the Swiss authorities the latter had expressly mentioned the term “counter-intelligence”. In addition, the inquiries by the Parliamentary Commission of Inquiry set up to investigate the so-called “card index” affair had shown that the federal police had monitored citizens for decades without a court order. Section 17(3) FCPA could not be relied on as a basis for such practices by the *police politique*.

With regard to the Federal Council’s Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor’s Office, the applicant pointed out that the text contained purely organisational provisions relating to the various offices of the Federal Department of Justice and Police and did not in any way empower those offices to interfere with the rights and freedoms protected by the Convention; it could not therefore be considered to be an adequate legal basis. Moreover, the applicant considered that the text was not sufficiently precise and accessible to satisfy the requirement of “foreseeability” as defined by the Court’s case-law.

48. The Commission found that there had not been a sufficient legal basis for the monitoring of the applicant’s telephone conversation. The Federal Council’s Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor’s Office was drafted in too general terms. Furthermore, it had not been shown that the procedure laid down in sections 66 et seq. FCPA had been followed.
49. The Government maintained that there had definitely been a legal basis in Swiss law. As

a preliminary point, they indicated that the measure in question had been carried out, under section 66(1 *bis*) FCPA, in the context of monitoring ordered by the Public Prosecutor’s Office of a particular employee at the former Soviet embassy in Berne and that the applicant had not been the subject of the telephone tapping, either as a suspect or as a third party (the latter being the person who had ordered the depilatory appliance); the applicant had therefore been recorded “fortuitously” as a “necessary participant”.

In the Government’s submission it was of little importance whether the measure had been ordered in the context of criminal proceedings which had already been instituted or with the aim of preventing the commission of an offence, since section 17(3) (based on Article 102 § 9 and 10 of the Federal Constitution), section 72 FCPA and Article 1 of the Federal Council’s Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor’s Office formed a sufficient legal basis in either case. It pointed out that the Court had concluded in a similar case that there had been a legal basis in Swiss law (see the Kopp judgment cited above, pp. 540-41, § 56-61).

The only decisive question was whether the safeguards provided for by law had been complied with. In that connection the Government stated that since they were unable to consult the file they could not verify whether the approval of the President of the Indictment Division of the Federal Court required under section 66 *bis* FCPA had been granted. In the light of the statement in the report by the Parliamentary Commission of Inquiry set up to examine the so-called “card index” affair that the President of the Indictment Division of the Federal Court had approved all the investigating judge’s decisions, they presumed, however, that he had also done so in this case.

50. The Court draws attention to its established case-law, according to which the expression “in accordance with the law” not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see the Kopp judgment cited above, p. 540, § 55).
 - i *Whether there was a legal basis in Swiss law*
51. The Government and the applicant disagreed as to whether that condition had been met.

The Government's submission that sections 17(3) and 72 FCPA and Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office amounted to a sufficient legal basis was disputed by the applicant.

52. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see the *Kruslin v. France* judgment of 24 April 1990, Series A no. 176-A, pp. 21-22, § 29, and the *Kopp* judgment cited above, p. 541, § 59). In that connection it points out that the Federal Court, in its judgment of 14 September 1994, held that it was unnecessary to examine whether sections 17(3) FCPA and Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office could justify the alleged infringement of the applicant's personality rights. Moreover, that court expressed itself only in very general terms regarding section 72 FCPA, confining itself to pointing out that information could lawfully be gathered in order to prevent an offence being committed against the State or national security if there was evidence that such an offence was being prepared.
53. The Court has, admittedly, already ruled on the issue whether the Federal Criminal Procedure Act amounted, under Swiss law, to a sufficient legal basis for telephone tapping (see the *Kopp* judgment cited above, pp. 540-41, § 56-61). Unlike the position in the instant case, however, the authority to which Mr Kopp had submitted his complaint (the Federal Council) had examined in detail whether the surveillance was lawful (*ibid.*, p. 533, § 31 (b)) and section 72 FCPA was not in issue.
54. In the instant case the Court does not consider it necessary to determine whether there was a legal basis for the interception of the telephone call of 12 October 1981. Even assuming that there was, one of the requirements flowing from the expression "in accordance with the law", namely – here – foreseeability, was not satisfied.

ii *Quality of the law*

55. The Court reiterates that the phrase "in accordance with the law" implies conditions which go beyond the existence of a legal basis in domestic law and requires that the legal basis be "accessible" and "foreseeable".
56. According to the Court's established case-law,

a rule is "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct (see the *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66). With regard to secret surveillance measures the Court has underlined the importance of that concept in the following terms (*ibid.*, pp. 32-33, § 67-68):

"The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ... The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident...

... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

It has also stated that "tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated" (see the *Kopp* judgment cited above, pp. 542-43, § 72).

57. The "quality" of the legal provisions relied on in the instant case must therefore be considered.
58. The Court points out first of all that Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office, according to which the federal police "shall provide an investigation and information service in the interests of the Confederation's internal and external security",

including by means of “surveillance” measures, contains no indication as to the persons concerned by such measures, the circumstances in which they may be ordered, the means to be employed or the procedures to be observed. That rule cannot therefore be considered to be sufficiently clear and detailed to afford appropriate protection against interference by the authorities with the applicant’s right to respect for his private life and correspondence.

59. It considers that the same is true of section 17(3) FCPA, which is drafted in similar terms.
60. As regards the other provisions of the Federal Criminal Procedure Act, the Court observes that section 66 defines the categories of persons in respect of whom telephone tapping may be judicially ordered and the circumstances in which such surveillance may be ordered. Furthermore, sections 66 *bis* et seq. set out the procedure to be followed; thus, implementation of the measure is limited in time and subject to the control of an independent judge, in the instant case the President of the Indictment Division of the Federal Court.
61. The Court does not in any way minimise the importance of those guarantees. It points out, however, that the Government were unable to establish that the conditions of application of section 66 FCPA had been complied with or that the safeguards provided for in sections 66 et seq. FCPA had been observed.

It points out further that, in the Government’s submission, the applicant had not been the subject of the impugned measure, either as a suspect or an accused, or as a third party presumed to be receiving information or sending it to a suspect or an accused, but had been involved “fortuitously” in a telephone conversation recorded in the course of surveillance measures taken against a particular member of staff of the former Soviet embassy in Berne.

The primary object of the Federal Criminal Procedure Act is the surveillance of persons suspected or accused of a crime or major offence (section 66(1) FCPA), or even third parties presumed to be receiving information from or sending it to such persons (section 66(1) *bis* FCPA), but the Act does not regulate in detail the case of persons monitored “fortuitously” as “necessary participants” in a telephone conversation recorded by the authorities pursuant to those provisions. In particular, the Act does not specify the precautions which should be taken with regard to those persons.

62. The Court concludes that the interference cannot therefore be considered to have been “in accordance with the law” since Swiss law does not indicate with sufficient clarity the scope and conditions of exercise of the authorities’ discretionary power in the area under consideration.

It follows that there has been a violation of Article 8 of the Convention arising from the recording of the telephone call received by the applicant on 12 October 1981 from a person at the former Soviet embassy in Berne.

D. Purpose and necessity of the interference

63. Having regard to the foregoing conclusion, the Court does not consider it necessary to examine whether the other requirements of paragraph 2 of Article 8 were complied with.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ARISING FROM THE CREATION OF A CARD AND THE STORING THEREOF IN THE CONFEDERATION’S CARD INDEX

64. The applicant complained that the creation of a card on him, following the interception of a telephone call he had received from a person at the former Soviet embassy in Berne, and the storing thereof in the Confederation’s card index had resulted in a violation of Article 8 of the Convention.

A. Applicability of Article 8

65. The Court reiterates that the storing of data relating to the “private life” of an individual falls within the application of Article 8 § 1 (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 22, § 48).

It points out in this connection that the term “private life” must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of “private life” (see the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and the *Halford* judgment cited above, pp. 1015-16, § 42).

That broad interpretation corresponds with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 and whose purpose is "to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him" (Article 1), such personal data being defined as "any information relating to an identified or identifiable individual" (Article 2).

66. In the present case the Court notes that a card was filled in on the applicant on which it was stated that he was a "contact with the Russian embassy" and did "business of various kinds with the [A.] company" (see paragraphs 15 and 18 above).
67. The Court finds that those details undeniably amounted to data relating to the applicant's "private life" and that, accordingly, Article 8 is applicable to this complaint also.

B. Compliance with Article 8

1. Whether there was any interference

68. The Government submitted that the issue whether there had been "interference" within the meaning of Article 8 of the Convention remained open since "the card contained no sensitive information about the applicant's private life", the latter "had not in any way been inconvenienced as a result of the creation and storing of his card" and that it had "in all probability never been consulted by a third party".
69. The Court reiterates that the storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding (see, *mutatis mutandis*, the Leander judgment cited above, p. 22, § 48, and the Kopp judgment cited above, p. 540, § 53).
70. In the instant case the Court notes that a card containing data relating to the applicant's private life was filled in by the Public Prosecutor's Office and stored in the Confederation's card index. In that connection it points out that it is not for the Court to speculate as to whether the information gathered on the applicant was sensitive or not or as to whether the ap-

plicant had been inconvenienced in any way. It is sufficient for it to find that data relating to the private life of an individual were stored by a public authority to conclude that, in the instant case, the creation and storing of the impugned card amounted to an interference, within the meaning of Article 8, with the applicant's right to respect for his private life.

2. Justification for the interference

71. Such interference breaches Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and, in addition, is "necessary in a democratic society" to achieve those aims.

C. Was the interference "in accordance with the law"?

72. The applicant submitted that there was no legal basis for creating and storing a card on him. In particular, he asserted that section 17(3) FCPA did not authorise the federal police to record the results of their surveillance measures. As to the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration, these were intended for the civil servants of the administration and were not therefore sufficiently clear and precise to enable citizens to ascertain their rights and obligations.

In his submission the authorities had, furthermore, failed to comply with the rules in force, since section 66(1 *ter*) FCPA and section 414 of the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration stipulated that recordings which turned out not to be necessary to the conduct of an investigation should be destroyed.

Lastly, he pointed out that the legislation which had come into force in the early 1990s, after the so-called "card index" affair had broken, did not provide for the possibility of instituting judicial proceedings to have a card destroyed. Thus, under the Federal Decree of 9 October 1992 on the Consultation of Documents of the Federal Public Prosecutor's Office and the Federal Council's Order of 20 January 1993 on the Consultation of Documents of the Federal Public Prosecutor's Office, cards were stored in the Federal Archives and all interested persons could do was have their card annotated if they disputed its contents.

73. The Commission agreed with the applicant. In

particular, it considered that the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration were insufficiently precise and merely presupposed that there was a legal basis to the storing of information without themselves providing one.

74. The Government submitted that the Swiss legal system provided a sufficiently accessible and foreseeable legal basis having regard to "the special nature of secret measures in the field of national security".

Before 1990, they submitted, the impugned measures had mainly been based on section 17(3) FCPA and Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office, those provisions being given concrete form by the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration. They pointed out that those directives had been published in the Federal Gazette (FF 1981, I, p. 1314).

After 1990, they submitted, a number of texts had been enacted on the processing and consultation of documents containing personal data, in particular the Federal Council's Order of 5 March 1990 on the Processing of Federal National Security Documents, the Federal Decree of 9 October 1992 on the Consultation of Documents of the Federal Public Prosecutor's Office and the Federal Council's Order of 20 January 1993 on the Consultation of Documents of the Federal Public Prosecutor's Office.

i Creation of the card

75. The Court notes that in December 1981, when the card on the applicant was created, the Federal Criminal Procedure Act, the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office and the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration were in force. None of those provisions, however, expressly mentions the existence of a register kept by the Public Prosecutor's Office, which raises the question whether there was "a legal basis in Swiss law" for the creation of the card in question and, if so, whether that legal basis was "accessible" (see the Leander judgment cited above, p. 23, § 51). It observes in that connection that the Federal Council's Directives of 16 March 1981 were above all intended for the staff of the federal administra-

tion.

In the instant case, however, it does not consider it necessary to rule on this subject, since even supposing that there was an accessible legal basis for the creation of the card in December 1981, that basis was not "foreseeable".

76. The Court has found above (see paragraphs 58 and 59) that section 17(3) FCPA and Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office were drafted in terms too general to satisfy the requirement of foreseeability in the field of telephone tapping. For the reasons already set out, it arrives at the same conclusion concerning the creation of the card on the applicant.

As regards the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration, they set out some general principles, for example that "there must be a legal basis for the processing of personal data" (section 411) or that "personal data may be processed only for very specific purposes" (section 412), but do not contain any appropriate indication as to the scope and conditions of exercise of the power conferred on the Public Prosecutor's Office to gather, record and store information; thus, they do not specify the conditions in which cards may be created, the procedures that have to be followed, the information which may be stored or comments which might be forbidden.

Those directives, like the Federal Criminal Procedure Act and the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office, cannot therefore be considered sufficiently clear and detailed to guarantee adequate protection against interference by the authorities with the applicant's right to respect for his private life.

77. The creation of the card on the applicant was not therefore "in accordance with the law" within the meaning of Article 8 of the Convention.

ii Storing of the card

78. The Court points out first of all that it would seem unlikely that the storing of a card which had not been created "in accordance with the law" could satisfy that requirement.

Moreover, it notes that Swiss law, both before and after 1990, expressly provided that data which turned out not to be "necessary" or "had

no further purpose" should be destroyed (section 66(1 *ter*) FCPA, section 414 of the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration and Article 7 of the Federal Decree of 9 October 1992 on the Consultation of Documents of the Federal Public Prosecutor's Office).

In the instant case the authorities did not destroy the stored information when it emerged that no offence was being prepared, as the Federal Court found in its judgment of 14 September 1994.

79. For these reasons, the storing of the card on the applicant was not "in accordance with the law" within the meaning of Article 8 of the Convention.
80. The Court concludes that both the creation of the impugned card by the Public Prosecutor's Office and the storing of it in the Confederation's card index amounted to interference with the applicant's private life which cannot be considered to be "in accordance with the law" since Swiss law does not indicate with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power in the area under consideration. It follows that there has been a violation of Article 8 of the Convention.

D. Purpose and necessity of the interference

81. Having regard to the foregoing conclusion, the Court does not consider it necessary to examine whether the other requirements of paragraph 2 of Article 8 were complied with.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

82. The applicant also alleged a violation of Article 13 of the Convention, which is worded as follows:

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

A. The Government's preliminary objection

83. The Government noted that the applicant had not repeated his complaint relating to Article 13 of the Convention in his memorial submitted on 11 May 1999. They accordingly consid-

ered that there was no need to examine that issue.

84. The Court notes that the applicant relied on Article 13 of the Convention before the Commission, that the Commission examined that complaint in its report of 20 May 1998 and that, when invited to lodge with the Court memorials relating to the issues raised by this case, as declared admissible by the Commission, the applicant submitted observations on Article 13 in his memorial filed on 14 June 1999.

Accordingly, the Court considers that the applicant did not manifest an intention to waive before it his complaint of a violation of Article 13 of the Convention which he had alleged before the Commission.

The Government's preliminary objection cannot therefore be upheld.

B. Merits of the complaint

85. The applicant complained that he had not had an "effective remedy" since he had been unable to raise before the Federal Court the issue whether the telephone tapping and the creation and storing of the card were lawful.
86. The Commission found that the administrative-law action brought by the applicant had amounted to an effective remedy.
87. The Government agreed with that finding. They stressed that the applicant, in bringing an administrative-law action in the Federal Court, had sought compensation for non-pecuniary damage and, in the alternative, a finding that the card on him was illegal.
88. The Court reiterates first of all that in cases arising from individual petitions the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see the Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, pp. 30-31, § 55).

It further observes that Article 13 of the Convention requires that any individual who considers himself injured by a measure allegedly contrary to the Convention should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see the Leander judgment cited above, pp. 29-30, § 77). That provision does not, however, require the certainty of a

favourable outcome (see the *D. v. the United Kingdom* judgment of 2 May 1997, *Reports* 1997-III, p. 798, § 71).

89. In the instant case the Court notes that the applicant was able to consult his card as soon as he asked to do so, in 1990, when the general public became aware of the existence of the card index being kept by the Public Prosecutor's Office. It also points out that the applicant brought an administrative-law action in the Federal Court and that on that occasion he was able to complain, firstly, about the lack of a legal basis for the telephone tapping and the creation of his card and, secondly, the lack of an "effective remedy" against those measures. It notes that the Federal Court had jurisdiction to rule on those complaints and that it duly examined them. In that connection it reiterates that the mere fact that all the applicant's claims were dismissed is not in itself sufficient to determine whether or not the administrative-law action was "effective".
90. The applicant therefore had an effective remedy under Swiss law to complain of the violations of the Convention which he alleged. There has not therefore been a violation of Article 13.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

92. The applicant claimed 1,000 Swiss francs (CHF) for non-pecuniary damage and did not claim any amount in respect of pecuniary damage.
93. The Government maintained that if the Court were to find a violation of the Convention, the non-pecuniary damage would be adequately compensated by the publicity given to the judgment.
94. The Court considers that the non-pecuniary damage is adequately compensated by the finding of violations of Article 8 of the Conven-

tion.

B. Costs and expenses

95. The applicant also claimed CHF 7,082.15 in respect of his costs and expenses for the proceedings before the Convention institutions.
96. The Government stated that, in the light of all the circumstances of the present case and the amounts awarded by the Court in other applications directed against Switzerland, they were prepared to pay CHF 5,000.
97. The Court considers that the claim for costs and expenses is reasonable and that it should be allowed in full.

C. Default interest

98. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention arising from the interception of the telephone call;
2. Holds that there has been a violation of Article 8 of the Convention arising from the creation and storing of the card;
3. Dismisses the Government's preliminary objection relating to Article 13 of the Convention;
4. Holds that there has not been a violation of Article 13 of the Convention;
5. Holds that the present judgment in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. Holds
 - (a) that the respondent State is to pay the applicant, within three months, CHF 7,082.15 (seven thousand and eighty-two Swiss francs fifteen centimes) for costs and expenses;
 - (b) that simple interest at an annual rate of 5% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;
7. Dismisses the remainder of the claim for just

satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 February 2000.

Elisabeth Palm, *President*

Michele de Salvia, *Registrar*

ECHR

ECJ

SECOND SECTION

CASE OF KOPP v SWITZERLAND

(13/1997/797/1000)

JUDGMENT

STRASBOURG
25 March 1998

TELEPHONE, TAPPING, COMMUNICATION, INTERFERENCE, PRIVATE LIFE, BUSINESS, LAWYER, INTERCEPTION, INVESTIGATION, CORRESPONDENCE, PROTECTED PERSON

IN THE CASE OF KOPP V. SWITZERLAND,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court B3, as a Chamber composed of the following judges:

Mr **R. Bernhardt**, *President*,

Mr **Thór Vilhjálmsson**,

Mr **L.-E. Pettiti**,

Mr **C. Russo**,

Mr **A. Spielmann**,

Mr **J.M. Morenilla**,

Mr **A.B. Baka**,

Mr **L. Wildhaber**,

Mr **M. Voicu**,

and also of Mr **H. Petzold**, *Registrar*,

and Mr **P.J. Mahoney**, *Deputy Registrar*,

Having deliberated in private on 29 November 1997 and 28 February 1998,

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

PROCEDURE

1. The case was referred to the Court by a Swiss national, Mr Hans W. Kopp (“the applicant”) on 20 January 1997, by the European Commission of Human Rights (“the Commission”) on 22 January 1997 and by the Government of the Swiss Confederation (“the Government”) on 27 February 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 23224/94) against Switzerland lodged with the Commission under Article 25 by Mr Kopp on 15 December 1993.

The applicant’s application bringing the case before the Court referred to Article 48 of the Convention, as amended by Protocol No. 9, which Switzerland has ratified; the Commission’s request referred to Articles 44 and 48 and to the declaration whereby Switzerland

recognised the compulsory jurisdiction of the Court (Article 46); the Government’s application referred to Articles 45, 47 and 48. The object of the request and of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 of the Convention.

2. On 20 January 1997 the applicant had designated the lawyer who would represent him (Rule 31 of Rules of Court B), who was given leave by the President to use the German language in both the written and the oral proceedings (Rule 28 § 3). The applicant was initially designated by the letters H.W.K., but subsequently agreed to the disclosure of his identity.
3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 21 February 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr C. Russo, Mr A. Spielmann, Mrs E. Palm, Mr A.B. Baka and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr J.M. Morenilla, substitute judge, replaced Mrs Palm, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).
4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant’s lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the memorials of the Government and the applicant on 19 and 27 September 1997 respectively.

On 7 October 1997 the Commission produced the documents on the proceedings before it, as requested by the Registrar on the President’s instructions.

5. In accordance with the President’s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 November 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr **P. Boillat**, Deputy Director, Head of the International Affairs Division, Federal Office of Justice, *Agent*,

Mr **F. Bänziger**, Deputy Federal Public Prosecutor,

Mr **F. Schürmann**, Head of the Human Rights and Council of Europe Section, Federal Office of Justice, *Advisers*;

(b) *for the Commission*

Mr **B. Marxer**, *Delegate*;

(c) *for the applicant*

Mr **T. Poledna**, of the Zürich Bar, *Counsel*.

The Court heard addresses by Mr Marxer, Mr Poledna and Mr Boillat.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Hans W. Kopp, a Swiss national born in 1931, was formerly a lawyer and lives in Zürich (Switzerland).

A. Background to the case

7. The applicant's wife, Mrs Elisabeth Kopp, was a member of the Federal Council and head of the Federal Department of Justice and Police from 1984 until her resignation in January 1989.

1. *The letter of request*

8. On 28 February 1988 a Mr Hauser, a member of the law firm Kopp & Partners, was asked by a client to verify the legality of a request for judicial assistance sent to Switzerland by the United States authorities concerning a tax matter. After studying the file, Mr Hauser declined to accept the work, referring to a standing instruction to members of the applicant's firm to refuse all cases concerning the Federal Department of Justice and Police, for which his wife was at that time responsible. The file was accordingly transferred to the law firm Niederer, Kraft & Frey in Zürich.
9. On 10 June 1988 Niederer, Kraft & Frey asked the Federal Office of Police if they could inspect the letter of request. On 23 August 1988 the Federal Office sent the firm an abridged

(*gestrippte*) version of the document, withholding a confidential section which concerned organised crime.

2. *Mrs Kopp's resignation*

10. In November 1988, in a separate development, the media reported allegations that a company, Shakarchi Trading AG, and Mr Kopp, who was at the relevant time the vice-chairman of its board of directors, were implicated in money laundering. At the end of 1988 Mr Kopp lodged a complaint against a newspaper.

11. At his wife's request, the applicant had resigned as vice-chairman of the board in October 1988. His wife then came under suspicion of disclosing confidential information obtained in an official capacity. As her husband was also suspected of other offences, she was obliged to resign.

3. *The establishment of a parliamentary commission of inquiry*

12. On 31 January 1989 the Swiss parliament set up a parliamentary commission of inquiry to look into the way Mrs Kopp had performed her duties, and the circumstances of her resignation.

13. In February 1989 the chairman of the parliamentary commission of inquiry, Mr Leuenberger, was informed that a Mr X, an American citizen, had obtained from the applicant a document which the Federal Office of Police and the Federal Court had refused to communicate to him, in exchange for a payment of 250,000 Swiss francs. Mr Leuenberger was given this information by a Mr Y, who had himself obtained it from the initial informant, a Mr Z.

14. It subsequently transpired that Mr X was named in the American letter of request, which contained confidential information about his role in organised crime. Suspicion therefore arose that a member of the Federal Department of Justice and Police might have passed on confidential documents relating to the request, thus breaching the duty not to disclose official secrets.

B. *The course of the inquiry and monitoring of the applicant's telephone lines*

15. On 21 November 1989 the Federal Public Prosecutor opened an investigation against a person or persons unknown in order to question the informant Y and to identify the person working at the Federal Department of Justice

and Police who might have disclosed official secrets.

16. He also ordered monitoring of the telephone lines of the informants Y and X, and of those of Mr Kopp and his wife. The applicant was monitored as a "third party", not as a suspect.
17. The monitoring began on 21 November 1989 and ended on 11 December 1989.
18. On 23 November 1989 the President of the Indictment Division of the Federal Court allowed an application by the Federal Public Prosecutor for monitoring of thirteen telephone lines in total, including the applicant's private and professional lines and those of his wife, and in particular a secret line allocated to her as a former member of the Federal Council. The order expressly mentioned that "the lawyers' conversations [were] not to be taken into account".
19. On 24 November 1989 the parliamentary commission of inquiry published its report. It concluded that Mrs Kopp had performed her duties with competence, diligence and circumspection, and that the rumours to the effect that she had allowed external influences to affect the way she performed her duties were unfounded. In February 1990 the Federal Court acquitted Mrs Kopp of disclosing official secrets.
20. On 1 December 1989 the Federal Public Prosecutor's Office interviewed the informant Y, in the presence of the chairman of the parliamentary commission, Mr Leuenberger.
21. On 4 December 1989 Mr Leuenberger contacted the informant Z, who was interviewed by the Federal Public Prosecutor's Office on 8 December.
22. On 12 December 1989, having concluded that the suspicions regarding the disclosure of official secrets were unfounded, the Federal Public Prosecutor's Office discontinued monitoring of all Mr and Mrs Kopp's telephone lines.
23. On 14 December 1989 the Federal Public Prosecutor's Office submitted its final report on the investigation, which stated that in 1988 Mr Hauser had passed on to the firm of Niederer, Kraft & Frey a file relating to the letter of request (see paragraph 8 above) and that there was no evidence that the applicant and his wife had been directly involved in that case.
24. On 6 March 1990 the Federal Public Prosecutor's Office decided to close the investigation,

on the ground that there was no evidence to corroborate the suspicions that the applicant's wife or a member of the Federal Department of Justice and Police had disclosed official secrets, namely certain passages of the letter of request which had been classified as confidential.

25. In a letter of 9 March 1990 the Federal Public Prosecutor's Office informed Mr Kopp that a judicial investigation had been opened, pursuant to Articles 320 and 340 § 1 (7) of the Criminal Code (see paragraph 34 below), in connection with the suspected disclosure of official secrets, and that his private and professional telephone lines had been tapped, in accordance with sections 66 et seq. of the Federal Criminal Procedure Act (see paragraphs 35–38 below).

The letter stated that the monitoring had lasted from 21 November to 11 December 1989 and that "conversations connected with his professional activities as a lawyer [had not been] monitored". It also stated that, pursuant to section 66(1 *ter*) of the Federal Criminal Procedure Act, all the recordings had been destroyed.

26. On 12 March 1990 the parliamentary commission of inquiry issued a communiqué concerning the monitoring of Mr Kopp's telephone lines in connection with the judicial investigation concerning him. It stated in particular:

"In the course of its inquiries, in connection with which it obtained authorisation to intercept telephone communications, the [Federal] Public Prosecutor's Office discovered that the American citizen's Swiss representatives had tried to obtain the confidential document in the file by applying to [the applicant]. They were hoping for privileged access to the Federal Department of Justice and Police on account of the fact that he was the husband of the Federal Councillor then responsible for that Department. For a fee, a lawyer from [the applicant]'s law firm studied the file in order to decide whether to take on the case, but turned it down. An attempt was then made to obtain the confidential part of the file through another lawyer. The American letter of request was in the end disclosed, but only after the confidential passages had been blotted out. On the basis of these findings, the Federal Public Prosecutor's Office discontinued the investigation... The suspicion that there had been a disclosure of official secrets thus proved to be unfounded. The police investigation did, however, reveal how the rumour that led to the information and the suspicion arose."

27. On 13 March 1990 a number of Swiss newspapers commented on the above communiqué. They mentioned the applicant among the persons implicated and mentioned that telephones had been tapped.

C. The proceedings brought by the applicant

1. *The complaint to the Federal Department of Justice and Police*

28. On 10 April, 3 September and 10 October 1990 Mr Kopp lodged complaints with the Federal Department of Justice and Police about breaches of the legislation on telephone tapping and of Article 8 of the Convention.
29. On 2 November 1992 the Federal Department dismissed the applicant's complaints. Considering that they were to be classified as complaints to a higher authority, it refused him unrestricted access to his file.

2. *The administrative appeal to the Federal Council*

30. On 2 December 1992 Mr Kopp lodged an administrative appeal with the Federal Council against the decision taken on 2 November 1992 by the Federal Department of Justice and Police. He complained, among other matters, of unlawful telephone tapping and of the refusal to give him free access to the file.

Under the heading "Violation of Article 8 of the Convention", he made the following submission in particular:

"In that context, it should also be noted that the telephone lines of [the applicant]'s law firm, which included a number of partners, were tapped. Section 66(1 *bis*) of the Federal Criminal Procedure Act expressly prohibits the interception of such telephone conversations. Interception of telephone conversations with [the applicant]'s law firm was therefore likewise illegal under the above-mentioned provision of Swiss law."

31. On 30 June 1993 the Federal Council dismissed the administrative appeal.

It observed that, where telephone tapping was concerned, a complaint to a higher authority, even one which had no basis in law, was to be treated as a normal administrative appeal. It held that it had jurisdiction to determine whether monitoring of the applicant's telephone lines had been unlawful, whether that measure had been in breach of the Convention and whether the applicant's right to in-

spect his file had been infringed. If his personal rights had been infringed, the applicant could claim damages. He could also rely on the Federal Council's decision in order to seek redress (*Genugtuung*) from the Federal Court.

(a) The right to inspect the file

The Federal Council considered that the applicant should have access only to those documents in the file which were directly relevant to the fact that he had had his telephone tapped as a "third party". It noted that he had had restricted access to the documents, some of which had been censored, particularly as regards the informants' names. Others, which concerned, for instance, the telephone tapping, had not been made available to him, but he had been orally informed of their existence and content. Several documents concerning third parties had not been handed over to him because their interests prevailed over his.

(b) The lawfulness of the telephone tapping

According to the Federal Council, section 66 of the Federal Criminal Procedure Act authorised monitoring the telephones of third parties, such as the applicant, if there was evidence giving rise to a presumption that they were receiving information from an offender or imparting information to him.

It considered that in the period of general uncertainty due to rumours of subversion which had then obtained (*eine durch Unterwanderungsgerüchte verunsicherte Zeit*) there had been specific evidence pointing to a disclosure of official secrets by someone within the Federal Department of Justice and Police. The document in question contained confidential information about which guarantees had been given to the United States. The credibility of Switzerland had therefore been at stake. An apparent risk had been identified when the name of the applicant, who was the husband of the former head of the Department of Justice and Police, was mentioned.

According to the Federal Council, it had been necessary to tap the telephone lines at the beginning of the investigation, before contacts were established with Mr Y and Mr Z. The civil servants concerned had therefore not immediately looked into the informants' credibility, considering that any further contact would have compromised the investigation.

The Federal Council observed that the applicant had had his telephone tapped not as a

suspect but as a “third party” within the meaning of section 66(1 *bis*) of the Federal Criminal Procedure Act. The conversations he had had in the capacity of lawyer had been expressly excluded. As he was not a civil servant, he could not have been guilty of the offence concerned. His wife had been one of the theoretically possible suspects, but there was no real evidence implicating her or anyone else. The fact that the applicant’s telephone lines had been monitored did not mean, therefore, that he had been under suspicion in the criminal sense. Moreover, the fact that the police investigation had been initiated in respect of “a person or persons unknown” was not simply a ploy to preserve appearances. Lastly, the investigation had not been ordered for political reasons and the chairman of the parliamentary commission had not been in a position to influence it.

In conclusion, the Federal Council observed that the conversations recorded had been of no interest to the investigators and no report on them had been made. Be that as it may, even if such a report had been sent to the parliamentary commission, it could not have been used improperly because its members were bound by the duty not to disclose official secrets.

3. *The administrative-law appeal to the Federal Court*

32. The applicant also lodged with the Federal Court an administrative-law appeal against the decision taken on 2 November 1992 by the Federal Department of Justice and Police (see paragraph 29 above). He asked the Federal Court to rule that the telephone tapping had been unlawful and accordingly to order the institution of criminal proceedings against those responsible.
33. On 8 March 1994 the Federal Court gave judgment against the applicant.

It first considered whether he should have been permitted to inspect the whole of the file when the case had been brought before the Federal Department of Justice and Police. It noted that he had been able to inspect those passages in the document which had determined the decision (*entscheidungswesentlich*) and that the decision not to disclose the informants’ names had been justified. It held that the above conclusion was also consistent with the parliamentary commission of inquiry’s decision to guarantee the informants’ anonymity. Moreover, on

the basis of even a partial inspection of the file (*gestützt auf die ihm zugestellten “gestrippten” Akten*), the applicant had been able to lodge appeals.

The Federal Court then considered whether criminal proceedings should be brought in connection with the monitoring of the applicant’s telephone lines. It held that it was not required to provide a conclusive (*abschliessend*) answer to the question whether the telephone tapping constituted a violation of Article 8 of the Convention, having regard in particular to the fact that the applicant had already appealed to the Federal Council. It noted that criminal proceedings had been instituted for a presumed disclosure of official secrets on the basis of information passed on by the chairman of the parliamentary commission of inquiry. The applicant’s firm was involved inasmuch as one of his partners had looked into the case in order to decide whether he should take it on. The presumption by the Federal Public Prosecutor’s Office that the first informant or the disloyal civil servant would contact the applicant did not seem to have been wholly unjustified.

II. RELEVANT DOMESTIC LAW

A. The Swiss Criminal Code

34. Under Article 320 § 1 of the Swiss Criminal Code, any person who discloses a secret entrusted to him in the capacity of civil servant makes himself liable to imprisonment or a fine. Under Article 340 § 1 (7), the offence comes under the jurisdiction of the Federal Court.

B. The Federal Criminal Procedure Act

35. The relevant provisions of the Federal Criminal Procedure Act (“the FCPA”), in the version of 23 March 1979, which was in force at the material time, were worded as follows:

Section 66

“1. The investigating judge may order monitoring of the accused’s or suspect’s postal correspondence and telecommunications...

1 *bis*. Where the conditions justifying the monitoring of the accused or suspect are satisfied, third parties may also be monitored if specific facts give rise to the presumption that they are receiving or imparting information intended for the accused or suspect or sent by him. Persons who, by virtue of section 77, may refuse to give evidence shall be exempt.

...

1 *ter*. Recordings which are not needed for the conduct of an investigation shall be kept in a separate place, under lock and key, and shall be destroyed at the end of the proceedings...

Section 66 *bis*

"1. Within twenty-four hours of his decision, the investigating judge shall submit a copy of it, accompanied by the file and a brief statement of his reasons, for approval by the President of the Indictment Division.

2. The decision shall remain in force for not more than six months; the investigating judge may extend its validity for one or more further periods of six months. The order extending its validity, accompanied by the file and the statement of reasons, must be submitted, not later than ten days before expiry of the time-limit, for approval by the President of the Indictment Division.

3. The investigating judge shall discontinue the monitoring as soon as it becomes unnecessary, or immediately if his decision is rescinded."

Section 66 *ter*

"1. The President of the Indictment Division shall scrutinise the decision in the light of the statement of reasons and the file. Where he finds that there has been a breach of federal law, including any abuse of a discretionary power, he shall rescind the decision.

2. He may authorise monitoring provisionally; in that case, he shall lay down a time-limit within which the investigating judge must justify the measure, either by adding any relevant material to the file or orally."

Section 66 *quater*

"1. The procedure shall be kept secret even from the person concerned. The President of the Indictment Division shall give brief reasons for his decision and notify the investigating judge thereof within five days of the date when the monitoring began, or, where the period of validity has been extended, before the further period begins.

2. The President of the Indictment Division shall ensure that the interception measures are discontinued on expiry of the time-limit."

Section 72

"1. Before the opening of a preliminary investigation the Principal Public Prosecutor may

order interception of postal correspondence and telecommunications..."

Section 77

"Clergymen, lawyers, notaries, doctors, pharmacists, midwives, and their auxiliaries, cannot be required to give evidence about secrets confided to them on account of their ministry or profession."

36. By the Telecommunications Act of 21 June 1991, which has been in force since 1 May 1992, the following relevant provisions were supplemented as follows (new text shown in italics):

Section 66

"1. The investigating judge may order monitoring of the accused's or suspect's postal correspondence and telecommunications if

(a) *The criminal proceedings concern a major offence whose seriousness or particular nature justifies intervention; and if*

(b) *Specific facts cause the person who is to be monitored to be suspected of being a principal or accessory in the commission of the offence; and if*

(c) *Without interception, the necessary investigations would be significantly more difficult to conduct or if other investigative measures have produced no results.*

1 bis. ... The telecommunications connection of third parties may be monitored at any time if there are reasons to suspect that it is being used by the accused.

..."

37. By the Federal Law of 4 October 1991, which has been in force since 15 February 1992, the following relevant provisions were amended as follows:

Section 66 *quinquies*

"1. *The investigating judge shall inform the person concerned, within thirty days of the close of the proceedings, of the reasons for the monitoring carried out, the means employed and its duration.*

..."

Section 72

..."

3. *Sections 66 to 66 quinquies shall be applica-*

ble by analogy.”

C. Legal literature and case-law on the scope of professional privilege

38. In the opinion of academic writers, information not specifically connected with a lawyer’s work on instructions from a party to proceedings is not covered by professional privilege (see, for example, G. Piquerez, *Précis de procédure pénale suisse*, Lausanne, 1994, p. 251, no. 1264, and B. Corboz, “*Le secret professionnel de l’avocat selon l’article 321 CP*”, *Semaine judiciaire*, Geneva, 1993, pp. 85–87).
39. Thus, in a judgment of 29 December 1986 (see ATF [Judgments of the Swiss Federal Court] 112 Ib 606), the Federal Court held that a lawyer may not decline to give evidence about confidential matters of which he has learned in the course of work not going beyond the management of assets and the investment of funds.

In another judgment, of 16 October 1989, the Federal Court similarly held that a lawyer who is the director of a company may not plead professional privilege to justify his refusal to give evidence (ATF 115 la 197).

In a case where a lawyer had complained of a seizure of documents, the Federal Court, after considering the complaint in the particular light of Article 8 of the Convention, once again upheld that case-law on 11 September 1991 (ATF 117 la 341).

Similarly, in connection with medical confidentiality, the Federal Court has held that information imparted to a doctor in his private capacity is not protected by professional privilege (ATF 101 la 10, judgment of 5 February 1975).

PROCEEDINGS BEFORE THE COMMISSION

40. Mr Kopp applied to the Commission on 15 December 1993. Relying on Articles 8 and 13 of the Convention, he complained of the monitoring of his telephone lines and of the lack of an effective remedy in that connection.
41. The Commission (First Chamber) declared the application (23224/94) admissible on 12 April 1996. In its report of 16 October 1996 (Article 31), it expressed the unanimous opinion that there had been a breach of Article 8 but no breach of Article 13. The full text of the Com-

mission’s opinion is reproduced as an annex to this judgment⁴.

FINAL SUBMISSIONS TO THE COURT

42. In their memorial the Government asked the Court

“to declare that there has been no violation of the Convention on the part of the Swiss authorities by virtue of the facts which gave rise to the application introduced by Mr Kopp against Switzerland”.

43. The applicant asked the Court to uphold his application.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. Mr Kopp submitted that the interception of his telephone communications had breached Article 8 of the Convention, which provides:

“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 freedoms of others.”

A. The Government’s preliminary objection

45. The Government submitted as their principal argument, as they had done before the Commission, that the applicant had not exhausted domestic remedies (Article 26 of the Convention), not having raised his complaint in substance before the national authorities. Before the Federal Council he had argued that it was only the application of section 66(1 *bis*) of the Federal Criminal Procedure Act (“the FCPA” – see paragraph 35 above) which had been contrary to Article 8 of the Convention, without contesting the lawfulness as such of the tapping of his telephone lines.

46. The applicant, on the other hand, asserted that he had complied with all the requirements of Article 26 of the Convention in so far as he had contended that the monitoring of his law firm's telephone lines had no legal basis in Swiss law.
47. The Court reiterates that the purpose of Article 26 is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Convention institutions. Thus the complaint to be submitted to the Commission must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. However, Article 26 must be applied with some degree of flexibility and without excessive formalism (see, for example, the *Ankerl v. Switzerland* judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1565, § 34, and the *K.-F. v. Germany* judgment of 27 November 1997, *Reports* 1997-VII, pp. 2670–71, § 46).
48. In the present case, the Court notes that in Mr Kopp's administrative appeal to the Federal Council of 2 December 1992 his lawyer complained, under the heading "Violation of Article 8 of the Convention", that the tapping of his telephone lines had been unlawful (see paragraph 30 above). He maintained in particular that section 66(1 *bis*) of the FCPA expressly prohibited the interception of lawyers' telephone calls and consequently that the monitoring of the lines of the applicant's law firm had contravened Swiss law.
49. The Court therefore considers, like the Commission, that the applicant raised in substance, before the national authorities, his complaint relating to Article 8 of the Convention. The preliminary objection must accordingly be dismissed.

B. Merits of the complaint

1. Applicability of Article 8

50. In the Court's view, it is clear from its case-law that telephone calls made from or to business premises, such as those of a law firm, may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 § 1 (see, among other authorities, the *Halford v. the United Kingdom* judgment of 25 June 1997, *Reports* 1997-III, p. 1016, § 44, and, *mutatis mutandis*, the *Niemietz v. Germany*

judgment of 16 December 1992, Series A no. 251-B, pp. 33–35, § 28–33). This point was in fact not disputed.

2. Compliance with Article 8

(a) Existence of an interference

51. The Government contended that the question whether there had really been interference by the authorities with the applicant's private life and correspondence remained open, since none of the recorded conversations in which he had taken part had been brought to the knowledge of the prosecuting authorities, all the recordings had been destroyed and no use whatsoever had been made of any of them.
52. The Court notes that it was not contested that the Federal Public Prosecutor had ordered the monitoring of the telephone lines of Mr Kopp's law firm, that the President of the Indictment Division of the Federal Court had approved that measure and that it had lasted from 21 November to 11 December 1989 (see paragraphs 16–18 above).
53. Interception of telephone calls constitutes "interference by a public authority", within the meaning of Article 8 § 2, with the exercise of a right guaranteed to the applicant under paragraph 1 (see, among other authorities, the *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, p. 30, § 64, and the above-mentioned *Halford* judgment, p. 1017, § 48 *in fine*). The subsequent use of the recordings made has no bearing on that finding.

(b) Justification for the interference

54. Such interference breaches Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is, in addition, "necessary in a democratic society" to achieve those aims.

i "In accordance with the law"

55. The expression "in accordance with the law", within the meaning of Article 8 § 2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the

rule of law.

– *Whether there was a legal basis in Swiss law*

56. The applicant submitted that in the present case there was no legal basis in Swiss law, since sections 66(1 *bis*) and 77 of the FCPA (see paragraph 35 above) expressly prohibited the tapping of a lawyer's telephone lines where the latter was being monitored as a third party.
57. The Commission accepted this argument. It took the view that the purpose of the legal provisions in question was to protect the professional relationship between, among others, a lawyer and his clients. For this special relationship to be respected, it had to be assumed that all the telephone calls of a law firm were of a professional nature. Consequently, the Swiss authorities' interpretation to the effect that these provisions gave them the power to record and listen to a lawyer's telephone conversations before deciding whether they were covered by professional privilege could not be accepted.
58. The Government maintained in the first place that telephone tapping in the course of proceedings conducted by the federal authorities was governed by a set of exhaustive and detailed rules (see paragraphs 35–37 above). Moreover, according to sections 66(1 *bis*) and 77 of the FCPA, and the relevant legal literature and case-law, legal professional privilege covered only activities specific to a lawyer's profession.
59. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the above-mentioned *Malone* judgment, p. 35, § 79, and the *Kruslin v. France* and *Huvig v. France* judgments of 24 April 1990, Series A no. 176-A and B, p. 21, § 29, and p. 53, § 28, respectively). In principle, therefore, it is not for the Court to express an opinion contrary to that of the Federal Department of Justice and Police and the Federal Council on the compatibility of the judicially ordered tapping of Mr Kopp's telephone with sections 66(1 *bis*) and 77 of the FCPA.
60. Moreover, the Court cannot ignore the opinions of academic writers and the Federal Court's case-law on the question, which the Government cited in their memorial (see paragraphs 38–39 above).

In relation to paragraph 2 of Article 8 of the

Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal one", and has in particular included unwritten law therein (see the above-mentioned *Kruslin* and *Huvig* judgments, pp. 21–22, § 29 *in fine*, and pp. 53–54, § 28 *in fine*, respectively).

61. In short, the interference complained of had a legal basis in Swiss law.
- *"Quality of the law"*
62. The second requirement which emerges from the phrase "in accordance with the law" – the accessibility of the law – does not raise any problem in the instant case.
63. The same is not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures.
64. The Court reiterates in that connection that Article 8 § 2 requires the law in question to be "compatible with the rule of law". In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures (see, as the most recent authority, the above-mentioned *Halford* judgment, p. 1017, § 49).
65. The Government submitted that the relevant legislation taken as a whole and the case-law of the Federal Court warranted the conclusion that the telephone tapping ordered in the instant case did in fact satisfy the requirement of foreseeability, as defined by the European Court.
66. The Court must therefore examine the "quality" of the legal rules applicable to Mr Kopp in the instant case.
67. It notes in the first place that the telephone lines of the applicant's law firm were tapped pursuant to sections 66 et seq. of the FCPA (see paragraph 25 above) and that he was monitored as a third party.

Under section 66(1 *bis*) of the FCPA, "... third parties may also be monitored if specific facts

give rise to the presumption that they are receiving or imparting information intended for the accused or suspect or sent by him. Persons who, by virtue of section 77, may refuse to give evidence shall be exempt.”

Section 77 of the FCPA provides: “... lawyers ... cannot be required to give evidence about secrets confided to them on account of their ... profession.”

68. On the face of it, the text seems clear and would appear to prohibit the monitoring of a lawyer's telephone lines when he is neither suspected nor accused. It is intended to protect the professional relations between a lawyer and his clients through the confidentiality of telephone conversations.
69. In the present case, moreover, the President of the Indictment Division adverted to that principle of the law, since the order of 23 November 1989 (see paragraph 18 above) states: “the lawyers' conversations are not to be taken into account.” Similarly the Federal Public Prosecutor's Office mentioned it in the letter of 9 March 1990 informing the applicant that his telephone lines had been tapped (see paragraph 25 above) and the Federal Council likewise referred to it in its decision of 30 June 1993 (see paragraph 31 above).
70. However, as the Court has already observed (see paragraph 52 above), all the telephone lines of Mr Kopp's law firm were monitored from 21 November to 11 December 1989.
71. The Government sought to resolve this contradiction by referring to the opinions of academic writers and the Federal Court's case-law to the effect that legal professional privilege covered only matters connected with a lawyer's profession. They added that Mr Kopp, the husband of a former member of the Federal Council, had not had his telephones tapped in his capacity as a lawyer. In the instant case, in accordance with Swiss telephone-monitoring practice, a specialist Post Office official had listened to the tape in order to identify any conversations relevant to the proceedings in progress, but no recording had been put aside and sent to the Federal Public Prosecutor's Office.
72. The Court, however, is not persuaded by these arguments.

Firstly, it is not for the Court to speculate as to the capacity in which Mr Kopp had had his telephones tapped, since he was a lawyer and all

his law firm's telephone lines had been monitored.

Secondly, tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a “law” that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated (see the above-mentioned *Kruslin* and *Huvig* judgments, p. 23, § 33, and p. 55, § 32, respectively).

In that connection, the Court by no means seeks to minimise the value of some of the safeguards built into the law, such as the requirement at the relevant stage of the proceedings that the prosecuting authorities' telephone-tapping order must be approved by the President of the Indictment Division (see paragraphs 18 and 35 above), who is an independent judge, or the fact that the applicant was officially informed that his telephone calls had been intercepted (see paragraph 25 above).

73. However, the Court discerns a contradiction between the clear text of legislation which protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case-law has established the principle, which is moreover generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel.
74. Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence.
75. In short, Swiss law, whether written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter. Consequently, Mr Kopp, as a lawyer, did not enjoy the minimum degree of protection required by the rule of

law in a democratic society. There has therefore been a breach of Article 8.

ii *Purpose and necessity of the interference*

76. Having regard to the above conclusion, the Court, like the Commission, does not consider it necessary to review compliance with the other requirements of paragraph 2 of Article 8 in this case.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

77. Article 13 of the Convention provides:

“Everyone whose rights and freedoms as set forth in [the] 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.”

78. Mr Kopp expressly stated that he did not intend to pursue this complaint before the Court, and the Court considers that it is not required to consider it of its own motion.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

79. Under Article 50 of the Convention,

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

80. Mr Kopp claimed 550,000 Swiss francs (CHF) for pecuniary damage on account of the effects that publication of the fact that his law firm’s telephone lines had been tapped had had on his professional activities and his firm’s good name. He also claimed CHF 1,000 for non-pecuniary damage, on the ground that the monitoring of his telephone lines had seriously perturbed his relations with his family and the members of his firm.
81. The Government maintained that the amounts claimed were excessive and that the applicant had not adduced evidence of either the

existence of pecuniary damage or a causal connection between any violation of the Convention and such damage. Furthermore, if the applicant had lost clients, it was not because of the telephone tapping in issue but for other reasons, such as the fact that he had been convicted of fraud and forging securities or the fact that his name had been struck off the roll of members of the Bar.

As regards non-pecuniary damage, the Government submitted that if the Court were to find a violation, that would constitute sufficient just satisfaction.

82. The Delegate of the Commission submitted that compensation should be awarded for loss of income, but left the amount to the Court’s discretion. He was of the view that the compensation claimed for non-pecuniary damage was justified.
83. As regards pecuniary damage, the Court considers that Mr Kopp was not able to prove the existence of a causal connection between the interception of his telephone calls and the alleged loss. As to non-pecuniary damage, the Court considers that the finding of a violation of Article 8 constitutes sufficient compensation.

B. Costs and expenses

84. The applicant also claimed CHF 67,640 in respect of his costs and expenses for the proceedings in the Swiss courts and CHF 58,291 in respect of those he had incurred for the proceedings before the Convention institutions. He further sought CHF 174,000 for research he had conducted himself and for out-of-pocket expenses.
85. The Government submitted that if the Court were to find a violation, an award of CHF 21,783 for costs and expenses would satisfy the requirements of Article 50. If the finding of a violation concerned only one of the two complaints raised by the applicant, it would be appropriate for the Court to reduce that amount in an equitable proportion.
86. The Delegate of the Commission left the amount to be awarded for costs and expenses to the Court’s discretion.
87. On the basis of the information in its possession and its case-law on this question, and taking into account the fact that only the applicant’s complaint under Article 8 of the Convention has given rise to the finding of a

violation, as the applicant expressly stated that he no longer wished to pursue the complaint relating to Article 13 of the Convention (see paragraph 78 above), the Court decides, on an equitable basis, to award the applicant the sum of CHF 15,000.

C. Default interest

88. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. **Dismisses the Government's preliminary objection;**
2. **Holds that there has been a violation of Article 8 of the Convention;**
3. **Holds that it is not necessary for the Court to consider of its own motion the complaint relating to Article 13 of the Convention;**
4. **Holds that the present judgment in itself constitutes sufficient just satisfaction for non-pecuniary damage;**
5. **Holds**
 - (a) **that the respondent State is pay to the applicant, within three months, 15,000 (fifteen thousand) Swiss francs for costs and expenses;**
 - (b) **that simple interest at an annual rate of 5% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;**
6. **Dismisses the remainder of the claim for just satisfaction.**

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 March 1998.

Rudolf Bernhardt, *President*
Herbert Petzold, *Registrar*

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the concurring opinion of Mr Pettiti is annexed to this judgment.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted for the finding of a breach of Article 8, in agreement with the analysis made by my colleagues. However, as to reasons, I did so on the basis of a number of additional considerations.

The Kopp case was of particular interest, coming as it did eight years after the *Kruslin* and *Huvig* judgments, and provided an opportunity to consolidate the case-law which led to the enactment of new French legislation regulating telephone tapping. Unfortunately, since that time mistakes have continued to be made in a number of Council of Europe member States, and some draft legislation may cause jurists some concern.

It is a regrettable fact that State, para-State and private bodies are making increasing use of the interception of telephone and other communications for various purposes. Private companies engage in all manner of illicit practices for industrial espionage. In Europe so-called administrative telephone monitoring is not generally subject to an adequate system or level of protection.

There is now less respect for private life, and this is accentuated by the excesses of certain sections of the media on the lookout for indiscreet articles or documents.

The Kopp case involved multiple breaches of Article 8, in that the law firm's partners and employees, clients and third parties who had no connection with the criminal proceedings were all monitored.

In my opinion, paragraph 72 of the judgment should also contain a reference to the serious breach of professional privilege. A number of States lay down conditions for the Bar associations to be involved in the procedure when a judge wishes to order searches or interceptions in respect of lawyer's practices. The safeguards mentioned in paragraph 72 are insufficient, since the fact that the applicant was informed dealt with only one aspect of the problem.

Swiss law, as formulated by the texts in force, does not afford sufficient protection to third parties, and does not provide for checks to ensure that recordings have been destroyed. In addition, it is shocking that Post Office officials were deployed to listen to the calls. The Court's considerations in paragraphs 73 and 74 could be more severe.

The European Court has clearly laid down in its

case-law the requirement of supervision by the judicial authorities in a democratic society, which is characterised by the rule of law, with the attendant guarantees of independence and impartiality; this is all the more important in order to meet the threat posed by new technologies. The Court has set forth the rules which telephone monitoring as a part of criminal procedure must obey. These cover matters such as the existence of serious grounds for suspicion, the lack of other sources of evidence, restrictions concerning the persons to be monitored, maximum duration, etc. The Court has also previously paid attention to measures for the destruction of tapes used for monitoring (see my concurring opinion in the case of *Malone v. the United Kingdom*).

Where monitoring is ordered by a judicial authority, even where there is a valid basis in law, it must be used for a specific purpose, not as a general “fishing” exercise to bring in information.

Similarly, where it is justified, the monitoring of suspects or those occupying posts of authority who may be guilty of offences or responsible for violations of State security must never be extended to partners in private life, because that is going beyond the bounds of what is required to protect democratic institutions and amounts to a perverse inquisition.

The legislation of numerous European States fails to comply with Article 8 of the Convention where telephone tapping is concerned. States use – or abuse – the concepts of official secrets and secrecy in the interests of national security. Where necessary, they distort the meaning and nature of that term. Some clarification of what these concepts mean is needed in order to refine and improve the system for the prevention of terrorism.

The warnings of jurists and parliamentarians go back more than twenty years: the Schmelck Report in France, the advisory opinion I gave to the Luxembourg parliament, the Government White Paper in the United Kingdom and the Court’s *Klass*, *Malone*, *Kruslin* and *Huvig* judgments have all remained largely ineffective. The people running the relevant State services remain deaf to these injunctions and to a certain extent act with impunity. Apart from the specific problem, is this not a sign of the decadence of the democracies; does it not reveal to what extent the meaning of human dignity has been eroded? For this depressing trend States and individuals must share responsibility.

ECHR

ECJ

SECOND SECTION

CASE OF LAMBERT v FRANCE

(88/1997/872/1084)

JUDGMENT

STRASBOURG
24 August 1998

INTERCEPTION, CORRESPONDENCE, TELEPHONE, TAPPING, INTERFERENCE, PRIVATE LIFE

IN THE CASE OF LAMBERT V. FRANCE,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A3, as a Chamber composed of the following judges:

Mr **R. Bernhardt**, *President*,

Mr **L.-E. Pettiti**,

Mr **A. Spielmann**,

Mr **N. Valticos**,

Sir **John Freeland**,

Mr **L. Wildhaber**,

Mr **K. Jungwiert**,

Mr **M. Voicu**,

Mr **V. Butkevych**,

and also of Mr **H. Petzold**, *Registrar*,

and Mr **P.J. Mahoney**, *Deputy Registrar*,

Having deliberated in private on 23 April and 27 July 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 September 1997 and by the French Government ("the Government") on 24 October 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 23618/94) against the French Republic lodged with the Commission under Article 25 by a French national, Mr Michel Lambert, on 8 February 1994.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the

case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).
3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 25 September 1997, in the presence of the Registrar, the President of the Court, Mr R. Rysdøl, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr A. Spielmann, Mr N. Valticos, Mr L. Wildhaber, Mr K. Jungwiert, Mr M. Voicu and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Sir John Freeland, substitute judge, replaced Mr Walsh, who had died on 9 March 1998 (Rule 22 § 1).
4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 23 December 1997 and 12 January 1998 and the Government's memorial on 20 March 1998.
5. On 30 March 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.
6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr **B. Nedelec**, *magistrat*, on secondment to the Legal Affairs Department, Ministry of Foreign Affairs, *Agent*,

Mr **A. Buchet**, *magistrat*, Head of the Human Rights Office, European and International Affairs Department, Ministry of Justice, *Adviser*,

(b) *for the Commission*

Mr J.-C. Soyer, *Delegate*;

(c) *for the applicant*

Mr O. de Nervo, of the *Conseil d'Etat* and Court of Cassation Bar, *Counsel*.

The Court heard addresses by Mr Soyer, Mr de Nervo and Mr Nedelec.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Lambert, a French national born in 1957, lives at Buzet-sur-Tarn.

A. The judicial investigation and interception of the applicant's telephone conversations

8. In the course of a judicial investigation into offences of theft, burglary, handling the proceeds of theft and aggravated theft, and unlawful possession of Class 4 weapons and ammunition, an investigating judge at Riom issued a warrant on 11 December 1991 instructing the gendarmerie to arrange for the telephone line of a certain R.B. to be tapped until 31 January 1992.

9. By means of standard-form written instructions ("*soit transmis*") dated 31 January, 28 February and 30 March 1992, the investigating judge extended the duration of the telephone tapping until 29 February, 31 March and 31 May 1992 respectively.

10. As a result of this tapping and the interception of some of his conversations, the applicant was charged with handling the proceeds of aggravated theft; he was held in custody from 15 May to 30 November 1992, when he was released subject to judicial supervision.

B. The proceedings brought by the applicant

1. *The application to the Indictment Division of the Riom Court of Appeal*

11. In an application of 5 April 1993 the applicant's lawyer applied to the Indictment Division of the Riom Court of Appeal for a ruling that the extensions of 31 January and 28 February 1992 were invalid, arguing that they had been ordered merely by standard-form written instructions without any reference to the offences which justified the telephone tapping, and that

the four-month period which could have been authorised in the warrant of 11 December 1991 had expired on 11 April 1992.

12. In a judgment of 25 May 1993 the Riom Court of Appeal dismissed Mr Lambert's application on the following grounds:

"... by Articles 100, 100-1 and 100-2 of the Code of Criminal Procedure [see paragraph 15 below] taken together, decisions to intercept telecommunications messages must be in writing and contain all the information necessary for identifying the link to be monitored, the offence that justifies the interception and the duration of the interception, which must not exceed four months but may be extended subject to the same formal requirements and maximum duration.

In the instant case it is beyond doubt that the warrant of 11 December 1991 complies with the requirements of the above-mentioned Articles in so far as it specifies the number of the link to be monitored, a duration of less than four months and the offences that justified interception, the criminal penalties for which were greater than two years' imprisonment.

It is also clear that the decisions to extend the duration of the interception, which were issued in standard-form instructions, were in writing and mentioned the number of the link concerned; that they are an extension of the original decision of 11 December 1991 and necessarily referred to it; and that the duration of their validity was less than four months. They thus comply with the requirements of Article 100-2 of the Code of Criminal Procedure."

2. *The appeal to the Court of Cassation*

13. The applicant appealed on a point of law against the judgment of 25 May 1993, arguing, as his only ground of appeal, that Article 8 of the Convention and Articles 100 et seq. of the Code of Criminal Procedure had been infringed because the extensions of the duration of the telephone tapping in issue, by means of standard-form written instructions, did not contain any reasons.

14. In a judgment of 27 September 1993 the Court of Cassation affirmed the decision appealed against and held that the applicant had "no *locus standi* to challenge the manner in which the duration of the monitoring of a third party's telephone line was extended" and that accordingly "the grounds of appeal, which contest[ed] the grounds on which the Indictment Division [had] wrongly considered it must examine

[the] objections of invalidity and subsequently dismissed them, [were] inadmissible”.

II. RELEVANT DOMESTIC LAW

15. The relevant provisions of the Code of Criminal Procedure (Law no. 91-646 of 10 July 1991 on the confidentiality of telecommunications messages) read as follows:

Article 100

“In the case of a serious crime or other major offence attracting a sentence of at least two years’ imprisonment, the investigating judge may, where necessary for the investigation, order the interception, recording and transcription of telecommunications messages. Such operations shall be carried out under his authority and supervision.

Decisions to intercept shall be in writing. They shall not constitute judicial decisions and no appeal shall lie against them.”

Article 100-1

“Decisions made pursuant to Article 100 shall contain all the information necessary for identifying the link to be monitored, the offence that justifies the interception and the duration of the interception.”

Article 100-2

“Such decisions shall be valid for a maximum duration of four months. Their validity may be extended only subject to the same procedural requirements and maximum duration.”

Article 100-3

“The investigating judge or a senior detective (*officier de police judiciaire*) acting on his instructions may call upon any qualified official of any department or body under the authority or supervision of the Minister for Telecommunications, or any qualified official of an authorised network operator or provider of telecommunications services, for the purpose of installing monitoring equipment.”

Article 100-4

“The investigating judge or the senior detective acting on his instructions shall draw up a report on each of the interception and recording operations. This report shall give the date and time of the beginning and end of each operation.”

Article 100-5

“The investigating judge or the senior detective acting on his instructions shall transcribe messages useful for establishing the truth. A report of the transcription shall be drawn up and the transcription placed in the case file.

Any messages in a foreign language shall be transcribed in French with the help of an interpreter called upon for this purpose.”

Article 100-6

“The Public Prosecutor or Principal Public Prosecutor shall ensure that the recordings are destroyed when prosecution becomes time-barred.

A formal report of the destruction shall be drawn up.”

Article 100-7

“The telephone line of a member of Parliament or senator shall not be tapped unless and until the Speaker of the relevant House has been informed by the investigating judge.

The home or office telephone lines of a member of the Bar shall not be tapped unless and until the chairman of the Bar has been informed by the investigating judge.

Any interception carried out in breach of the requirements of this Article shall be null and void.”

PROCEEDINGS BEFORE THE COMMISSION

16. Mr Lambert applied to the Commission on 8 February 1994. He alleged that the interception of certain telephone conversations which were used against him amounted to interference with his private life and correspondence, contrary to Article 8 of the Convention; he also maintained that he had not had an effective remedy in the Court of Cassation, contrary to Article 13 of the Convention.
17. The Commission declared the application (no. 23618/94) admissible on 2 September 1996. In its report of 1 July 1997 (Article 31), it expressed the opinion by twenty votes to twelve that there had been a violation of Article 8 of the Convention and by twenty-seven votes to five that it was unnecessary to consider the case under Article 13 of the Convention also. The full text of the Commission’s opinion and of

the two dissenting opinions contained in the report is reproduced as an annex to this judgment⁴.

FINAL SUBMISSIONS TO THE COURT

18. In their memorial the Government submitted that “the application lodged by Mr Lambert should be dismissed”.
19. The applicant asked the Court to
 - “hold that there has been a violation of Article 8 of the ... Convention;
 - award him 500,000 francs by way of just satisfaction”.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. Mr Lambert submitted that the Court of Cassation’s decision to refuse him any standing to complain of the interception of some of his telephone conversations, on the ground that it was a third party’s line that had been tapped, had infringed Article 8 of the Convention, which provides:

“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 freedoms of others.”

A. Whether there was any interference

21. The Court points out that as telephone conversations are covered by the notions of “private life” and “correspondence” within the meaning of Article 8, the admitted measure of interception amounted to “interference by a public authority” with the exercise of a right secured to the applicant in paragraph 1 of that Article (see, among other authorities, the following judgments: *Malone v. the United Kingdom*, 2

August 1984, Series A no. 82, p. 30, § 64; *Kruslin v. France* and *Huvig v. France*, 24 April 1990, Series A no. 176-A and B, p. 20, § 26, and p. 52, § 25; *Halford v. the United Kingdom*, 25 June 1997, *Reports of Judgments and Decisions* 1997-III, pp. 1016–17, § 48; and *Kopp v. Switzerland*, 25 March 1998, *Reports* 1998-II, p. 540, § 53). In this connection, it is of little importance

that the telephone tapping in question was carried out on the line of a third party.

The Government did not dispute this.

B. Justification for the interference

22. Such interference will contravene Article 8 unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is “necessary in a democratic society” in order to achieve them.

1. Was the interference “in accordance with the law”?

23. The expression “in accordance with the law” within the meaning of Article 8 § 2 requires, firstly, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

(a) Whether there was a statutory basis in French law

24. The Court notes that the investigating judge ordered the telephone tapping in question on the basis of Articles 100 et seq. of the Code of Criminal Procedure (see paragraphs 12 and 15 above).
25. The interference complained of therefore had a statutory basis in French law.

(b) “Quality of the law”

26. The second requirement which derives from the phrase “in accordance with the law” – the accessibility of the law – does not raise any problem in the instant case.
27. As to the “foreseeability of the law”, the Government maintained that following the Court’s judgments in the *Kruslin* and *Huvig* cases (see paragraph 21 above), the French legislature had remedied the omissions and weaknesses of domestic law on telephone tapping by

adopting safeguards in respect of the persons whose telephones could be tapped, the duration of interception, the requirements for drawing up reports, and the communication or destruction of recordings.

28. The Court considers, as the Commission did, that Articles 100 et seq. of the Code of Criminal Procedure, inserted by the Law of 10 July 1991 on the confidentiality of telecommunications messages, lay down clear, detailed rules and specify with sufficient clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities (see the *Kruslin* and *Huvig* judgments cited above, pp. 24–25, § § 35–36, and p. 56, § § 34–35, respectively, and, as the most recent authority and *mutatis mutandis*, the *Kopp* judgment cited above, pp. 541–43, § § 62–75).

2. Purpose and necessity of the interference

29. The Court shares the opinion of the Government and the Commission and considers that the interference was designed to establish the truth in connection with criminal proceedings and therefore to prevent disorder.
30. It remains to be ascertained whether the interference was “necessary in a democratic society” for achieving those objectives. Under the Court’s settled case-law, the Contracting States enjoy a certain margin of appreciation in assessing the existence and extent of such necessity, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, *mutatis mutandis*, the *Silver and Others v. the United Kingdom* judgment of 25 March 1983, Series A no. 61, pp. 37–38, § 97, and the *Barfod v. Denmark* judgment of 22 February 1989, Series A no. 149, p. 12, § 28).
31. When considering the necessity of interference, the Court stated in its *Klass and Others v. Germany* judgment of 6 September 1978 (Series A no. 28, pp. 23 and 25–26, § § 50, 54 and 55):

“The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on ... [among other things] the kind of remedy provided by the national law.

...

It therefore has to be determined whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the ‘interference’ resulting from the contested legislation to what is ‘necessary in a democratic society’.

... In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention... The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual’s rights should be subject to an effective control...”

32. The applicant said that he had wished to complain of the circumstances in which the investigating judge had ordered the extensions of the duration of the telephone tapping (see paragraph 13 above), but the Court of Cassation’s decision had deprived him of any practical possibility of using the remedies provided by law to penalise irregularities committed by the authorities.
33. In the Government’s submission, the interference complained of had been “necessary in a democratic society”. In the instant case the telephone tapping had been one of the principal means of investigation contributing to the establishment of the truth and, in particular, to proving the involvement of various individuals, including the applicant, in large-scale illicit dealing in furniture. Furthermore, Mr Lambert had been able to avail himself of a remedy in the Indictment Division, and a further remedy in the Court of Cassation was quite unnecessary to satisfy the requirement of “effective control”.
34. The Court must accordingly ascertain whether an “effective control” was available to Mr Lambert to challenge the telephone tapping to which he had been made subject.
35. It notes, firstly, that the Court of Cassation in its judgment of 27 September 1993 held that the applicant had “no *locus standi* to challenge the manner in which the duration of the monitoring of a third party’s telephone line was extended” and that accordingly “the grounds of appeal, which contest[ed] the grounds on which the Indictment Division [had] wrongly considered it must examine [the] objections of invalidity and subsequently dismissed them,

[were] inadmissible”.

36. In its ruling the Court of Cassation therefore went beyond the ground relied on by the applicant concerning the extension of the duration of the telephone tapping and held that a victim of the tapping of a telephone line not his own has no standing to invoke the protection of national law or Article 8 of the Convention. It concluded that in the instant case the Indictment Division had been wrong to examine the objections of invalidity raised by the applicant as the telephone line being monitored had not been his own.
37. Admittedly, the applicant had been able to avail himself of a remedy in respect of the disputed point in the Indictment Division, which held that the investigating judge’s extension of the duration of the telephone tapping had been in accordance with Articles 100 et seq. of the Code of Criminal Procedure (see paragraph 12 above), and it is not the Court’s function to express an opinion on the interpretation of domestic law, which is primarily for the national courts to interpret (see the *Kruslin and Huvig* judgments cited above, p. 21, § 29, and p. 53, § 28, respectively). However, the Court of Cassation, the guardian of national law, criticised the Indictment Division for having examined the merits of Mr Lambert’s application.
38. As the Court has already said (see paragraph 28 above), the provisions of the Law of 1991 governing telephone tapping satisfy the requirements of Article 8 of the Convention and those laid down in the *Kruslin and Huvig* judgments. However, it has to be recognised that the Court of Cassation’s reasoning could lead to decisions whereby a very large number of people are deprived of the protection of the law, namely all those who have conversations on a telephone line other than their own. That would in practice render the protective machinery largely devoid of substance.
39. That was the case with the applicant, who did not enjoy the effective protection of national law, which does not make any distinction according to whose line is being tapped (Articles 100 et seq. of the Code of Criminal Procedure – see paragraph 15 above).
40. The Court therefore considers, like the Commission, that the applicant did not have available to him the “effective control” to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was “nec-

essary in a democratic society”.

41. There has consequently been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

42. The applicant also alleged a violation of Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] 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.”
43. In view of the preceding conclusion (see paragraph 41 above), the Court does not consider that it need rule on the complaint in question.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

44. Article 50 of the Convention provides:

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Non-pecuniary damage

45. Mr Lambert sought 500,000 French francs (FRF) for non-pecuniary damage.
46. The Government considered that any finding of a violation would constitute sufficient just satisfaction.
47. The Delegate of the Commission expressed no view on the matter.
48. The Court considers that the applicant undeniably sustained non-pecuniary damage and awards him the sum of FRF 10,000 under this head.

B. Costs and expenses

49. The applicant also claimed FRF 15,000 in respect of the costs and expenses incurred in the proceedings before the Court.

50. The Government considered that the amount claimed was not unreasonable and wished to leave the matter to the Court's discretion.
51. The Delegate of the Commission did not express a view.
52. Making its assessment on an equitable basis and with reference to its usual criteria, the Court awards the sum claimed.

C. Default interest

53. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. **Holds that there has been a violation of Article 8 of the Convention;**
2. **Holds that it is unnecessary to examine the complaint based on Article 13 of the Convention;**
3. **Holds**
 - (d) **that the respondent State is to pay the applicant, within three months, 10,000 (ten thousand) French francs for non-pecuniary damage and 15,000 (fifteen thousand) French francs in respect of costs and expenses;**
 - (e) **that simple interest at an annual rate of 3.36% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;**
4. **Dismisses the remainder of the claim for just satisfaction.**

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 August 1998.

Rudolf Bernhardt, *President*
Herbert Petzold, *Registrar*

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the concurring opinion of Mr Pettiti is annexed to this judgment.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted in favour of the view that there had been a violation of Article 8 of the Convention for the reasons set out in the judgment, which strengthen the Court's settled case-law since the judgments in the König, Malone, Kruslin and Huvig cases. By way of putting in context the importance of this line of authority, I would also refer to my concurring opinion in the Malone judgment and to the advisory opinion I gave to the Luxembourg Parliament.

Intercepting telephone conversations is one of the most serious temptations for State authorities and one of the most harmful for democracies.

Originally, reason of State or national security were put forward in the attempt to justify interceptions, particularly in the sphere of so-called administrative telephone tapping that is sometimes used to evade the rules governing judicial telephone tapping.

Abuses, however, are becoming more and more unacceptable, taking the form of monitoring wholly private conversations on the pretext of spying on political entourage.

In several member States the supervision systems set up to control the monitors have proved inadequate and defective.

Will it be necessary in the future, in order to protect privacy, to require people to get into "bubbles", in imitation of the practice of some embassies, in order to preclude any indiscretions? That would be to give in to Big Brother.

The European Court's case-law on telephone tapping is undoubtedly one of the most positive aspects of its work to safeguard fundamental rights.

ECHR

ECJ

SECOND SECTION

CASE OF VALENZUELA CONTRERAS v SPAIN

(58/1997/842/1048)

JUDGMENT

STRASBOURG

30 July 1998

TELEPHONE, TAPPING, INTERFERENCE, INTERCEPTION, PRIVATE LIFE, CORRESPONDENCE, INVESTIGATION, SURVEILLANCE, COMMUNICATION

IN THE CASE OF VALENZUELA CONTRERAS V. SPAIN,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A3, as a Chamber composed of the following judges:

Mr **R. Bernhardt**, *President*,

Mrs **E. Palm**,

Mr **A.N. Loizou**,

Mr **J.M. Morenilla**,

Sir **John Freeland**,

Mr **A.B. Baka**,

Mr **L. Wildhaber**,

Mr **J. Casadevall**,

Mr **V. Butkevych**,

and also of Mr **H. Petzold**, *Registrar*,

and Mr **P.J. Mahoney**, *Deputy Registrar*,

Having deliberated in private on 28 March and 30 June 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 29 May 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 27671/95) against the Kingdom of Spain lodged with the Commission under Article 25 by a Spanish national, Mr Cosme Valenzuela Contreras, on 2 May 1995.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby Spain recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the Spanish language (Rule 27 § 3).
3. The Chamber to be constituted included *ex officio* Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 27 August 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr B. Walsh, Mrs E. Palm, Mr A.N. Loizou, Mr A.B. Baka, Mr L. Wildhaber, Mr J. Casadevall and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who had died on 18 February 1998 (Rule 21 § 6, second sub-paragraph), and Sir John Freeland, substitute judge, replaced Mr Walsh, who had died on 9 March 1998 (Rule 22 § 1).
4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Spanish Government (“the Government”), the applicant’s lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 30 September 1997, the Registrar received the Government’s and the applicant’s memorials on 15 December 1997. On 19 January 1998 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.
5. On 19 January 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President’s instructions.
6. In accordance with the decision of the President, who had also given the Agent of the Government leave to address the Court in Spanish (Rule 27 § 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 26 March 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr **J. Borrego Borrego**, Head of the Legal Department for the European Commission

and Court of Human Rights, Ministry of Justice, *Agent*;

(b) *for the Commission*

Mr **M.A. Nowicki**, *Delegate*;

(c) *for the applicant*

Mr **J.-C. Rubio Moreno**, of the Madrid Bar, *Counsel*.

The Court heard addresses by Mr Nowicki, Mr Rubio Moreno and Mr Borrego Borrego.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a Spanish citizen and was born in 1952. He is the deputy head of personnel of the W. company.

A. Background to the case and the inquiry

8. On 12 November 1984, following a complaint lodged by Mrs M., an employee of the W. company, with Madrid investigating judge no. 31 against a person or persons unknown in respect of insulting and threatening telephone calls and letters she had received, a criminal investigation (*diligencias previas*) was started. On 6 February 1985 Mrs M.'s fiancé, Mr R., lodged a complaint against a person or persons unknown for the same offence.

9. On 8 January and 19 February 1985, the investigating judge made orders under Article 18 § 3 of the Constitution for Mrs M.'s and Mr R.'s telephone lines to be tapped for a month, as they had requested when making their statement. Several suspect calls made from the W. company and from telephone boxes were intercepted.

10. On 18 February and 25 March 1985 respectively the monitoring ceased.

11. On 29 March 1985 Mrs M. gave the investigating judge the names of the five people, including the applicant, who had access to the telephone at the W. company from which some of the suspect calls had been made.

That same day three other people were summonsed to appear. The W. company was asked to provide information about the offices in which the telephones concerned were located

and the people having access to them.

12. On 30 April 1985 the investigating judge made a further order for Mrs M.'s and Mr R.'s telephone lines to be tapped, on this occasion from 1 to 31 May 1985. He also ordered an analysis of the typeface of the anonymous letters containing threats against Mrs M. (in order to determine the make of typewriter used) and of photographs enclosed with some of the letters. In addition, he had the saliva residue and the fingerprints on the envelopes examined.

13. On 7 June 1985 the cassette recording of the calls made on the monitored lines, some of which showed that Mrs M. had been subjected to threats and insults, was delivered to the investigating judge.

14. On 19 November 1985 the investigating judge made an order under Article 18 § 3 of the Constitution (see paragraph 29 below) and Chapter VIII of Volume II of the Code of Criminal Procedure "on the entry into and searches of closed premises, the opening of books and written documents and the interception and opening of written and telegraphic correspondence" (see paragraph 30 below), for the monitoring of the private telephone lines of S. and of Mr Valenzuela, the head and deputy head of personnel of the company where the applicant worked, for a period of one month commencing on 26 November 1985. The applicant was considered to be the prime suspect, firstly, because most of the calls were being made from the W. company, where he worked and where, as deputy head of personnel, he had access to the company's staff files and, secondly, because he had previously had a relationship with Mrs M. The investigating judge's order read as follows:

"An application has been made for an order for the monitoring of telephone lines nos. 641 29 25 and 795 22 00, of Cosme Valenzuela Contreras and Mr [S.] respectively, who reside in this town, Mr Valenzuela Contreras at Avda. del Oeste no. 41 de Alorcón and Mr [S.] in H. Street, in connection with a police investigation currently under way into certain offences.

It is implicit in what has been said by the police that reliable evidence exists to suggest that information concerning the commission of an offence may be obtained by monitoring telephone lines nos. 641 29 25 and 795 22 00 belonging to Cosme Valenzuela Contreras and Mr [S.] respectively; it is appropriate to grant the requested application authorising the

monitoring, in accordance with Article 18 § 3 of the Constitution as in force. It will be carried out by agents of the National Telephone Company referred to above.

Having considered, in addition to the Article cited above, Chapter VIII of Volume [II] of the Code of Criminal Procedure and other provisions of general application,

[The judge] orders that the telephone lines nos. 641 29 25 and 795 22 00 of Cosme Valenzuela Contreras and Mr [S.] respectively shall be monitored by staff of the National Telephone Company of Spain for a period of one month starting from today; at the end of that period they shall report their findings.

..."

15. On 10 December 1985 police headquarters at the Ministry of the Interior informed Madrid investigating judge no. 1 that the monitoring of Mr [S.]'s line had not revealed anything suspect, no suspicious call or conversation having been recorded. Conversely, the monitoring of Mr Valenzuela's line had shown that a number of calls had been made from his telephone to Mrs M., her fiancé and their close relatives. However, the caller had hung up as soon as the telephone was answered.

On the same day, after further insulting letters had been sent to Mrs M., police headquarters applied for a warrant from the judge to carry out a search of Mr Valenzuela's home.

16. Owing to a breakdown in the system, the applicant's telephone line ceased to be tapped on 20 December 1985. The original cassettes containing the recordings were delivered to the investigating judge and included in the court file that was available for inspection and comment by the parties.
17. On 27 December 1985 the applicant himself applied to Madrid investigating judge no. 2, complaining that he had received threatening telephone calls. On 17 June 1986 the applicant requested the judge to order the monitoring of the applicant's own telephone line; that measure proved fruitless. On 14 June 1988 the judge made a provisional discharge order (*sobreseimiento provisional*).
18. On 9 December 1985 and 13 January 1986 police headquarters confirmed before the investigating judge that twenty-two calls had been made from the applicant's telephone while it was being tapped, three to Mrs M.'s home, eight to Mr R.'s home, two to Mr R.'s aunt and

nine to his superior.

19. On 26 January 1986 the public prosecutor applied for criminal proceedings (*sumario*) to be brought against Mr Valenzuela and, if appropriate, Mr S., for offences of proffering grave insults and making threats.
20. On 25 February 1986 Madrid investigating judge no. 31 ordered that the applicant's home and the head office of the W. company be searched.
21. On 18 April 1986 he decided to institute criminal proceedings against Mr Valenzuela. In an order (*auto de procesamiento*) of 18 April 1986 he charged the applicant with proffering grave insults and making threats under Articles 457, 458 § 2, 3 and 4, 459, 463 and 493 § 2 of the Criminal Code.
22. On 26 December 1990 Madrid investigating judge no. 27, to whom the case had been assigned on 2 January 1990, closed the investigation and committed the applicant for trial before the Madrid *Audiencia provincial*.

B. Proceedings before the Madrid *Audiencia provincial*

23. On 25 June and 8 July 1991 the public prosecutor, and Mrs M. and Mr R. as private prosecutors (*acusadores particulares*), filed provisional submissions.
24. On 7 May 1992 the applicant argued that the monitoring of his telephone line and searches of his house constituted breaches of Articles 18 and 24 of the Constitution (see paragraph 29 below).
25. On 8 May 1992 the Madrid *Audiencia provincial* convicted the applicant of making threats by letter and on the telephone against Mrs M. and Mr R., her fiancé, and their respective families, both at their homes and at work. It sentenced him to four months' imprisonment, imposed a number of fines and ordered him to pay Mrs M. compensation.
26. The *Audiencia provincial* found that neither the searches nor the monitoring had been decisive in establishing the applicant's guilt. The monitoring had revealed that some of the calls from his home telephone had been made to Mrs M.'s telephone number and that most of the calls complained of had been made from the company where both Mrs M. and the applicant worked. Nevertheless, it had not proved possible to determine the identity of the per-

son making the calls because he had hung up as soon as the telephone was answered.

C. Proceedings before the Supreme Court

27. The applicant lodged an appeal on points of law, which the Supreme Court dismissed on 19 March 1994. It held with regard to the telephone tapping that, even if the court order allowing the applicant's telephone line to be monitored had been couched in general terms, the evidence thereby obtained had not been the only evidence on which the trial court had relied in convicting him and, in any event, the threats had also been made in writing.

D. The *amparo* appeal to the Constitutional Court

28. The applicant then filed an *amparo* appeal with the Constitutional Court in which he relied on the principle of the presumption of innocence, on the right to respect for his private and family life and on the confidentiality of telephone communications (Articles 24 and 18 of the Constitution – see paragraph 29 below). That appeal was dismissed on 16 November 1994 on the following grounds:

"... Contrary to what is said by the applicant, there has been no breach of his right to make telephone communications in confidence in the present case, since the monitoring of his telephone line had previously been authorised in a reasoned court order made under Article 579 § 3 of the Code of Criminal Procedure. It must nevertheless be noted that the monitoring failed to produce any decisive results enabling the conclusion to be reached that Mr Valenzuela had been guilty of making the threats of which he was suspected, inasmuch as the only finding was that frequent calls in which the caller had remained silent had been made from his home to the home of the person receiving the threats, as the caller had hung up as soon as [the victim] answered. The decisive factor in this respect [the finding that the applicant was guilty] was the evidence as a whole including the *amparo* appellant's recent relationship with [Mrs M.], the fact that he was the deputy head of personnel in the company where she worked, the fact that it had been shown that some of the calls had been made from that company's premises, the fact that the photographs enclosed with some of the anonymous letters were from the company's archives to which only members of the personnel department had access, [Mr Valenzuela's] reactions during the oral hearing, etc. That evidence, which was properly reviewed by the [*Audiencia provin-*

cial] in a clearly reasoned judgment that was not illogical, may be considered to have been sufficient to rebut the presumption that the appellant was innocent..."

II. RELEVANT DOMESTIC LAW

A. The Constitution

29. The relevant provisions of the Constitution read as follows:

Article 10 § 2

"The rules relating to the fundamental rights and the freedoms recognised under the Constitution shall be construed in accordance with the Universal Declaration of Human Rights and the international treaties and agreements concerning the same subject matter that have been ratified by Spain."

Article 18 § 3

"Communications, particularly postal, telegraphic and telephone communications, shall be confidential unless the court decides otherwise."

Article 96

"Properly concluded international treaties shall form part of the domestic legal order once they have been published in Spain..."

B. The Code of Criminal Procedure

1. *Before Implementing Law no. 4/1988 of 25 May 1988 came into force*
30. The relevant provisions of Chapter VIII of Volume II of the Code of Criminal Procedure "on the entry into and searches of closed premises, the opening of books and written documents and the interception and opening of written and telegraphic correspondence" were as follows:

Article 579

"A court may authorise the seizure, opening and examination of private postal and telegraphic correspondence sent or received by a person charged if there is reason to believe that facts or circumstances material to the case may thereby be uncovered or verified."

Article 581

"The officer who seizes the correspondence shall immediately hand it to the investigating judge."

Article 583

"The decision, which shall be reasoned, authorising the seizure and inspection of correspondence ... shall specify which correspondence is to be seized or inspected..."

Article 586

"The procedure shall take place by the judge himself opening the correspondence..."

Article 588

"The fact that the correspondence has been opened shall be noted in a record..."

The record thereof shall be signed by the investigating judge, the registrar and any other persons present."

2. *Since Implementing Law no. 4/1988 of 25 May 1988 came into force*

31. Implementing Law no. 4/1988 amended two Articles of Chapter VIII of Volume II (see paragraph 30 above), namely Articles 553 and 579. Of these, only Article 579 is relevant in the present case and it now provides:

Article 579

"1. A court may authorise the seizure, opening and examination of private postal and telegraphic correspondence sent or received by a person charged if there is reason to believe that facts or circumstances material to the case may thereby be uncovered or verified.

2. A court may also authorise, in a reasoned decision, the monitoring of the telephone calls of a person charged if there is evidence to show that facts or circumstances material to the case may thereby be uncovered or verified.

3. Likewise, a court may, in a reasoned decision, authorise for a maximum renewable period of three months the monitoring of the postal, telegraphic and telephonic communications of persons reasonably believed to have committed an offence and of communications made for criminal ends.

..."

C. The case-law

32. In its judgment no. 114/1984 of 29 November 1984 the Constitutional Court held that the concept of "confidentiality" did not cover just the content of communications, but also other aspects of them such as the subjective identity of the people communicating.
33. In its judgment of 21 February 1991 the Supreme Court noted that the legislative amendment made by Implementing Law no. 4/1988 of 25 May 1988, bringing in the new wording of Article 579 of the Code of Criminal Procedure, was not perfect. The court said that cassette recordings of telephone conversations should be put at the disposal of the judge with an accurate transcript, which was to be checked by the registrar for use at the trial if appropriate. It added that "if the conditions laid down by Article 579 are satisfied, if the judge has reviewed the content of the evidence so obtained and has given leave for it to be used at the trial", evidence obtained from telephone tapping may be considered admissible.
34. In a decision (*auto*) of 18 June 1992 the Supreme Court construed the Spanish legislation on the admissibility of evidence obtained by telephone tapping as it stood after Implementing Law no. 4/1988 of 25 May 1988 had come into force (see paragraphs 29 and 31 above). It stated that "the legislature [had] not specified any limitations according to the nature of the possible offence or the sentence it carried" and emphasised that the deficiencies, inadequacies and vagueness of that legislation needed to be rectified by the case-law of the domestic courts and of the European Court of Human Rights.
- In the light of the latter Court's case-law, the Supreme Court reached the following conclusions in its decision:
- "In summary, the violations that render evidence obtained from telephone tapping inadmissible and determine its effects are as follows:
- (1) Lack of evidence. Lack of sufficient reasoning
- Lack ... of evidence capable, in the judge's view, of justifying a measure restricting fundamental rights to the extent telephone tapping does; mere suspicion on the part of the police, which in principle serves as the basis for the court's decision, cannot suffice.
- (2) Lack of supervision
- There was an almost total lack of any form of judicial supervision of the actual monitoring of the telephone concerned, which must necessarily be effected in compliance with the proportionality principle, which indeed can only be established through the reasoning, by, for example, listening to conversations recorded over reasonable periods in order for progress

in the investigation (in this case a police investigation) to be checked and a decision taken as to whether or not expressly to extend the measure/surveillance – which, moreover, should not be for more than a reasonable period – in accordance with the principles laid down by the Code of Criminal Procedure.

(3) Periodic review. Effects

Once the conversations have been recorded on the tapes, the judge must periodically, in the manner he deems appropriate in the light of all the circumstances, examine them in the presence of the court registrar and, after hearing the recorded voices, decide on the proper course of action and, if appropriate, order that the monitoring continue, in which case he determines the appropriate guidelines to be followed by those responsible for implementing the measure.

If he orders that the measure should cease, the person or persons affected by that measure must be informed of the operation that has ended ... so that they may henceforth take such action as they deem appropriate...

Only in exceptional cases can the measure remain secret until the end of the investigation so as not to frustrate the legitimate interest in pursuing it ... but it must cease to remain secret once the investigation has ended...

(4) Divergence between the monitoring and the investigation

... There is a violation of the right to private life or, even more simply, the confidentiality of communications in general and of telephone communications in particular where ..., during the course of the originally authorised monitoring, it appears possible that one or more new offences may have been committed. At that point ... the police must, without delay, immediately inform the investigating judge who authorised/ordered the monitoring so that he may consider the question of his jurisdiction and the requirement of proportionality... A blanket authorisation may not be given; nor, without a fresh, express authority from the judge, can the measure/surveillance continue if the new presumed offence revealed on the telephone is found to be independent of the offence covered by the original authorisation. Such situations, if uncontrollable and not directly supervised by the judge, cause or are apt to cause a total failure to comply with the proportionality principle. It will never be known whether or not that principle was complied with in the present case...

(5) Production of copies rather than originals

There will also be a violation where the measure fails to comply with the Constitution and all the legislation (Article 579 of the Code of Criminal Procedure). The fact that the tape recordings produced to the court were copies, not originals, and moreover represented a selection made by the police without any judicial supervision, is a serious violation of the system. ... as the judge, in the registrar's presence, must select, in the manner he deems appropriate, what is relevant to the investigation ordered by him while the remaining recordings must be kept in the registrar's custody, thereby precluding any undesired or undesirable knowledge of conversations beyond the scope of the decision to monitor. The judge must order the immediate cessation of the measure when it is no longer relevant to the legitimate aim of establishing the commission of a serious offence, whose gravity must always be proportionate to what is, in principle, an intolerable interference with private life...

(6) Finding of proportionality

On that basis, it is necessary to consider whether or not the preventive measures used were proportionate to the aim pursued... The judge, who is the essential guarantor of fundamental rights and public freedoms, must consider each offence in the light of all the circumstances and decide whether the legitimate interests in investigation, prosecution and, where appropriate, conviction warrant in a given case the sacrifice of legal interests as important as the dignity, privacy and freedom of the individual...

(7) Determination of the measure and its limits

... The judicial authority must state what form the measure is to take and ensure that it is implemented with the least possible harm to the person affected by it..."

PROCEEDINGS BEFORE THE COMMISSION

35. Mr Valenzuela Contreras applied to the Commission on 2 May 1995. He relied on Article 6 § 1 and Article 8 of the Convention, complaining that he had not had a fair hearing in that his guilt had not been established by lawful means and that the monitoring of his telephone line had infringed his right to respect for his private life.
36. On 18 October 1996 the Commission declared the application (no. 27671/95) admissible as regards the applicant's complaint under Article 8

and inadmissible as to the remainder. In its report of 11 April 1997 (Article 31), it expressed the opinion that there had been a violation of Article 8 (eleven votes to six). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment⁴.

FINAL SUBMISSIONS TO THE COURT

37. In their memorial the Government invited the Court to hold that the monitoring of the applicant's telephone line had not constituted a violation of Article 8 of the Convention.
38. The applicant requested the Court to hold that there had been breaches of Articles 6 and 8 of the Convention and to award him just satisfaction under Article 50.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

39. In his memorial to the Court, the applicant repeated the complaint he had submitted to the Commission under Article 6 of the Convention, which the Commission had declared inadmissible (see paragraphs 35 and 36 above). He affirmed that the only basis for his conviction had been the evidence obtained from monitoring his telephone and that without it, his guilt could not have been established.
40. However, since the compass of the case before it is delimited by the Commission's decision on admissibility, the Court has no jurisdiction to revive issues declared inadmissible (see, among other authorities, the *Masson and Van Zon v. the Netherlands* judgment of 28 September 1995, Series A no. 327-A, p. 16, § 40, and the *Leutscher v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 434, § 22).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant maintained that the interception of his telephone communications amounted to a violation of Article 8 of the Convention, which provides:

"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 freedoms of others."

A. Applicability of Article 8

42. The Court considers that it is clear from its case-law that telephone calls from a person's home come within the notions of "private life" and "correspondence" referred to in Article 8 (see the following judgments: *Klass and Others v. Germany* of 6 September 1978, Series A no. 28, p. 21, § 41, *Malone v. the United Kingdom* of 2 August 1984, Series A no. 82, p. 30, § 64, and *Kruslin v. France* and *Huvig v. France* of 24 April 1990, Series A no. 176-A and B, p. 20, § 26, and p. 52, § 25, respectively). Indeed, the point was not disputed.

B. Compliance with Article 8

1. Arguments of those appearing before the Court

(a) The applicant

43. The applicant's main contention was that the interception of his telephone conversations amounted to an unjustified interference in the exercise of his right to respect for his private life, in breach of Article 8. He argued that the statutory basis for the measure in issue was not sufficiently foreseeable and clear and that the existence of a general and unrestricted system for monitoring communications was contrary to Article 8, especially as there had been no judicial supervision in the instant case. He referred to the Court's judgment in the *Malone* case (judgment cited above, pp. 32–33, § 68) and said that the "law", namely the Spanish Constitution, which was of direct application as no other law was applicable in the present case, did not define "the extent

of any such power or the manner of its exercise with a degree of clarity that – having regard to the legitimate aim pursued – was sufficient to give the individual adequate protection against arbitrary interference".

He submitted that the tapping of the tel-

ephones did not satisfy the requirements laid down by the Court's case-law, in particular in that the investigating judge had not given sufficient reasons in his order of 19 November 1985 for requiring the applicant's telephone line to be monitored. The applicant emphasised that that order was akin to a "standard-form decision", since it contained no mention of the facts on which it was based or of the reasons that could have justified such a measure; furthermore, the measure was disproportionate to the seriousness of the offence.

(b) The Government

44. In the Government's submission, the interference in the applicant's private life was in accordance with the law (see Article 18 of the Constitution and the provisions of the Code of Criminal Procedure that were applicable under a wide construction of Article 579 of the Code of Criminal Procedure, before its amendment in 1988) and justified by the need to establish that the offence in question had been committed. They also pointed out that the provisions relating to fundamental rights are to be construed in the light of the Universal Declaration of Human Rights and the international treaties which Spain had ratified on the subject (see paragraph 29 above).

The order for the monitoring of the applicant's telephone line had been made by the investigating judge in a properly reasoned decision in connection with criminal proceedings brought for insulting and threatening telephone calls and letters. The measure had been necessary in order to discover or to verify facts relevant to the proceedings. The monitoring had been limited in time and the cassette recordings had been transcribed and made available for inspection and comment by both parties. Moreover, the telephone numbers and the names of the subscribers to which the measure related were mentioned in the order, as were the statutory provisions on which the decision to intercept communications was based.

The Government referred in particular to a decision (*auto*) of the Supreme Court of 18 June 1992 (see paragraph 34 above) that had been delivered two years before the Supreme Court's judgment of 19 March 1994 and the Constitutional Court's decision of 16 November 1994 (see paragraphs 27 and 28 above), in which all the necessary conditions applicable under Spanish law, as established by the Court's case-law, were set out.

(c) The Commission

45. Before the Court, the Delegate of the Commission pointed out that at the material time the Spanish system governing the monitoring of telephones did not provide adequate safeguards; it did not indicate with the clarity and precision required by the Convention the scope and manner of exercise of the power conferred on the authorities. Although the legislation and, in particular, the case-law in that sphere had evolved in a very positive way, that evolution had not begun until several years after the order in issue had been made.

2. The Court's assessment

(a) General principles

46. The following principles relevant in the instant case have been established by the Court in its case-law:
- (i) The interception of telephone conversations constitutes an interference by a public authority in the right to respect for private life and correspondence. Such an interference will be in breach of Article 8 § 2 unless it is "in accordance with the law", pursues one or more legitimate aims under paragraph 2 and, in addition, is "necessary in a democratic society" to achieve those aims (see the *Kopp v. Switzerland* judgment of 25 March 1998, *Reports* 1998-II, p. 539, § 50).
 - (ii) The words "in accordance with the law" require firstly that the impugned measure should have some basis in domestic law. However, that expression does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law. The expression thus implies that there must be a measure of protection in domestic law against arbitrary interference by public authorities with the rights safeguarded by paragraph 1 (see the *Malone* judgment cited above, p. 32, § 67). From that requirement stems the need for the law to be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him (see the *Kruslin* judgment cited above p. 20, § 27, and the *Kopp* judgment cited above, p. 540, § 55).
 - (iii) Especially where a power of the executive is exercised in secret the risks of arbitrariness are evident. In the context of secret measures of surveillance or interception

by public authorities, the requirement of foreseeability implies that the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to take any such secret measures (see the Malone judgment cited above, pp. 31–32, § § 66–67, the Kruslin judgment cited above, pp. 22–23, § 30, the Halford v. the United Kingdom judgment of 25 June 1997, Reports 1997-III, p. 1017, § 49, and the Kopp judgment cited above, p. 541, § 64). It is essential to have clear, detailed rules on the subject, especially as the technology available for use is constantly becoming more sophisticated (see the Kruslin judgment cited above, p. 23, § 33, the Huvig judgment cited above, p. 55, § 32, and the Kopp judgment cited above, pp. 542–43, § 72).

- (iv) The Kruslin and Huvig judgments mention the following minimum safeguards that should be set out in the statute in order to avoid abuses of power: a definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedure for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence and the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court (loc. cit. p. 24, § 35, and p. 56, § 34, respectively).

(b) Application of these principles in the instant case

i *Whether there has been an interference*

47. The tapping of Mr Valenzuela Contreras's telephone line between 26 November and 20 December 1985 (see paragraphs 14 and 16 above) constitutes an "interference by a public authority" within the meaning of Article 8 § 2 in the applicant's exercise of his right to respect for his private life and correspondence. Indeed, that point was not disputed. Nor is it decisive in that regard that, as the Government intimated,

only a "metering" system was used (see the Malone judgment cited above, p. 38, § 87).

ii *Was the interference justified?*

48. It is necessary to examine whether that interference satisfied the requirements of paragraph 2 of Article 8.

(a) *Was the interference "in accordance with the law"?*

49. It is not contested that there was a legal basis in Spanish law for such a measure. The Court therefore confines itself to noting that Article 18 § 3 of the Constitution, on which the investigating judge principally based the order for the applicant's telephone line to be monitored, provides that "communications, particularly postal, telegraphic and telephone communications, should be confidential unless the court decides otherwise" (see paragraphs 14 and 29 above).

50. The second requirement resulting from the phrase "in accordance with the law", namely that the law be accessible, does not give rise to any problem in the present case.

51. That is not true of the third requirement, namely that the law be foreseeable as regards the meaning and nature of the applicable measures.

52. The Government submitted that the relevant statutory provisions and the case-law of the Supreme Court and the Constitutional Court taken as a whole (see paragraphs 29, 30 and 32–34 above) warranted the conclusion that the telephone tapping ordered in the present case satisfied the foreseeability requirement as laid down by the European Court.

53. The Court must therefore assess the quality of the legal rules that were applied in Mr Valenzuela Contreras's case.

54. It notes, firstly, that the applicant's telephone line was tapped under Article 18 § 3 of the Constitution, which was the only provision allowing, at the time the order for the telephone tapping was made, restrictions on the right to confidentiality of telephone communications (see paragraph 29 above). It observes, however, that in order to justify his decision the judge who ordered the measure took into account Chapter VIII of Volume II of the Code of Criminal Procedure, which was in force at the time, "on the entry into and searches of closed premises, the opening of books and written documents

- and the interception and opening of written and telegraphic correspondence" (see paragraphs 14 and 30 above).
55. The Government submitted that the judge who had ordered the monitoring of the applicant's telephone line had, in the instant case, complied with the safeguards recommended by the Court in that connection. He had indicated the identity and telephone numbers of the two suspects, stated that the measure was being taken for the purposes of an investigation into certain events into which a police inquiry was under way, limited the duration of the measure to one month and supervised its enforcement. The investigating judge had consequently anticipated the safeguards and guarantees against arbitrariness specified in the *Kruslin v. France* and *Huvig v. France* judgments five years before those judgments were delivered.
56. The Court recognises that the investigating judge attempted to ensure maximum protection with respect to the enforcement of the monitoring order under the legal provisions in force at the time. He had taken into account, at least in a general way, those provisions of the Code of Criminal Procedure "on the entry into and searches of closed premises, the opening of books and written documents and the interception and opening of written and telegraphic correspondence" (see paragraph 14 above) capable of serving as a basis for his decision.
57. However, it has to be noted that the guarantees cited by the Government (see paragraph 55 above), deduced from a wide construction of statutory provisions or court decisions, were not apparent from the actual wording of Article 18 § 3 of the Constitution, or, for the most part, from the provisions of the Code of Criminal Procedure which the judge considered when ordering the monitoring of the applicant's telephone communications (see paragraphs 14 and 30 above).
58. The Court is aware of the efforts made by the legislature and the judicial authorities to introduce in both legislation and practice in Spain the guarantees required in this sphere by the Convention. The Supreme Court's decision (*auto*) of 18 June 1992 (see paragraph 34 above) provides the best example. The Court, like the Delegate of the Commission, notes, however, that those developments took place well after the order for the tapping of the applicant's telephone line had been made.
- The Court also notes that, in any event, in the decision referred to above, the Supreme Court did not interpret the legislation applicable when the order for the monitoring of the applicant's telephone was made, but the legislation as amended by Implementing Law no. 4/1988 of 25 May 1988 (see paragraph 31 above), by which the notion of telephone tapping was inserted into Article 579 of the Code of Criminal Procedure.
59. The Court notes that some of the conditions necessary under the Convention to ensure the foreseeability of the effects of the "law" and, consequently, to guarantee respect for private life and correspondence are not included either in Article 18 § 3 of the Constitution or in the provisions of the Code of Criminal Procedure cited in the order of 19 November 1985 (see paragraphs 14 and 30 above). They include, in particular, the conditions regarding the definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedure for drawing up the summary reports containing intercepted conversations and the use and destruction of the recordings made (see paragraph 46(iv) above).
60. Like the Delegate of the Commission, the Court cannot accept the Government's argument that the judge who ordered the monitoring of the applicant's telephone conversations could not have been expected to know the conditions laid down in the *Kruslin* and *Huvig* judgments five years before those judgments were delivered in 1990. It reiterates that the conditions referred to in the judgment cited by the Government concerning the quality of the law stem from the Convention itself. The requirement that the effects of the "law" be foreseeable means, in the sphere of monitoring telephone communications, that the guarantees stating the extent of the authorities' discretion and the manner in which it is to be exercised must be set out in detail in domestic law so that it has a binding force which circumscribes the judges' discretion in the application of such measures (see paragraph 46(iii) and (iv) above). Consequently, the Spanish "law" which the investigating judge had to apply should have provided those guarantees with sufficient precision. The Court further notes that at the time the order for the monitoring of the applicant's telephone line was made it had already stated, in a judgment in which it had found

a violation of Article 8, that “the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence” (see the *Malone* judgment cited above, p. 32, § 67). In addition, it points out that in any event the investigating judge who ordered the monitoring of the applicant’s telephone communications had himself put in place a number of guarantees which, as the Government said, did not become a requirement of the case-law until much later.

61. In summary, Spanish law, both written and unwritten, did not indicate with sufficient clarity at the material time the extent of the authorities’ discretion in the domain concerned or the way in which it should be exercised. Mr Valenzuela Contreras did not, therefore, enjoy the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society (see the *Malone* judgment cited above, p. 36, § 79). There has therefore been a violation of Article 8.

(β) Aim of the interference and the need for it

62. Having regard to the foregoing conclusion, the Court, like the Commission, does not consider it necessary to consider whether the other requirements of paragraph 2 of Article 8 were complied with in the instant case.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

63. The applicant claimed just satisfaction under Article 50 of the Convention, which provides:

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

64. The applicant sought 1,304,181 pesetas for the pecuniary damage sustained as a result of his conviction, corresponding to the compensa-

tion he had had to pay to Mrs M., the fine imposed on him and the portion of legal costs he had had to bear before the Madrid *Audiencia provincial*.

65. The Government argued that in the circumstances of the case the present judgment would in itself constitute sufficient just satisfaction. The Delegate of the Commission expressed no view.
66. The Court considers that there is no causal link between the finding of a violation of Article 8 and the alleged pecuniary damage corresponding to the amounts the applicant had to pay as a result of his conviction for making threats. The claim must therefore be dismissed.

B. Costs and expenses

67. The applicant sought 1,500,000 pesetas for the expenses and lawyers’ fees incurred before the Constitutional Court and the Convention institutions.
68. The Government considered those claims reasonable.
69. The Delegate of the Commission did not express a view.
70. Making its assessment on an equitable basis and having regard to the criteria it applies in such circumstances, the Court grants the sum claimed in full.

C. Default interest

71. According to the information available to the Court, the statutory rate of interest applicable in Spain at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it has no jurisdiction to consider the applicant’s complaint under Article 6 of the Convention;
2. Holds that there has been a violation of Article 8 of the Convention;
3. Holds:
 - (d) that the respondent State is to pay the applicant, within three months, 1,500,000 (one million five hundred thousand) pesetas for costs and expenses;
 - (e) that simple interest at an annual rate of

7.5% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 July 1998.

Rudolf Bernhardt, *President*

Herbert Petzold, *Registrar*

ECHR

ECJ

COURT (PLENARY)

CASE OF AUTRONIC AG v SWITZERLAND

(Application no. 12726/87)

JUDGMENT

STRASBOURG

22 May 1990

INFORMATION, BROADCASTING, TELEVISION, INTERCEPTION, INTERFERENCE, FREEDOM OF RECEPTION, LICENSING, DEMOCRACY, SECRET, CONFIDENTIALITY, ILLEGAL ACCESS.

IN THE AUTRONIC AG CASE,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court and composed of the following judges:

Mr **R. Ryssdal**, *President*,

Mr **J. Cremona**,

Mr **Thór Vilhjálmsson**,

Mrs **D. Bindschedler-Robert**,

Mr **F. Gölcüklü**,

Mr **F. Matscher**,

Mr **L.-E. Pettiti**,

Mr **B. Walsh**,

Sir **Vincent Evans**,

Mr **R. Macdonald**,

Mr **C. Russo**,

Mr **R. Bernhardt**,

Mr **A. Spielmann**,

Mr **J. De Meyer**,

Mr **J.A. Carrillo Salcedo**,

Mr **S.K. Martens**,

Mrs **E. Palm**,

Mr **I. Foighel**,

and also of Mr **M.-A. Eissen**, *Registrar*,

and Mr **H. Petzold**, *Deputy Registrar*,

Having deliberated in private on 25 January and 24 April 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 12 April and 6 July 1989 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 12726/87) against

Switzerland lodged with the Commission under Article 25 (art. 25) by a Swiss company, Autronic AG, on 9 January 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant company stated that it wished to take part in the proceedings and designated the lawyer who would represent it (Rule 30).
3. On 29 April 1989 the President of the Court decided that, in the interests of the proper administration of justice, this case should be considered by the Chamber constituted on 24 November 1988 to hear the case of Groppera Radio AG and Others (Rule 21 § 6). That Chamber included ex officio Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)); and the five members drawn by lot (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43) were Mr F. Gölcüklü, Mr F. Matscher, Mr L.-E. Pettiti, Mr J. De Meyer and Mrs E. Palm.
4. In his capacity as President of the Chamber (Rule 21 § 5), Mr Ryssdal consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant company on the need for a written procedure (Rule 37 § 1). In accordance with his Order and his instructions, the Registrar received the Government's and Autronic AG's memorials on 12 September. On 13 November the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.
5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 15 June that the oral proceedings should open on 21 November 1989 (Rule 38).
6. On 20 June the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary

Court (Rule 51).

7. On 17 October the Commission's secretariat lodged in the registry the documents relating to the proceedings before the Commission.

On 2 November the Government sent the Court the International Telecommunication Union's reply to the questions that the Government had put to it.

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Mr **O. Jacot-Guillarmod**, Assistant Director, Federal Office of Justice, Head of the International Affairs Division, *Agent*,

Mr **B. Münger**, Federal Office of Justice, Deputy Head of the International Affairs Division,

Mr **P. Koller**, Federal Department of Foreign Affairs, Deputy Head of the Cultural Affairs Section,

Mr **A. Schmid**, Head Office of the PTT, Head of the General Legal Affairs Division,

Mr **H. Kieffer**, Head Office of the PTT, Head of the Frequency Management and Broadcasting Rights Section,

Mr **M. Regnotto**, Federal Department of Transport, Communications and Energy-Radio and Television Department, *Counsel*;

(b) for the Commission

Mr **J.A. Frowein**, *Delegate*;

(c) for the applicant company

Mr **R. Gullotti**, *Rechtsanwalt, Counsel*,

Mr **W. Streit**, *Adviser*.

The Court heard addresses by Mr Jacot-Guillarmod and Mr Kieffer for the Government, by Mr Frowein for the Commission and by Mr Gullotti for the applicant company, as well as their answers to its questions.

9. The Agent of the Government and counsel for the applicant company produced several documents at the hearing.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. Autronic AG is a limited company incorporated under Swiss law and has its head office at Dübendorf (Canton of Zürich). It specialises in electronics and in particular sells 90 cm-diameter dish aerials for home use.
11. Its application relates to the reception in Switzerland of uncoded television programmes made and broadcast in the Soviet Union. They are transmitted to the Soviet satellite G-Horizont (also called Stationar-4), which sends them back to receiving earth stations on Soviet territory, and these in turn distribute them to users. The satellite is a telecommunications satellite and not a direct-broadcasting one: it provides a fixed point-to-point radiocommunication service (number 22 of the Radio Regulations - see paragraph 36 below) and uses the frequencies allotted to radiocommunications. It also transmits telephone conversations, telexes or telegrams and data.
12. In 1982 the only television broadcasts by satellite that could be received in Switzerland by means of a dish aerial were those from G-Horizont.

A. Background to the case

1. *The first application for permission*

13. In the spring of 1982 Autronic AG applied to the Radio and Television Division of the Head Office of the national Post and Telecommunications Authority (PTT). It requested permission to give a showing at the Basle Trade Fair (Mustermesse) from 17 to 26 April 1982 of the public television programme that it received direct from G-Horizont by means of a private dish aerial, its object being to give a demonstration of the technical capabilities of the equipment in order to promote sales of it.
14. The Division wrote to the Soviet Union's embassy in Berne, which on 21 April conveyed the Soviet authorities' consent for the duration of the fair.

2. *The second application for permission*

15. On 7 July 1982 Autronic AG made a similar approach in order to give demonstrations at the FERA exhibition, which was to be held in Zürich from 30 August to 6 September 1982 and cov-

ered the latest developments in radio, television and electronics.

16. The Radio and Television Division again applied to the Soviet embassy, but did not receive a reply. On 14 and 26 July and on 6 August it informed Autronic AG that without the express consent of the Soviet authorities it could not allow reception of the G-Horizon broadcasts and that the Radio Regulations (see paragraph 36 below) required it to prevent such reception.

B. The application for a declaratory ruling

1. *The proceedings before the Radio and Television Division*

(a) The application of 1 November 1982

17. As Autronic AG was anxious to give further demonstrations, it applied to the Radio and Television Division, on 1 November 1982, for a declaratory ruling (Feststellungsverfügung) that, in particular, reception for private use of uncoded television programmes from satellites such as G-Horizon should not require the consent of the broadcasting State's authorities.
18. The applicant company relied on several arguments: the confidentiality of a programme could not depend on the use of particular frequencies; numbers 1992-1994 of the Radio Regulations gave no indication of which kind of broadcast was to be kept confidential; reception of radio and television programmes intended for and accessible to the general public could be made subject only to the award of a licence under Swiss law, which was available to everybody; and, lastly, the reception in question did not infringe Swiss legislation on intellectual property, because while programmes taken individually could have the status of "works", the same was not true of a whole schedule.

(b) The decision of 13 January 1983

19. On 13 January 1983 the Radio and Television Division rejected the applicant company's application, stating that it could not grant a receiving licence without the consent of the broadcasting State's authorities.
20. The Division noted that only duly approved earth stations were entitled to receive signals from telecommunications satellites. In this connection it referred to number 960 of the Radio Regulations, under which each national authority could assign certain frequencies to

point-to-point radiocommunications provided that the broadcasts were not intended for direct reception by the general public.

It also stressed the difference between broadcasting satellites and telecommunications satellites. The former transmitted radio and television programmes to an undefined number of receiving stations within a given area, on frequencies expressly reserved for direct reception, while the latter were covered by the secrecy of broadcasts which all member States were obliged to ensure under Article 22 of the International Telecommunication Convention and numbers 1992-1994 of the Radio Regulations (see paragraphs 34 and 36 below). It added, lastly (translation from German):

"As to whether a broadcast is intended for direct reception by the general public, the decisive factor is accordingly not the content of the radiocommunication transmitted (a television programme, for example) but the mode of its transmission, in other words its classification as a telecommunication. It follows that radio or television programmes transmitted via a telecommunications satellite cannot be received in a country unless the telecommunications authority of the broadcasting State ... has given its permission to the telecommunications authority of the receiving State. This will ensure compliance with the provisions on the secrecy of telecommunications. There is no apparent reason why telecommunications authorities should not be able to keep certain radiocommunications secret since they are under an obligation to ensure that the provisions of the International Telecommunication Convention and of the Radio Regulations are complied with."

2. *The proceedings before the Head Office of the PTT*

21. On 14 February 1983 Autronic AG lodged an appeal (Beschwerde) against the Radio and Television Division's decision but this was rejected by the Head Office of the PTT on 26 July.

The Head Office began by holding that it had jurisdiction and that the company had an interest, worthy of protection, in having the disputed decision set aside under section 48 of the Federal Administrative Procedure Act.

It went on to set out its reasons for dismissing the appeal. Protection of the material information could not depend on whether the broadcasts were intended for the general public, since as a rule it was not known, at the time of transmission by telecommunications satellites,

which broadcasts were intended for general use. Furthermore, Article 10 (art. 10) of the European Convention on Human Rights secured only the right to receive information from generally accessible sources, which telecommunications satellites were not. Lastly, it was irrelevant that the broadcasts were ultimately intended for general use, as the obligation to keep the transmitted data secret subsisted at the time of broadcasting.

3. *The proceedings in the Federal Court*

22. On 13 September 1983 Autronic AG lodged an administrative-law appeal with the Federal Court against the decision of the Head Office of the PTT. It applied to have that decision set aside and sought a judgment which would clarify the legal situation for the future; it asked the court in particular to rule that reception for private use of uncoded broadcasts emanating from telecommunications satellites and intended for the general public should not be subject to the broadcasting State's consent.

(a) Consideration of the appeal

23. In reply to a request for information made by the Radio and Television Division of the Head Office of the Swiss PTT, the Head Office of the Soviet Union's Gostelradio said the following in a telex of 7 February 1984:

"With reference to your letter of 9 January 1984, we should like to inform you that the programmes transmitted by 'Stationar 4' [G-Horizont] are not satellite broadcasts intended for foreign countries. The programmes are intended for Soviet television viewers and are our internal affair. On the other hand, we have no technical means of preventing them from reaching other countries, particularly Switzerland. As regards the international use of the signal, only discussion and settlement of the problem at world level will provide a solution."

24. On 9 July 1984 the Federal Court put a number of questions to the parties about the factual and legal position. The Head Office of the PTT replied on 22 August and the applicant company on 31 August.
25. On 10 June 1985 the rapporteur informed Autronic AG that the Federal Court had not yet been able to consider the appeal and that the company had until 16 August 1985 to submit any further observations.
26. On 26 June 1985 the Radio and Television Division sent the Netherlands telecommunications authorities the following telex:

"...

In connection with the judgment of a request, we would like to know on which conditions reception of TV programmes via telecommunications satellites is permitted in the Netherlands. Please let us also know if the Soviet communications satellite G-Horizont Stationar is received in your country (by cable operators).

"..."

The Netherlands authorities replied on 1 July 1985 as follows:

"... The conditions for reception of TV programmes by cable operators in the Netherlands seem to be quite similar to those in your country.

The Netherlands PTT issues licences to cable operators, separate for each particular TV program. With such a licence the operator can install his own TVRO antenna, although it is advisable for him to consult with PTT for frequency co-ordination purposes in order to avoid interference from terrestrial micro-waves.

...

A few years ago some reception of the G-Horizont satellite did indeed take place.

This was considered illegal because of the absence of agreements with the USSR program provider and satellite operator, and the cable operators were so informed.

"..."

In response to a similar request for information, the Finnish telecommunications authorities stated the following on 8 July 1985:

"..."

We have permission from the Telecommunications Ministry of USSR to receive as an experiment the [G-Horizont] signal up to 31.12.1985. Authorization for distribution has been given in seven cases so far."

(b) The judgment of 10 July 1986

27. The Federal Court gave judgment on 10 July 1986 and served the text on Autronic AG on 11 November.

The court held that the appellant company was seeking a review in the abstract of the legal position, whereas in reality it could only complain of the ban on receiving the disputed broadcasts during the FERA exhibition. There

was, however, no point in ruling on the admissibility of the appeal, since at all events the company had failed to show that it had an interest worthy of protection.

Apart from G-Horizont, there was no other satellite over Europe at the time whose broadcasts were receivable by means of a domestic dish aerial. Autronic AG picked up the signals from the Soviet satellite because there was no alternative source. As long as this situation continued, there would be practically no market for such equipment and only "eccentrics" (Sonderlinge) would be inclined to buy it. Although two other satellites - one German and one French - were to be launched, it remained unclear how they would be used and it was impossible to assess either the interest that direct reception of their broadcasts would arouse or the number of dish aerials that would come into use.

The Federal Court concluded that as it had failed to adduce evidence of any direct economic interest, the applicant company had no interest worthy of protection. It therefore refused to determine the merits of the case.

C. Subsequent developments

28. At the present time, there are still only a handful of direct-broadcasting satellites, whereas there are more than 150 telecommunications satellites such as G-Horizont, covering all or part of western Europe and broadcasting all kinds of uncoded programmes intended for the general public.

II. THE LEGAL RULES IN ISSUE

A. Swiss legislation

29. Article 36 § 4 of the Federal Constitution guarantees "inviolability of the secrecy of letters and telegrams".

1. *The Federal Act of 1922*

30. The relevant provisions of the Federal Act of 14 October 1922 regulating telegraph and telephone communications are as follows:

Section 1

"The Post and Telecommunications Authority shall have the exclusive right to set up and operate transmitting and receiving equipment or equipment of any kind for the electric or radio transmission of signals, images or sounds."

Section 3

"The competent authority shall be able to issue licences for setting up and operating equipment for the electric and radio transmission of signals, images and sounds."

Section 46 § 2

"The provisions required for the implementation of this Act shall be incorporated into the Ordinance on telegraphs and telephones to be enacted by the Federal Council and in the detailed regulations ..."

2. *The 1973 Ordinance*

31. On 10 December 1973 the Federal Council enacted Ordinance no. 1 relating to the 1922 Act; among other things the Council laid down the scope of television licences:

Article 66

"1. Licence I for television-receiving equipment shall entitle the holder to operate equipment for the private reception, by means of radio waves or by electric wire, of Swiss and foreign public television broadcasts.

2. Reception of television broadcasts on premises which are not accessible to the public shall be deemed to be private.

3. The licence-holder may himself install his equipment for receiving broadcasts by means of radio waves.

4. A special licence must be held in order to exercise rights vested in the State other than those mentioned in paragraphs 1 and 3, in particular in order to demonstrate how receiving equipment works, to install receiving equipment in the homes of third parties and to arrange for public reception of broadcasts."

32. The revised text of Ordinance no. 1, which was enacted on 17 August 1983, came into force on 1 January 1984. Although it does not apply in the instant case, several of its provisions are worth quoting:

Article 19 § 1

"Licences may be refused where there is good reason to suppose that the telecommunications equipment will be used for a purpose that is

- (a) unlawful;
- (b) contrary to public morals or public policy; or
- (c) prejudicial to the higher interests of the

country, of the Post and Telecommunications Authority or of broadcasting."

Article 57 § 1

"Radio- and television-receiving licences shall authorise their holders to receive Swiss and foreign radio broadcasts privately or publicly."

Article 78 § 1

"A community-antenna licence shall entitle the holder to:

(a) Operate the local distribution network defined in the licence and rebroadcast by this means radio and television programmes from transmitters which comply with the provisions of the International Telecommunication Convention of 25 October 1973 and the International Radio Regulations and with those of the international conventions and agreements concluded within the International Telecommunication Union;

...

(f) Transmit programmes and special broadcasting services which, on the authorisation of the Post and Telecommunications Authority, which itself requires the Department's consent, are received from telecommunications satellites;

..."

Article 79 § 2

"The authorisation referred to in Article 78 § 1 (f) shall be granted where the appropriate telecommunications authority has given its consent and none of the grounds for refusal provided for in Article 19 exist."

3. *The Federal Decree of 1987*

33. On 20 December 1985 the Federal Council submitted to Parliament, by means of a communication, a draft decree of general application on satellite broadcasting. The decree, enacted on 18 December 1987 and effective from 1 May 1988, contained an Article 28 concerning foreign programmes, which was worded as follows:

"1. A licence from the [appropriate federal] department shall be required in order to retransmit programmes broadcast by satellite under a foreign licence.

2. Such a licence shall be granted where this is not contrary to the country's higher interests and where

(a) the PTT finds that the requirements of Swiss and international telecommunications law are satisfied;

...

3. The department may refuse to grant a licence where a State whose licensing system allows a programme does not accept the retransmission on its territory of programmes broadcast under a Swiss licence."

B. *The international rules*

1. *The International Telecommunication Convention*

34. The International Telecommunication Convention, which was concluded in 1947 within the International Telecommunication Union and has been revised several times, came into force on 1 January 1975 and has been ratified by all the Council of Europe's member States. In Switzerland it has been published in full in the Official Collection of Federal Statutes (1976, p. 994, and 1985, p. 1093) and in the Compendium of Federal Law (0.784.16).

Article 22, entitled "Secrecy of telecommunications", provides:

"1. Members agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.

2. Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties."

Under Article 44 member States are bound to abide by the Convention and the Administrative Regulations in all telecommunications offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference with radio services of other countries.

35. The Convention is complemented by three sets of detailed administrative rules (as indicated in Article 83): the Radio Regulations, the Telegraph Regulations and the Telephone Regulations. Only the Radio Regulations are relevant in the instant case.

2. *The Radio Regulations*

36. The Radio Regulations date from 21 December 1959 and were likewise amended in 1982

and also on other occasions. They run to over a thousand pages and - except for numbers 422 and 725 - have not been published in the Official Collection of Federal Statutes. The latter contains the following reference to them:

"The administrative regulations relating to the International Telecommunication Convention of 25 October 1973 are not being published in the Official Collection of Federal Statutes. They may be consulted at the Head Office of the PTT, Library and Documentation, Viktoriastrasse 21, 3030 Berne, or may be obtained from the ITU, International Telecommunication Union, Place des Nations, 1202 Geneva."

The following provisions are the ones relevant in the present case:

Number 22

"Fixed-Satellite Service: A radiocommunication service between earth stations at specified fixed points when one or more satellites are used; in some cases this service includes satellite-to-satellite links, which may also be effected in the inter-satellite service; the fixed-satellite service may also include feeder links for other space radiocommunication services."

Number 37

"Broadcasting-Satellite Service: A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.

In the broadcasting-satellite service, the term 'direct reception' shall encompass both individual reception and community reception."

Number 960

"Any administration may assign a frequency in a band allocated to the fixed service or allocated to the fixed-satellite service to a station authorized to transmit, unilaterally, from one specified fixed point to one or more specified fixed points provided that such transmissions are not intended to be received directly by the general public."

Numbers 1992-1994

"In the application of the appropriate provisions of the Convention, administrations bind themselves to take the necessary measures to prohibit and prevent:

(a) the unauthorized interception of radiocommunications not intended for the general use of the public;

(b) the divulgence of the contents, simple disclosure of the existence, publication or any use whatever, without authorization, of information of any nature whatever obtained by the interception of the radiocommunications mentioned [in sub-paragraph (a)]"

3. *The International Telecommunication Union's reply to the Swiss Government's questions*

37. On 29 September 1983 the Permanent Mission of Switzerland to the international organisations in Geneva put two questions to the International Telecommunication Union, which replied on 31 October, saying inter alia:

"17. With regard to this aspect of [the] practical pursuance [of the principle of secrecy of telecommunications], it is ... important, indeed essential, to note also that no precise measures concerning practical ways of effectively ensuring such 'secrecy of telecommunications' are prescribed by either the Convention or the RR [Radio Regulations], but that the RR leave the choice of these practical measures to the administrations of the Union's Members.

18. That is how it is necessary to understand and interpret numbers 1992 and 1993 of the RR, which stipulate that it is administrations that bind themselves to take the necessary measures to prohibit and prevent: (a) the unauthorised interception of radiocommunications not intended for the general use of the public (... that also applies, of course, to number 1994 of the RR).

19. This means that it is for the administration of each of the Union's Members itself to take whatever measures it deems necessary to prohibit and prevent on its territory the unauthorised interception of the radiocommunications referred to in number 1993 of the RR. This, incidentally, is in accordance with the first principle laid down in the preamble to the Convention, which is worded as follows: "While fully recognising the sovereign right of each country to regulate its telecommunication ...". In the case under consideration here ..., it is for the Swiss Administration to put into effect Switzerland's undertaking to ensure the secrecy of telecommunications by whatever measures it itself considers necessary for the purpose. Such measures may, of course, be different from those regarded as necessary by the administrations of other Members of the Union which have given the same undertaking.

20. With regard, lastly, to the authorisation required for the interception of radiocom-

munications not intended for the general use of the public ..., it should be inferred from the terms of numbers 1992 and 1993 of the RR that an administration which has committed itself to taking the necessary measures to prohibit and prevent such unauthorised interception in order to ensure the secrecy of telecommunications is also to be regarded as the one empowered to give, where appropriate, the authorisation for such interception on its territory and hence to lay down the terms and conditions on which it grants such authorisation. In the case under consideration here ... it is therefore the Swiss Administration that, with a view to ensuring the secrecy of telecommunications, should decide whether or not such authorisation is to be granted and lay down the terms and conditions it itself considers necessary for the purposes of that decision. By way of a conclusion and a final legal consequence, it should be borne in mind that what was stated in the preceding paragraph also applies, *mutatis mutandis*, in respect of the authorisation itself."

4. Recommendation T/T2

38. At a session held in Vienna from 14 to 25 June 1982 the European Conference of Postal and Telecommunications Administrations adopted Recommendation T/T2, which reads:

"The European Conference of Postal and Telecommunications Administrations, considering

(a) ...

(b) that fixed-satellite service signals are intended for reception only by known correspondents duly authorised under the Radio Regulations appended to the International Telecommunication Convention;

(c) ...

(d) that there is a risk that the technical development of small earth stations may facilitate the unauthorised reception and use of fixed-satellite service signals, particularly television signals, thus turning the fixed-satellite service into a broadcasting-satellite service, which would be unlawful under the International Telecommunication Convention and the Radio Regulations;

(e) ...

(f) ...

(g) that all ITU Members are under an obligation to apply and enforce the provisions of the International Telecommunication Convention and the Radio Regulations appended to the Convention; ...

Recommends

1. ...

2. that reception of these signals should be authorised only with the consent of the Administration of the country in which the station transmitting to the satellite is situated and of that of the country in which the prospective receiving earth station is located;

3. ..." (translation by the registry)

5. *The European Convention on Transfrontier Television*

39. The European Convention on Transfrontier Television, which was drawn up within the Council of Europe and signed on 5 May 1989 by nine States, including Switzerland, is not yet in force. Article 4, entitled "Freedom of reception and of retransmission", provides:

"The Parties shall ensure freedom of expression and information in accordance with Article 10 (art. 10) of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention."

The Swiss Government made a declaration to the effect that the Confederation would apply the Convention provisionally, in accordance with Article 29 § 3.

PROCEEDINGS BEFORE THE COMMISSION

40. Autronic AG applied to the Commission on 9 January 1987 (application no. 12726/87). The company complained that the granting of permission to receive uncoded television broadcasts for general use from a telecommunications satellite had been made subject to the consent of the broadcasting State and it alleged an infringement of its right to receive information, as guaranteed in Article 10 (art. 10) of the Convention.
41. The Commission declared the application admissible on 13 December 1988. In its report of 8 March 1989 (made under Article 31) (art. 31) the Commission expressed the opinion, by eleven votes to two with one abstention, that there had been a breach of Article 10 (art. 10). The full text of the Commission's opinion and

of the two separate opinions contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

42. At the hearing the Government confirmed their submissions in their memorial. They requested the Court to hold:

"That Article 10 (art. 10) of the Convention is not applicable to the case at issue; In the alternative, that since, by the terms of Article 10 § 1, third sentence (art. 10-1), of the Convention, even broadcasting enterprises may be subject to licensing both to receive and to retransmit television broadcasts sent via a telecommunications satellite, there is all the more reason why a private commercial enterprise should be required to apply for a receiving licence in a given case; In the further alternative, that the State interference relating to this licensing system was "prescribed by law" (including international law) and was necessary, in a democratic society, for the purpose of maintaining international order in telecommunications and to prevent the disclosure of confidential information transmitted by a telecommunications satellite from one fixed point to another."

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (ART. 10)

43. Autronic AG complained that the Swiss Post and Telecommunications Authority had made reception of television programmes from a Soviet telecommunications satellite by means of a dish aerial subject to the consent of the broadcasting State (see paragraphs 13-16 above). It regarded this as a violation of Article 10 (art. 10) of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restric-

tions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Having regard to the arguments of the parties, the first issue to be settled is whether this provision is applicable.

A. Applicability of Article 10 (art. 10)

44. In the Government's submission, the right to freedom of expression was not relevant to the applicant company's complaint in the present case.

In the first place, the company had not attached any importance to the content of the transmission (programmes in Russian), since it was pursuing purely economic and technical interests. The company was a corporate body whose activities were commercial and its sole object had been to give a demonstration at a fair of the capabilities of a dish aerial in order to promote sales of it. Freedom of expression that was exercised, as in the present case, exclusively for pecuniary gain came under the head of economic freedom, which was outside the scope of the Convention. The "information" in question was therefore not protected by Article 10 (art. 10).

In the second place, the Government emphasised that the television programmes in issue had not been intended for or made accessible to the public at the time Autronic AG could have received them. At that time they were in process of transmission between two fixed points of the distribution network on Soviet territory by means of the telecommunications satellite G-Horizont (see paragraphs 11 and 12 above) and were accordingly covered by the secrecy of such telecommunications under international law, that is to say Article 22 of the International Telecommunication Convention and numbers 1992-1994 of the Radio Regulations.

45. The applicant company argued on the contrary that the right to freedom of expression included the right to receive information from accessible sources and consequently to receive television programmes intended for the general public which were retransmitted by a telecom-

munications satellite. Moreover, Article 10 (art. 10) protected not only the substance but also the process of communication. The company could not see why the fundamental rights which corporate bodies undoubtedly enjoyed under Article 10 (art. 10) should be subject to restrictions merely because they were pursuing economic or technical objectives.

46. In its report of 8 March 1989 the Commission noted that "at present" only telecommunications satellites were in operation over Europe. Their programmes were undoubtedly picked up primarily by receiving stations for retransmission but they were also received direct by private aeriels or community antennas. The practice of several Council of Europe member States, including France and the United Kingdom, suggested that the International Telecommunication Convention and the Radio Regulations did not preclude direct reception of signals retransmitted by telecommunications satellite where they were intended for the general public.

At the material time - in 1982 - only G-Horizont was concerned, but that was of little importance as Autronic AG's application of 1 November 1982 to the Swiss authorities for a declaratory ruling (see paragraph 17 above) was not limited to transmissions from the Soviet satellite; and in any case, on the Government's own admission, the Swiss PTT would adopt the same attitude today if faced with a similar application. The Commission considered that the distinction between signals according to their means of transmission - direct-broadcasting satellite or, where uncoded, telecommunications satellite - was purely formal. Since no question of secrecy arose and technological progress meant that anyone could receive broadcasts by means of his own equipment, the corresponding right to do so was included in the freedom to receive information.

47. In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies (see the Sunday Times judgment of 26 April 1979, Series A no. 30, the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, and the

Groppera Radio AG and Others judgment of 28 March 1990, Series A no. 173). Furthermore, Article 10 (art. 10) applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information. Indeed the Article (art. 10) expressly mentions in the last sentence of its first paragraph (art. 10-1) certain enterprises essentially concerned with the means of transmission.

Before the Convention institutions the applicant company complained of an interference with its freedom to receive information and ideas regardless of frontiers, and not with its freedom to impart them. Like the Commission, the Court is of the view that the reception of television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10 § 1 (art. 10-1), without it being necessary to ascertain the reason and purpose for which the right is to be exercised. As the administrative and judicial decisions complained of (see paragraphs 16, 19 and 27 above) prevented Autronic AG from lawfully receiving G-Horizont's transmissions, they therefore amounted to "interference by public authority" with the exercise of freedom of expression.

The Government's submission based on the concern to protect the secrecy of telecommunications relates only to justification for the interference and accordingly needs to be considered, if at all, in regard to paragraph 1 in fine or paragraph 2 of Article 10 (art. 10-1, art. 10-2).

48. In conclusion, Article 10 (art. 10) was applicable.

B. Compliance with Article 10 (art. 10)

49. The Government submitted in the alternative that the interference was compatible with paragraph 1 in fine, whereby Article 10 (art. 10) is not to "prevent States from requiring the licensing of broadcasting [or] television ... enterprises"; in the further alternative, they argued that the interference satisfied the requirements of paragraph 2.

1. Paragraph 1, third sentence, of Article 10 (art. 10-1)

50. On the first point Autronic AG maintained that the International Telecommunication Convention and the Radio Regulations did not make reception for private use of uncoded pro-

grammes broadcast by satellite subject to the consent of the authorities of the broadcasting State and that the third sentence of Article 10 § 1 (art. 10-1) was therefore of no relevance.

The Commission likewise thought that this provision could not justify the impugned interference. Since the rights recognised in paragraph 1 (art. 10-1) applied "regardless of frontiers", the Contracting States could only, in its view, "restrict information received from abroad" on the basis of paragraph 2 (art. 10-2). Furthermore, the third sentence covered only broadcasting, television and the cinema, not the use of receiving equipment.

51. The Government submitted, on the contrary, that international law required that any transmission from a telecommunications satellite should be kept secret and laid a duty upon States to ensure this. Article 10 § 1 (art. 10-1) in fine, they said, empowered States to establish a system whereby broadcasting enterprises had to obtain a licence both to receive such transmissions and to rebroadcast them. This applied all the more in the case of a private commercial company such as Autronic AG.
52. It is unnecessary to consider this submission and, therefore, to rule on the applicability of the third sentence of Article 10 § 1 (art. 10-1) in the instant case; at all events, that sentence "does not ... provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole", as the Court pointed out in its *Groppera Radio AG and Others* judgment of 28 March 1990 (Series A no. 173, p. 24, § 61).

2. Paragraph 2 of Article 10 (art. 10-2)

53. It must be determined whether the interference complained of was "prescribed by law", was in pursuance of one or more of the legitimate aims listed in paragraph 2 (art. 10-2) and was "necessary in a democratic society" in order to achieve them.

(a) "Prescribed by law"

54. The applicant company submitted that Swiss law did not contain any rule that would provide a legal basis for the decision in issue or that referred to provisions of international telecommunications law. The International Telecommunication Union's reply to the Swiss Government's questions afforded proof of this

(see paragraphs 7 and 37 above), as it showed that it was for each member State to take the measures it considered necessary in order to achieve the treaty objectives and honour its own corresponding commitments.

55. The Government considered that the national and international rules satisfied the requirements of precision and accessibility that had been established in the Convention institutions' case-law.

As to the first of these requirements, they pointed out that the decisions taken on 13 January 1983 by the Radio and Television Division and on 26 July 1983 by the Head Office of the PTT were founded on the Federal Council's Ordinance no. 1 of 10 December 1973 and several specific provisions of international telecommunication law (the International Telecommunication Convention and the Radio Regulations).

As to the requirement of accessibility, the Government recognised that only the International Telecommunication Convention had been published in full in the Official Collection of Federal Statutes and in the Compendium of Federal Law. While the Radio Regulations had not been so published - except for numbers 422 and 725 -, the Official Collection indicated how they could be consulted or obtained (see paragraph 36 above). This practice was, the Government said, justified by the length of the text, which ran to more than a thousand pages. Moreover, the practice had been approved by the Federal Court (judgment of 12 July 1982 in the case of *Radio 24 Radiowerbung Zürich AG gegen Generaldirektion PTT*, Judgments of the Swiss Federal Court, vol. 108, Part Ib, p. 264) and could be found in at least ten other member States of the Council of Europe. Lastly, it was consonant with the European Court's case-law on individuals' access to legal norms in common-law systems.

56. The Commission did not share this opinion. The Federal Council's Ordinance no. 1 did not provide a sufficient legal basis as it did not make any mention of the need for the broadcasting State's consent in order to receive television programmes intended for the general public. As to the Radio Regulations, the provisions relied on by the Government lacked precision.
57. In the Court's view, the legal basis for the interference is to be found in the Federal Act of 1922 and Article 66 of Ordinance no. 1 relating to that Act (see paragraph 31 above), taken together with Article 22 of the International

Telecommunication Convention and the provisions of the Radio Regulations cited in paragraph 36 above.

Having regard to the particular public for which they are intended, these enactments are sufficiently accessible (see paragraphs 34 and 36 above and the *Groppera Radio AG and Others* judgment previously cited, Series A no. 173, p. 26, § 68). Their status as "law" within the meaning of Article 10 § 2 (art. 10-2), however, remains doubtful, because it may be asked whether they do not lack the required clarity and precision. The national provisions do not indicate exactly what criteria are to be used by the authorities in determining applications for one of the licences referred to in Article 66, while the international provisions seem to leave a substantial margin of appreciation to the national authorities.

But it does not appear necessary to decide the question, since even supposing that the "prescribed by law" condition is satisfied, the Court comes to the conclusion that the interference was not justified (see paragraphs 60-63 below).

(b) Legitimate aim

58. The Government contended that the impugned interference was in pursuance of two aims recognised in the Convention.

The first of these was the "prevention of disorder" in telecommunications. It was important to have regard to the limited number of frequencies available, to prevent the anarchy that might be caused by unlimited international circulation of information and to ensure cultural and political pluralism.

Secondly, the interference was, the Government maintained, aimed at "preventing the disclosure of information received in confidence": the secrecy of telecommunications, which covered the television transmissions in question and was guaranteed in Article 22 of the International Telecommunication Convention, had to be protected.

The applicant company, on the other hand, observed that the material broadcasts were intended for the general public and that other Contracting States had more liberal rules on the subject.

The Commission acknowledged the legitimacy of the first objective mentioned by the Government, the only one on which they had relied in the proceedings before the Commission.

59. The Court finds that the interference was in pursuance of the two aims cited by the Government, which were fully compatible with the Convention - the prevention of disorder in telecommunications and the need to prevent the disclosure of confidential information.

(c) "Necessary in a democratic society"

60. The applicant company submitted that the refusal to give it permission did not correspond to any pressing social need; it was not necessary in order to prevent the disclosure of confidential information, since broadcasters anxious to restrict their broadcasts to a particular audience would encode them.

The Government emphasised the distinction between direct-broadcasting satellites and telecommunications satellites; they claimed that international telecommunications law was designed to afford the same legal protection to broadcasts from the latter as to telephonic communications.

In the Commission's view, the case raised no problem with regard to the protection of confidential information; merely receiving G-Horizont's signals could not upset the international telecommunications order, and the distinction between direct-broadcasting satellites and telecommunications satellites was purely formal. In short, the interference appeared to be unnecessary.

61. The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established (see the *Barthold* judgment of 25 March 1985, Series A no. 90, p. 26, § 58).
62. The Government maintained that the Court, in carrying out its review, should look at matters as they stood at the material time and, in particular, should ignore the legal and technical developments that had taken place since. On the other hand, the Government held the view that Article 22 of the International Telecommu-

nication Convention and the aforementioned provisions of the Radio Regulations would still leave the PTT no choice but to refuse applications such as those from the applicant company, if permission had not first been obtained from the authorities of the country in which the station transmitting to the satellite was situated.

The Court observes that later developments can be taken into account in so far as they contribute to a proper understanding and interpretation of the relevant rules.

In the technical field, several other telecommunications satellites broadcasting television programmes have come into service. In the legal field, developments have included, at international level, the signature within the Council of Europe on 5 May 1989 of the European Convention on Transfrontier Television and, at national level, the fact that several member States allow reception of uncoded television broadcasts from telecommunications satellites without requiring the consent of the authorities of the country in which the station transmitting to the satellite is situated.

The latter circumstance is not without relevance, since the other States signatories to the International Telecommunication Convention and the international authorities do not appear to have protested at the interpretation of Article 22 of this Convention and the provisions of the Radio Regulations that it implies. The contrary interpretation of these provisions, which was relied on by the Swiss Government in support of the interference, is consequently not convincing. This is also apparent from paragraphs 19 and 20 of the International Telecommunication Union's reply to the Government's questions (see paragraph 37 above).

63. That being so, the Government's submission based on the special characteristics of telecommunications satellites cannot justify the interference. The nature of the broadcasts in issue, that is to say uncoded broadcasts intended for television viewers in the Soviet Union, in itself precludes describing them as "not intended for the general use of the public" within the meaning of numbers 1992-1994 of the Radio Regulations. Leaving aside the international rules discussed above, there was therefore no need to prohibit reception of these broadcasts.

Before the Court the Swiss Government also argued that a total ban on unauthorised reception of transmissions from telecommuni-

cations satellites was the only way of ensuring "the secrecy of international correspondence", because there was no means of distinguishing signals conveying such correspondence from signals intended for the general use of the public. That submission is unpersuasive, since the Government had already conceded before the Commission that there was no risk of obtaining secret information by means of dish aerials receiving broadcasts from telecommunications satellites.

The Court concludes that the interference in question was not "necessary in a democratic society" and that there has accordingly been a breach of Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 (ART. 50)

64. By Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Autronic AG did not seek compensation for damage. On the other hand, the company did claim reimbursement of its costs and expenses in the domestic proceedings and in those before the Convention institutions. It said that these amounted to 42,245 Swiss francs, namely 380 in costs paid to the Swiss authorities for the decision taken by the Head Office of the PTT on 26 July 1983, 40,000 for lawyer's fees (representing 235 hours' work) and 1,865 for sundry expenses.

The Government did not contest the first or third heads, but found the second head "frankly excessive" - the applicant company had not provided a breakdown of the fees and had committed "a procedural error" by submitting an abstract question to the Federal Court, which would in any case not have awarded more than 4,000 Swiss francs in costs if the administrative-law appeal had been allowed.

The Delegate of the Commission did not express any view.

65. Taking its decision on an equitable basis as

required by Article 50 (art. 50), the Court considers that Autronic AG is entitled to be reimbursed for costs and expenses in the amount of 25,000 Swiss francs.

FOR THESE REASONS, THE COURT

1. **Holds by sixteen votes to two that Article 10 (art. 10) applied and that there has been a breach of it;**
2. **Holds unanimously that Switzerland is to pay the applicant company costs and expenses in the amount of 25,000 (twenty-five thousand) Swiss francs;**
3. **Dismisses unanimously the remainder of the claim for just satisfaction.**

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 May 1990.

Rolv RYSSDAL, *President*

Marc-André EISSEN, *Registrar*

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mrs **Bindschedler-Robert** and Mr **Matscher**;
- (b) concurring opinion of Mr **De Meyer**.

DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT AND MATSCHER

(Translation)

We regret that we cannot share the majority's opinion as to the applicability of Article 10 (art. 10) or as to the breach if Article 10 (art. 10) is held to be applicable.

1. We do not dispute that a commercial company can in principle rely on Article 10 (art. 10), even in connection with its commercial activities. But we note that in the instances mentioned in the judgment (*The Sunday Times*, Series A no. 30; *Markt Intern Verlag GmbH and Klaus Beermann*, Series A no. 165, and *Groppera Radio AG and Others*, Series A no. 173) the content of the information which the company wished to disseminate was of some significance to it or to the intended recipients. In our opinion, Article 10 (art. 10) presupposes a minimum of identification between the person claiming to rely on the right protected by that Article (art. 10) and the "information" transmitted or received. In the instant case, however, the content of the information - by pure chance Soviet programmes in Russian - was a matter of complete indifference to the company and to the visitors to the trade fair who were likely to see the programmes; the sole purpose was to give a demonstration of the technical characteristics of the dish aerial in order to promote sales of it. That being so, we consider it unreasonable on the part of the company to invoke freedom of information, and Article 10 (art. 10) is accordingly not, in our opinion, applicable in the instant case.
2. Even supposing that Article 10 (art. 10) was applicable, we cannot see that there has been any breach of that provision in the restriction of freedom of reception imposed on the applicant company.

We would point out at the outset that the sale of dish aeriels was not itself made subject to any restriction. It is therefore not possible in the instant case to derive a restriction of freedom of information from an alleged restriction of trade in technical equipment for radiocommunication.

As the majority accepted, the restriction that was imposed was in pursuit of a legitimate aim: order in international telecommunications. The

majority leave a lingering doubt, however, as to the "law" status of the statutory provisions on which the interference was based. In our opinion, both the International Telecommunication Convention and the international Radio Regulations had, as was recognised in the *Gropper Radio AG and Others* case (judgment of 28 March 1990, § 68), the necessary clarity and precision in respect of the vital points: the fundamental distinction between direct-broadcasting satellites, whose broadcasts are intended for direct reception by the general public; and telecommunications satellites (broadcasting from point to point), whose broadcasts are not directly intended for the general use of the public, and the obligation to take the necessary measures to prohibit and prevent the unauthorised interception of radiocommunications not intended for the general use of the public, that is to say broadcasts from telecommunications satellites (RR nos. 22, 37, 1992-1994). It should be remembered that the G-Horizont satellite was precisely a satellite of this latter type.

As the ITU pointed out in its reply of 2 November 1989, it follows from these provisions that the interception of the broadcasts via telecommunications satellite was subject to authorisation by the Swiss PTT, which was empowered to lay down the terms and conditions of such authorisation and which, in so doing, had to have regard to the undertaking it had entered into under the Radio Regulations. The disputed interference - the Swiss authorities' refusal of permission - therefore had a sufficient legal basis.

3. Switzerland's opinion that this undertaking obliged it to make permission for reception subject to the consent of the broadcasting State - in this instance the Soviet Union - was in keeping with the interpretation generally accepted at the time (and even until quite recently), as appears from the replies of the foreign authorities from which Switzerland requested information (the USSR, 7 February 1984; the Netherlands, 1 July 1985; Finland, 8 July 1985; and the Federal Republic of Germany, 29 August 1989); it was also in keeping with the recommendation adopted in 1982 by the European Conference of Postal and Telecommunications Administrations (see the judgment, § 38).

It was therefore legitimate for Switzerland to believe itself to be not only entitled but obliged to make the permission sought by Au-

tronic AG subject to the consent of the appropriate Soviet authorities, in order to discharge the international obligations it had undertaken, by complying with them as they were understood by the relevant international bodies and by the other States, in particular by the State concerned in this instance, the Soviet Union. In other words, since the Soviet authorities' consent had not been secured, the refusal of permission complained of by Autronic AG could be regarded at the time as a measure necessary for ensuring order in international telecommunications.

Even if, in recent years, some national authorities seem to have dispensed with the condition of first securing the consent of the broadcasting State, it nonetheless emerges from the replies received as late as 1989 that this approach is not yet a general one. The inter-State agreements concluded in order to set up Eutelsat and Intelsat, which allow only specially authorised earth stations to pick up broadcasts from satellites, prove this. But even if that were not the case and if views have changed, this cannot be taken as a basis for determining the issue of whether or not there has been a violation of the Convention in this case and therefore of the State's responsibility, which is an issue that has to be assessed in the light of the legal rules in force (and as understood) at the material time.

The fact that the ITU considers that it is for the authorities of each member of the Union themselves to take the "necessary measures to prohibit and prevent the unauthorised interception of radiocommunications not intended for the general use of the public" and that any national administration is empowered to "lay down the terms and conditions on which it grants such authorisation" means only that, under the International Telecommunication Convention and the Radio Regulations, the States enjoy some discretion in deciding on suitable measures for the purposes laid down in the aforesaid international rules; it cannot be argued from this discretion that a measure taken in this context which appears perfectly suitable and proportionate to the legitimate aim pursued, that is to say in the instant case to the prevention of international disorder in telecommunications, is unnecessary. Moreover, the measure complained of was not an absolute, indiscriminate prohibition but a reasonable response to the international undertakings entered into by the State in question, a response which had regard to the legal inter-

ests of the broadcasting State.

That being so, we consider that there has been no breach of Article 10 (art. 10).

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

The reasons which led me to hold that there had been a breach of the right to freedom of expression in the case of *Groppera Radio AG and Others*⁵ could not but prompt me to reach the same decision in the instant case, especially as what was in issue here was measures preventing public demonstration of equipment for receiving television broadcasts.

In this connection I think it useful to say that the licensing power of States in respect of radio and television does not extend to the reception of broadcasts⁶ and that, for the rest, such reception can only be interfered with by States as regards methods or circumstances and only to the extent that one or other of those is giving rise to harmful effects which there is a pressing social need to prevent or eliminate⁷. The freedom to see and watch and to hear and listen is not, as such, subject to States' authority.

ECHR

ECJ

COURT (CHAMBER)

CASE OF HUVIG v FRANCE

(Application no. 11105/84)

JUDGMENT

STRASBOURG

24 April 1990

TELEPHONE, TAPPING, SURVEILLANCE, INTERFERENCE,
INTERCEPTION, PRIVATE LIFE, CORRESPONDENCE

IN THE HUVIG CASE,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr **R. Ryssdal**, *President*,

Mrs **D. Bindschedler-Robert**,

Mr **F. Gölcüklü**,

Mr **F. Matscher**,

Mr **L.-E. Pettiti**,

Mr **B. Walsh**,

Sir **Vincent Evans**,

and also of Mr **M.-A. Eissen**, *Registrar*,

and Mr **H. Petzold**, *Deputy Registrar*,

Having deliberated in private on 26 October 1989 and 27 March 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 March 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11105/84) against the French Republic lodged with the Commission under Article 25 (art. 25) by two nationals of that State, Mr Jacques Huvig and his wife Mrs Janine Huvig-Sylvestre, on 9 August 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8).

2. In response to the enquiry made in accordance

with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. On 30 March 1989 the President of the Court decided, under Rule 21 § 6 and in the interests of sound administration of justice, that a single Chamber should be constituted to consider both the instant case and the *Kruslin* case*.

The Chamber thus constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On the same day, 30 March 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with his orders and instructions, the Registrar received the Government's memorial on 18 August 1989; the applicants' representative and the Delegate of the Commission informed the Registrar on 11 July and 19 October respectively that they would not be filing memorials.

On 13 September and 10 October 1989 the Commission provided the Registrar with various documents he had asked for on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 21 June 1989 that the oral proceedings should open on 24 October 1989 (Rule 38).
6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- (a) for the Government

Mr **J.-P. Puissochet**, Head of the Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Mrs **I. Chaussade**, magistrat, on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Miss **M. Picard**, magistrat, on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Mr **M. Dobkine**, magistrat, Department of Criminal Affairs and Pardons, Ministry of Justice,

Mr **F. Le Gunehec**, magistrat, Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;

(b) for the Commission

Mr **S. Trechsel**, *Delegate*.

By letter of 11 July 1989 counsel for the applicant had informed the Registrar that he would not be attending the hearing.

The Court heard addresses by Mr Puissochet for the Government and by Mr Trechsel for the Commission, as well as their answers to a question it put.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Jacques Huvig and his wife Janine, née Sylvestre, currently live at Grau-du-Roi (Gard). Before he retired, Mr Huvig, with his wife's assistance, ran a wholesale fruit-and-vegetable business at Varennes-sur-Amance and Montigny-le-Roi (Haute-Marne).
8. On 20 December 1973 the Director of the Haute-Marne Tax Office lodged a complaint against the applicant and two other persons alleging tax evasion, failure to make entries in accounts and false accounting.

A judicial investigation was begun on 26 December by an investigating judge at Chaumont, assigned by the President of the Chaumont tribunal de grande instance.

Mr and Mrs Huvig's home was searched as were their business premises, pursuant to a warrant issued on 14 March 1974 by the investigating judge. The latter also issued a warrant to the gendarmerie at Langres (Haute-Marne) on 4 April requiring them to monitor and transcribe all Mr and Mrs Huvig's telephone calls -

both business and private ones - on that day and the next day.

The telephone tapping took place from about 8 p.m. on 4 April 1974 until midnight on 5 April; on 6 April the second in command of the gendarmerie unit at Langres made a "summary report" on the tapping, which was subsequently brought to the knowledge of the applicants.

9. Mr Huvig was charged with tax evasion, forgery of private and business documents, failure to keep proper accounts, aiding and abetting misuse of company property and receiving funds derived from misuse of company property, and on 9 April he appeared before the investigating judge, who remanded him in custody; he was released on 11 June 1974.

Mrs Huvig, who from 20 March 1974 onwards was questioned several times as a witness, was charged on 13 May 1976 with aiding and abetting tax evasion and forgery of business documents.

10. On 23 December 1976 the investigating judge committed them for trial - with the other two persons mentioned above - at the Chaumont tribunal de grande instance, in Mr Huvig's case on charges of forgery, uttering, aiding and abetting misuse of company property, aiding and abetting tax evasion, aiding and abetting fraud, receiving funds derived from misuse of company property, and false or incomplete accounting, and in Mrs Huvig's case on charges of aiding and abetting forgery, aiding and abetting tax evasion and aiding and abetting improper keeping of accounts.

They raised as a preliminary issue several pleas of nullity, one of which related to the telephone tapping carried out on 4 and 5 April 1974. On 26 January 1982 the court ordered that these pleas should be heard as part of the main trial, and on 30 March 1982 it rejected them. Of the telephone tapping it said:

"This investigative measure, even if it must remain an exceptional one, is within the investigating judge's powers as part of his inquiries during an investigation;

No infringement of the rights of the defence has been substantiated, especially as in the instant case the results were unusable and did not serve as a basis for the prosecution ..."

In the same judgment it was held that the various offences with which the applicants were charged had been made out, except that of

aiding and abetting fraud in Mr Huvig's case; in consequence, Mr Huvig was sentenced to eight months' imprisonment, six months of which were suspended, and Mrs Huvig to two months suspended.

11. The defendants, the civil party seeking damages and the prosecution appealed to the Dijon Court of Appeal.

The defence again raised the pleas of nullity that had been put forward unsuccessfully at the original trial. The Court of Appeal rejected all of them on 17 March 1983. As regards the impugned telephone tapping, it gave the following reasons for its decision:

"[According to Mr Huvig, the investigating judge] infringed the rights of the defence and the guarantees afforded by law to all accused persons, seeing that, even though he had not yet had his first interview with the investigating judge (which took place on 9 April 1974 ...), he nonetheless had to be regarded as having already been charged, since the public prosecutor's application of 20 December 1973 was directed against him among others;

But, as the trial court rightly pointed out, this investigative measure, while it must remain an exceptional one, is one of the prerogatives of an investigating judge carrying out inquiries as part of an investigation he is conducting;

The Court has been able to check and satisfy itself that this operation, which to be effective must be carried out without the knowledge of the person suspected - or even charged -, was carried out on the investigating judge's authority and under his supervision, without any subterfuge or ruse being employed;

The operation, moreover, lasted only 28 hours ..., did not yield anything usable and did not serve as a basis for the prosecution;

Nothing enables it to be established that the procedure thus followed had the result of jeopardising the exercise of the rights of the defence, since it must be borne in mind that Mr Huvig had not at that stage been officially charged by the investigating judge and that Article 81 of the Code of Criminal Procedure empowers the latter to take all investigative measures he deems useful for establishing the truth ...;

..."

At the same time the Dijon Court of Appeal upheld the judgment under appeal as to the finding that the defendants were guilty but increased the sentences passed on them by

the trial court, sentencing the applicant to two years' imprisonment, twenty-two months of which were suspended, and to a fine of 10,000 French francs, and his wife to six months suspended.

12. The applicants appealed to the Court of Cassation on points of law. In the first of their grounds of appeal the Court of Appeal's judgment was criticised for its failure to quash the investigating judge's warrant of 4 April 1974:

"Firstly, investigating judges are not empowered by Article 81 of the Code of Criminal Procedure to tap the telephone of anybody - whether it be a person charged with a criminal offence, a third party or a witness - and such a procedure is contrary to the law, since the Code of Criminal Procedure has regulated searches, the seizing of property and the taking of evidence from witnesses and has not conferred on investigating judges the power to tap the telephones of persons against whom there is substantial, consistent evidence of guilt, such a procedure being prohibited both by Articles 6 and 8 (art. 6, art. 8) of the Convention ... and by Article 9 of the Civil Code, Articles L. 41 and L. 42 of the Post and Telecommunications Code and Article 368 of the Criminal Code;

Secondly, an individual who has been personally proceeded against by the civil party seeking damages and in respect of whom ... the public prosecutor has requested that an investigation be commenced is a party to the proceedings and must consequently be regarded as a person charged with a criminal offence within the meaning of Article 114 of the Code of Criminal Procedure; such a person must, therefore, before any statement is taken by the investigating judge, be informed of the charges against him, of his right not to make any statement and of his right to the assistance of a lawyer; the investigating judge accordingly cannot, without infringing the rights of the defence, record such a person's telephone conversations without the person's knowledge;

Lastly, since what is at issue is a nullity that is absolute as a matter of public policy - unlawful telephone tapping being a criminal offence -, it is of little importance that the conversations recorded were not used as the basis for the prosecution."

On pages 6 and 7 of the supplementary pleadings there were references to the Klass and Others judgment of the European Court of Human Rights (6 September 1978, Series A no. 28).

The Criminal Division of the Court of Cassation dismissed the appeal on 24 April 1984. It rejected the foregoing ground in the following terms:

"In the judgment [of the Dijon Court of Appeal] the plea that the investigation proceedings were null and void because of the nullity of the warrant issued by the investigating judge on 4 April 1974 ordering that Huvig's telephone conversations should be monitored was rejected on the grounds that this measure was within the contemplation of Article 81 of the Code of Criminal Procedure and that as, moreover, it had not served as a basis for the prosecution, it had not had the effect of jeopardising the exercise of the rights of the defence;

As these reasons stand and seeing, furthermore, that it has not been found - nor even alleged by the appellants - that the investigative measure in question, which was carried out under the supervision of the investigating judge, entailed any subterfuges or ruses, the Court of Appeal did, without laying itself open to the objection raised in the ground of appeal, provide a legal basis for its decision;

..." (Recueil Dalloz Sirey (DS) 1986, jurisprudence, pp. 125-128)

II. THE RELEVANT LEGISLATION AND CASE-LAW

13. French criminal law adopts the principle that any kind of evidence is admissible: "unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge ..." (Article 427 of the Code of Criminal Procedure).

There is no statutory provision which expressly empowers investigating judges to carry out or order telephone tapping, or indeed to carry out or order various measures which are nonetheless in common use, such as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations of witnesses and reconstructions of crimes. On the other hand, the Code of Criminal Procedure does expressly confer power on them to take several other measures, which it regulates in detail, such as pre-trial detention, seizure of property and searches.

14. Under the old Code of Criminal Procedure the Court of Cassation had condemned the use of telephone tapping by investigating judges, at least in circumstances which it regarded as

disclosing, on the part of a judge or the police, a lack of "fairness" incompatible with the rules of criminal procedure and the safeguards essential to the rights of the defence (combined divisions, 31 January 1888, *ministère public c. Vigneau*, Dalloz 1888, jurisprudence, pp. 72-74; Criminal Division, 12 June 1952, *Imbert*, Bull. no. 153, pp. 258-260; Civil Division, second section, 18 March 1955, *époux Jolivot c. époux Lubrano et autres*, DS 1955, jurisprudence, pp. 573-574, and *Gazette du Palais (GP) 1955*, jurisprudence, p. 249). Some trial courts and courts of appeal which had to deal with the issue, on the other hand, showed some willingness to hold that such telephone tapping was lawful if there had been neither "entrapment" nor "provocation"; this view was based on Article 90 of the former Code (*Seine Criminal Court, Tenth Division, 13 February 1957, ministère public contre X*, GP 1957, jurisprudence, pp. 309-310).

15. Since the 1958 Code of Criminal Procedure came into force, the courts have had regard in this respect to, among others, Articles 81, 151 and 152, which provide:

Article 81

(first, fourth and fifth paragraphs)

"The investigating judge shall, in accordance with the law, take all the investigative measures which he deems useful for establishing the truth.

...

If the investigating judge is unable to take all the investigative measures himself, he may issue warrants to senior police officers (*officiers de police judiciaire*) in order to have them carry out all the necessary investigative measures on the conditions and subject to the reservations provided for in Articles 151 and 152.

The investigating judge must verify the information thus gathered.

..."

Article 151

(as worded at the material time)

"An investigating judge may issue a warrant requiring any judge of his court, any district-court judge within the territorial jurisdiction of that court, any senior police officer (*officier de police judiciaire*) with authority in that jurisdiction or any investigating judge to undertake any investigative measures he considers necessary in places coming under their respective

jurisdictions.

The warrant shall indicate the nature of the offence to which the proceedings relate. It shall be dated and signed by the issuing judge and shall bear his seal.

It may only order investigative measures directly connected with the prosecution of the offence to which the proceedings relate.

..."

Article 152

"The judges or senior police officers instructed to act shall exercise, within the limits of the warrant, all the powers of the investigating judge.

..."

16. An Act of 17 July 1970 added to the Civil Code an Article 9 guaranteeing to everyone "the right to respect for his private life". It also added to the Criminal Code an Article 368, whereby:

"Anyone who wilfully intrudes on the privacy of others:

1. By listening to, recording or transmitting by means of any device, words spoken by a person in a private place, without that person's consent;

2. ...

shall be liable to imprisonment for not less than two months and not more than one year and a fine ... or to only one of these two penalties."

During the preparatory work, one of the vice-chairmen of the National Assembly's Statutes Committee, Mr Zimmermann, sought "certain assurances" that this enactment "[would] not prevent the investigating judge from issuing strictly within the limits of the law warrants to have telephones tapped, obviously without making use of any form of inducement and in compliance with all the legal procedures" (Journal officiel, National Assembly, 1970 proceedings, p. 2074). The Minister of Justice, Mr René Pleven, replied: "... there is no question of interfering with the powers of investigating judges, who are indeed empowered, in the circumstances laid down by law, to order tapping"; he added a little later: "when an official taps a telephone, he can only do so lawfully if he has a warrant from a judicial authority or is acting on the instructions of a minister" (ibid., p. 2075). Both Houses of Parliament thereupon passed the Bill without amending it on this

point.

17. Article 41 of the Post and Telecommunications Code provides that any public servant or anyone authorised to assist with the performance of relevant official duties who breaches the secrecy of correspondence entrusted to the telecommunications service shall be liable to the penalties provided for in Article 187 of the Criminal Code - a fine, imprisonment and temporary disqualification from any public office or employment. Article 42 provides that anyone who, without permission from the sender or the addressee, divulges, publishes or uses the content of correspondence transmitted over the air or by telephone shall be liable to the penalties provided for in Article 378 of the Criminal Code (on professional confidentiality) - a fine or imprisonment.

General Instruction no. 500-78 on the telephone service - intended for Post and Telecommunications Authority officials - contains the following provisions, however, given here in the amended version of 1964 (Article 24 of Part III):

"Postmasters and sub-postmasters are required to comply with any requests that ... calls to or from a specified telephone should be monitored by the relevant authority, made by:

1. An investigating judge (Arts. 81, 92 and 94 of the Code of Criminal Procedure) or any judge or senior police officer (officier de police judiciaire) to whom a judicial warrant has been issued (Art. 152);

..."

The General Instruction was published in the official bulletin of the Ministry of Post and Telecommunications and was described by the Government as an "implementing regulation".

18. The striking development of various forms of serious crime - large-scale thefts and robberies, terrorism, drug-trafficking - appears in France to have led to a marked increase in the frequency with which investigating judges resort to telephone tapping. The courts have as a result given many more decisions on the subject than formerly; telephone tapping has not been held to be unlawful in itself, although the courts have occasionally shown some distaste for it (Paris Court of Appeal, Ninth Criminal Division, 28 March 1960, Cany et Rozenbaum, GP 1960, jurisprudence, pp. 253-254).

The vast majority of the decisions cited to the

Court by the Government and the Commission, or of which the Court has had cognisance by its own means, are of later date than the facts of the instant case (April 1974) and have gradually provided a number of clarifications. These do not all stem from judgments of the Court of Cassation, and do not for the time being constitute a uniform body of case-law, because the decisions or reasons given in some of the cases have remained unique. They may be summarised as follows.

- (a) Articles 81 and 151 of the Code of Criminal Procedure (see paragraph 15 above) empower investigating judges - and them alone, as far as judicial investigations are concerned - to carry out telephone tapping or, much more commonly in practice, to issue a warrant to that effect to a senior police officer (*officier de police judiciaire*) within the meaning of Article 16 (see, in particular, Court of Cassation, Criminal Division, 9 October 1980, *Tournet*, Bull. no. 255, pp. 662-664; 24 April 1984 - see paragraph 12 above; 23 July 1985, *Kruslin*, Bull. no. 275, pp. 713-715; 4 November 1987, *Croce, Antoine et Kruslin*, DS 1988, *sommaires*, p. 195; 15 February 1988, *Schroeder*, and 15 March 1988, *Arfi*, Bull. no. 128, pp. 327-335). Telephone tapping is an "investigative measure" which may sometimes be "useful for establishing the truth". It is comparable to the seizure of letters or telegrams (see, among other authorities, Poitiers Court of Appeal, Criminal Division, 7 January 1960, *Manchet*, *Juris-Classeur périodique (JCP)* 1960, *jurisprudence*, no. 11599, and Paris Court of Indictment Division, 27 June 1984, *F. et autre*, DS 1985, *jurisprudence*, pp. 93-96) and it similarly does not offend the provisions of Article 368 of the Criminal Code, having regard to the legislative history and to the principle that any kind of evidence is admissible (see paragraphs 13 and 16 above and Strasbourg tribunal de grande instance, 15 February 1983, *S. et autres*, unreported; Colmar Court of Appeal, 9 March 1984, *Chalvignac et autre*, unreported; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited and judgment of 31 October 1984, *Li Siu Lung et autres*, GP 1985, *sommaires*, pp. 94-95).
- (b) The investigating judge can only issue such a warrant "where there is a presumption that a specific offence has been committed which has given rise to the investigation" which he is responsible for conducting and

not in respect of a whole category of offences "on the off chance"; this is clear not only from Articles 81 and 151 (second and third paragraphs) of the Code of Criminal Procedure but also "from the general principles of criminal procedure" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The French courts do not seem ever to have held that telephone tapping is lawful only where the offences being investigated are of some seriousness or if the investigating judge has specified a maximum duration for it.

- (c) "Within the limits of the warrant" that has been issued to him - if need be by fax (*Limoges Court of Appeal, Criminal Division, 18 November 1988, Lecesne et autres*, DS 1989, *sommaires*, p. 394) - the senior police officer exercises "all the powers of the investigating judge" (Article 152 of the Code of Criminal Procedure). He exercises these under the supervision of the investigating judge, who by the fifth paragraph of Article 81 is bound to "verify the information ... gathered" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The warrant apparently sometimes takes the form of a general delegation of powers, including - without its being expressly mentioned - the power to tap telephones (Court of Cassation, Civil Division, second section, judgment of 18 March previously cited, and Paris Court of Appeal, judgment of 28 March 1960 previously cited).

- (d) In no case may a police officer tap telephones on his own initiative without a warrant, for example during the preliminary investigation preceding the opening of the judicial investigation (see, among other authorities, Court of Cassation, Criminal Division, 13 June 1989, *Derrien*, and 19 June 1989, *Grayo*, Bull. no. 254, pp. 635-637, and no. 261, pp. 648-651; full court, 24 November 1989, *Derrien*, DS 1990, p. 34, and JCP 1990, *jurisprudence*, no. 21418, with the submissions of Mr Advocate-General Emile Robert).
- (e) Telephone tapping must not be accom-

panied by "any subterfuge or ruse" (see, among other authorities, Court of Cassation, Criminal Division, judgment of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988 and 15 March 1988 previously cited) failing which the information gathered by means of it must be either deleted or removed from the case file (Court of Cassation, Criminal Division, judgments of 13 and 19 June 1989 previously cited).

- (f) The telephone tapping must also be carried out "in such a way that the exercise of the rights of the defence cannot be jeopardised" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988, 15 March 1988 and 19 June 1989 previously cited). In particular, the confidentiality of the relations between suspect or person accused and lawyer must be respected, as must, more generally, a lawyer's duty of professional confidentiality, at least when he is not acting in any other capacity (Aix-en-Provence Court of Appeal, Indictment Division, 16 June 1982 and 2 February 1983, Sadjı Hamou et autres, GP 1982, jurisprudence, pp. 645-649, and GP 1983, jurisprudence, pp. 313-315; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited).
- (g) With this reservation, it is permissible to tap telephone calls to or from a charged person (Court of Cassation, Criminal Division, judgments of 9 October 1980 and 24 April 1984 previously cited) or a mere suspect (judgments of the Strasbourg tribunal de grande instance, 15 February 1983, the Colmar Court of Appeal, 9 March 1984, and the Indictment Division of the Paris Court of Appeal, 27 June 1984, previously cited) or even a third party, such as a witness, whom there is reason to believe to be in possession of information about the perpetrators or circumstances of the offence (see, among other authorities, Aix-en-Provence Court of Appeal, judgment of 16 June 1982 previously cited).
- (h) A public telephone-box may be tapped (Seine Criminal Court, Tenth Division, 30 October 1964, Trésor public et Société de courses c. L. et autres, DS 1965, jurisprudence, pp. 423-424) just like a private line, irrespective of whether current is diverted

to a listening station (Court of Cassation, Criminal Division, 13 June 1989, and full court, 24 November 1989, previously cited).

- (i) The senior police officer supervises the tape or cassette recording of the conversations and their transcription, where he does not carry out these operations himself; when it comes to choosing extracts to submit "for examination by the court", it is for him to determine "what words may render the speaker liable to criminal proceedings". He performs these duties "on his own responsibility and under the supervision of the investigating judge" (Strasbourg tribunal de grande instance, judgment of 15 February 1983 previously cited, upheld by the Colmar Court of Appeal on 9 March 1984; Paris Court of Appeal, judgment of 27 June 1984 previously cited).
- (j) The original tapes are "exhibits", not "investigation documents", but have only the weight of circumstantial evidence; their contents are transcribed in reports in order to give them a physical form so that they can be inspected (Court of Cassation, Criminal Division, 28 April 1987, Allieis, Bull. no. 173, pp. 462-467).
- (k) If transcription raises a problem of translation into French, Articles 156 et seq. of the Code of Criminal Procedure, which deal with expert opinions, do not apply to the appointment and work of the translator (Court of Cassation, Criminal Division, 6 September 1988, Fekari, Bull. no. 317, pp. 861-862 (extracts), and 18 December 1989, M. et autres, not yet reported).
- (l) There is no statutory provision prohibiting the inclusion in the file on a criminal case of evidence from other proceedings, such as tapes and reports containing transcriptions, if they may "assist the judges and help to establish the truth", provided that such evidence is added under an adversarial procedure (Court of Cassation, Criminal Division, judgments of 23 July 1985 and 6 September 1988 previously cited).
- (m) The defence must be able to inspect the reports containing transcriptions, to hear the original tape recordings, to challenge their authenticity during the judicial investigation and subsequent trial and to apply for any necessary investigative measures - such as an expert opinion - relating to their contents and the circumstances in which they

were made (see, among other authorities, Court of Cassation, Criminal Division, 23 July 1985, previously cited; 16 July 1986, *Il-louz*, unreported; and 28 April 1987, *Allieis*, previously cited).

- (n) Just as the investigating judge supervises the senior police officer, he is himself supervised by the Indictment Division, to which he - exactly like the public prosecutor - may apply under Article 171 of the Code of Criminal Procedure.

Trial courts, courts of appeal and the Court of Cassation may have to deal with objections or grounds of appeal as the case may be - particularly by defendants but also, on occasion, by the prosecution (Court of Cassation, judgments of 19 June and 24 November 1989 previously cited) - based on a failure to comply with the requirements summarised above or with other rules which the parties concerned claim are applicable. A failure of this kind, however, would not automatically nullify the proceedings such that a court of appeal could be held to have erred if it had not dealt with them of its own motion; they affect only defence rights (Court of Cassation, Criminal Division, 11 December 1989, *Takrouni*, not yet reported).

19. Since at least 1981, parties have increasingly often relied on Article 8 (art. 8) of the Convention - and, much less frequently, on Article 6 (art. 6) (Court of Cassation, Criminal Division, 23 April 1981, *Pellegrin et autres*, Bull. no. 117, pp. 328-335, and 21 November 1988, *S. et autres*) - in support of their complaints about telephone tapping; they have sometimes as in the instant case (see paragraph 12 above) - cited the case-law of the European Court of Human Rights.

Hitherto only telephone tapping carried out without a warrant, during the police investigation (see, among other authorities, Court of Cassation, judgments of 13 June and 24 November 1989 previously cited), or in unexplained circumstances (see, among other authorities, Court of Cassation, judgment of 19 June 1989 previously cited) or in violation of defence rights (Paris Court of Appeal, Indictment Division, judgment of 31 October 1984 previously cited) has been held by the French courts to be contrary to Article 8 § 2 (art. 8-2) ("in accordance with the law") or to domestic law in the strict sense. In all other cases the courts have either found no violation (Court

of Cassation, Criminal Division, judgments of 24 April 1984, 23 July 1985, 16 July 1986, 28 April 1987, 4 November 1987, 15 February 1988, 15 March 1988, 6 September 1988 and 18 December 1989 previously cited, and 16 November 1988, *S. et autres*, unreported, and the judgments of 15 February 1983 (*Strasbourg*), 9 March 1984 (*Colmar*) and 27 June 1984 (*Paris*) previously cited) or else ruled the plea inadmissible for various reasons (Court of Cassation, Criminal Division, judgments of 23 April 1981, 21 November 1988 and 11 December 1989 previously cited and the unreported judgments of 24 May 1983, *S. et autres*; 23 May 1985, *Y. H. W.*; 17 February 1986, *H.*; 4 November 1986, *J.*; and 5 February 1990, *B. et autres*).

20. While academic opinion is divided as to the compatibility of telephone tapping as carried out in France - on the orders of investigating judges or others - with the national and international legal rules in force in the country, there seems to be unanimous agreement that it is desirable and even necessary for Parliament to try to solve the problem by following the example set by many foreign States (see in particular *Gaëtan di Marino*, comments on the *Tournet* judgment of 9 October 1980 (Court of Cassation), *JCP* 1981, jurisprudence, no. 19578; *Albert Chavanne*, 'Les résultats de l'audio-surveillance comme preuve pénale', *Revue internationale de droit comparé*, 1986, pp. 752-753 and 755; *Gérard Cohen-Jonathan*, 'Les écoutes téléphoniques', *Studies in honour of Gérard J. Wiarda*, 1988, p. 104; *Jean Pradel*, 'Écoutes téléphoniques et Convention européenne des Droits de l'Homme', *DS* 1990, chronique, pp. 17-20). In July 1981 the Government set up a study group chaired by Mr Robert Schmelck, who was then President of the Court of Cassation, and consisting of senators and MPs of various political persuasions, judges, university professors, senior civil servants, judges and a barrister. The group submitted a report on 25 June 1982, but this has remained confidential and has not yet led to a bill being tabled.

PROCEEDINGS BEFORE THE COMMISSION

21. The applicants applied to the Commission on 9 August 1984 (application no. 11105/84). Mr Huvig relied on Article 6 § 1 (art. 6-1) of the Convention and complained of the investigating judge's refusal to grant his application for an expert opinion on technical and financial

matters; he ascribed this refusal to evidence improperly taken from a witness. He and his wife also complained under Article 6 § 3 (a) (art. 6-3-a) of the delay in charging them. Lastly, both alleged that the telephone tapping carried out on 4 and 5 April 1974 had contravened Article 8 (art. 8).

22. On 15 October 1987 the Commission declared the first complaint inadmissible as being manifestly ill-founded (under Article 27 § 2) (art. 27-2) and the second complaint inadmissible for failure to exhaust domestic remedies (under Articles 26 and 27 § 3) (art. 26, art. 27-3). The third and final complaint, however, it declared admissible, on 6 July 1988.

In its report of 14 December 1988 (made under Article 31) (art. 31) the Commission expressed the opinion by ten votes to two that there had been a breach of Article 8 (art. 8). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

23. At the hearing the Court was requested:
- by the Agent of the Government to "hold that in the instant case there ha[d] been no conduct disclosing a breach of Article 8 (art. 8) of the Convention"; and
 - by the Delegate of the Commission to "find that there ha[d] been a violation of Article 8 (art. 8)".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (ART. 8)

24. Mr and Mrs Huvig claimed that in the instant case there had been a breach of Article 8 (art. 8), which provides:

"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 inter-

ests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government disputed that submission, while the Commission agreed with it in substance.

25. The telephone tapping complained of amounted without any doubt to an "interference by a public authority" with the exercise of the applicants' right to respect for their "correspondence" and their "private life" (see the Klass and Others judgment of 8 September 1978, Series A no. 28, p. 21, § 41, and the Malone judgment of 2 August 1984, Series A no. 82, p. 30, § 64). The Government did not dispute this.

Such an interference contravenes Article 8 (art. 8) unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 (art. 8-2) and furthermore is "necessary in a democratic society" in order to achieve them.

A. "In accordance with the law"

26. The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

1. *Whether there was a legal basis in French law*

27. It was a matter of dispute before the Commission and the Court whether the first condition was satisfied in the instant case.

The applicants said it was not. They submitted that there was no law in France governing the matter. France being a country of written law, case-law was a source only of law in general (droit), not of law in the statutory sense (loi). Furthermore, the courts had left the question of tapping private telephones to the unfettered discretion of investigating judges.

In the Government's submission, there was no contradiction between Article 368 of the Criminal Code and Article 81 of the Code of Criminal Procedure, at least not if regard was had to the drafting history of the former (see paragraph

16 above). The Code of Criminal Procedure, they argued, did not give an exhaustive list of the investigative means available to the investigating judge - measures as common as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations between witnesses, and reconstructions of crimes, for example, were not mentioned in it either (see paragraph 13 above). The provisions added to Article 81 by Articles 151 and 152 were supplemented in national case-law (see paragraphs 15 and 18-19 above). By "law" as referred to in Article 8 § 2 (art. 8-2) of the Convention was meant the law in force in a given legal system, in this instance a combination of the written law - essentially Articles 81, 151 and 152 of the Code of Criminal Procedure - and the case-law interpreting it.

The Delegate of the Commission considered that in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a "law" for the purposes of Article 8 § 2 (art. 8-2) of the Convention. Admittedly the Court had held that "the word 'law' in the expression 'prescribed by law' cover[ed] not only statute but also unwritten law" (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, § 47, the Dudgeon judgment of 22 October 1981, Series A no. 45, p. 19, § 44, and the Chappell judgment of 30 March 1989, Series A no. 152, p. 22, § 52), but in those instances the Court was, so the Delegate maintained, thinking only of the common-law system. That system, however, was radically different from, in particular, the French system. In the latter, case-law was undoubtedly a very important source of law, but a secondary one, whereas by "law" the Convention meant a primary source.

28. Like the Government and the Delegate, the Court points out, firstly, that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the Malone judgment previously cited, Series A no. 82, p. 36, § 79, and the Eriksson judgment of 22 June 1989, Series A no. 156, p. 25, § 62). It is therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges is compatible with Article 368 of the Criminal Code. For many years now, the courts - and in particular the Court of Cassation - have regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping

carried out by a senior police officer (*officier de police judiciaire*) under a warrant issued by an investigating judge.

Settled case-law of this kind cannot be disregarded. In relation to paragraph 2 of Article 8 (art. 8-2) of the Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both enactments of lower rank than statutes (see, in particular, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, § 93) and unwritten law. The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but it would be wrong to exaggerate the distinction between common-law countries and Continental countries, as the Government rightly pointed out. Statute law is, of course, also of importance in common-law countries. Conversely, case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts. The Court has indeed taken account of case-law in such countries on more than one occasion (see, in particular, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, § 29, the Salabiaku judgment of 7 October 1988, Series A no. 141, pp. 16-17, § 29, and the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30). Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" (Series A no. 30, p. 30, § 47). In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.

In sum, the interference complained of had a legal basis in French law.

2. "Quality of the law"

29. The second requirement which emerges from the phrase "in accordance with the law" - the accessibility of the law - does not raise any problem in the instant case.

The same is not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures. As the Court pointed out in the Malone judgment of

2 August 1984, Article 8 § 2 (art. 8-2) of the Convention "does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law". It

"thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... Undoubtedly ..., the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations"

- or judicial investigations -

"as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

... [In its judgment of 25 March 1983 in the case of *Silver and Others* the Court] held that 'a law which confers a discretion must indicate the scope of that discretion', although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (Series A no. 61, pp. 33-34, § 88-89). The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter ... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive"

- or to a judge -

"to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference."

(Series A no. 82, pp. 32-33, § 67-68)

30. The Government submitted that the Court must be careful not to rule on whether French legislation conformed to the Convention in the abstract and not to give a decision based on legislative policy. The Court was therefore not concerned, they said, with matters irrelevant to Mr and Mrs Huvig's case, such as the fact that there was no requirement that an individual whose telephone had been monitored should be so informed after the event where proceedings had not in the end been taken against him. Such matters were in reality connected with the condition of "necessity in a democratic society", fulfilment of which had to be reviewed in concrete terms, in the light of the particular circumstances of each case.

31. The Court is not persuaded by this argument. Since it must ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant French "law" in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction. It is none the less concerned with the "quality" of the national legal rules applicable to Mr and Mrs Huvig in the instant case.

32. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.

Before the Commission (supplementary observations of 17 October 1988, pages 4-7, summarised in paragraph 31 of the report) and, in a slightly different form, before the Court, the Government listed seventeen safeguards which they said were provided for in French law (*droit*). These related either to the carrying out of telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government claimed that the applicants had not been deprived of any of them.

33. The Court does not in any way minimise the value of several of the safeguards, in particular the need for a decision by an investigating judge, who is an independent judicial authority; the latter's supervision of senior police of-

ficers and the possible supervision of the judge himself by the Indictment Division (*chambre d'accusation*) of the Court of Appeal, by trial courts and courts of appeal and, if need be, by the Court of Cassation; the exclusion of any "subterfuge" or "ruse" consisting not merely in the use of telephone tapping but in an actual trick, trap or provocation; and the duty to respect the confidentiality of relations between suspect or accused and lawyer.

It has to be noted, however, that only some of these safeguards are expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others have been laid down piecemeal in judgments given over the years, practically all of them after the interception complained of by the applicants (April 1974). Some have not yet been expressly laid down in the case-law at all, at least according to the information gathered by the Court; the Government appear to infer them either from general enactments or principles or else from an analogical interpretation of legislative provisions - or court decisions - concerning investigative measures different from telephone tapping, notably searches and seizure of property. Although logical in itself, such "extrapolation" does not provide sufficient legal certainty in the present context.

34. Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points shows at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case-law.
35. In short, French law, written and unwritten,

does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr and Mrs Huvig did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the *Malone* judgment previously cited, Series A no. 82, p. 36, § 79). Admittedly they suffered little or no harm from this, as the results of the impugned telephone tapping did not "serve as a basis for the prosecution" (see paragraphs 10-12 above), but the Court has consistently held that a violation is conceivable even in the absence of any detriment; the latter is relevant only to the application of Article 50 (art. 50) (see, *inter alia*, the *Johnston and Others* judgment of 18 December 1986, Series A no. 112, p. 21, § 42).

There has therefore been a breach of Article 8 (art. 8) of the Convention.

B. Purpose and necessity of the interference

36. Having regard to the foregoing conclusion, the Court, like the Commission (see paragraph 67 of the report), does not consider it necessary to review compliance with the other requirements of paragraph 2 of Article 8 (art. 8-2) in this case.

II. APPLICATION OF ARTICLE 50 (ART. 50)

37. By Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

In their written observations of February and September 1988 the applicants asked the Commission to "award them just compensation", but before the Court they did not seek either compensation or reimbursement of costs and expenses.

38. As these are not matters which the Court has to examine of its own motion (see, as the most recent authority, the *Kostovski* judgment of 20 November 1989, Series A no. 166, p. 18, § 46),

it finds that it is unnecessary to apply Article 50 (art. 50) in this case.

**FOR THESE REASONS, THE COURT
UNANIMOUSLY**

1. Holds that there has been a breach of Article 8 (art. 8);
2. Holds that it is unnecessary to apply Article 50 (art. 50).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1990.

Rolv RYSSDAL, *President*

Marc-André EISSEN, *Registrar*

ECHR

ECJ

COURT (CHAMBER)

CASE OF KRUSLIN v FRANCE

(Application no. 11801/85)

JUDGMENT

STRASBOURG

24 April 1990

PRIVATE LIFE, CORRESPONDENCE, TELEPHONE, TAPPING, SURVEILLANCE, INTERFERENCE, INTERCEPTION, CORRESPONDENCE

IN THE KRUSLIN CASE,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr **R. Ryssdal**, *President*,

Mrs **D. Bindschedler-Robert**,

Mr **F. Gölcüklü**,

Mr **F. Matscher**,

Mr **L.-E. Pettiti**,

Mr **B. Walsh**,

Sir **Vincent Evans**,

and also of Mr **M.-A. Eissen**, *Registrar*,

and Mr **H. Petzold**, *Deputy Registrar*,

Having deliberated in private on 26 October 1989 and 27 March 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 March 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11801/85) against the French Republic lodged with the Commission under Article 25 (art. 25) by a national of that State, Mr Jean Kruslin, on 16 October 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8).

2. In response to the enquiry made in accordance

with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. On 30 March 1989 the President of the Court decided, under Rule 21 § 6 and in the interests of sound administration of justice, that a single Chamber should be constituted to consider both the instant case and the Huvig case*.

The Chamber thus constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On the same day, 30 March 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1). In accordance with his orders and instructions, the Registrar received, on 10 July 1989, Mr Kruslin's claims under Article 50 (art. 50) of the Convention and, on 17 August, the Government's memorial. On 19 October the Secretariat of the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 10 and 16 October 1989 the Commission supplied the Registrar with various documents he had asked for on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 21 June 1989 that the oral proceedings should open on 24 October 1989 (Rule 38).

On 29 September he granted the applicant legal aid (Rule 4 of the Addendum to the Rules of Court).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Mr **J.-P. Puissochet**, Head of the Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Mrs **I. Chaussade**, magistrat, on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Miss **M. Picard**, magistrat, on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Mr **M. Dobkine**, magistrat, Department of Criminal Affairs and Pardons, Ministry of Justice,

Mr **F. Le Gunehec**, magistrat, Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;

(b) for the Commission

Mr **S. Trechsel**, *Delegate*;

(c) for the applicant

Ms **C. Waquet**, *avocat* at the Conseil d'État and the Court of Cassation, *Counsel*.

The Court heard addresses by Mr Puissochet for the Government, by Mr Trechsel for the Commission and by Ms Waquet for the applicant, as well as their answers to its questions.

7. On various dates between 24 October and 7 December 1989 the Government and Mr Kruslin's representative produced several documents, either of their own accord or because the Court had requested them at the hearing. To one of them Ms Waquet had attached a short memorandum of observations, and the President consented to this being filed; she also supplemented her client's claims for just satisfaction with pleadings which reached the registry on 24 November.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

8. Mr Jean Kruslin, who is unemployed and has no fixed abode, is currently in custody at Fresnes (Val-de-Marne).
9. On 8 and 14 June 1982 an investigating judge at Saint-Gaudens (Haute-Garonne), who was inquiring into the murder of a banker, Mr Jean Baron, at Montréjeau on the night of 7-8 June

("the Baron case"), issued two warrants to the commanding officer of the investigation section of the Toulouse gendarmerie. In the second of these the officer was instructed to tap the telephone of a suspect, Mr Dominique Terrieux, who lived in Toulouse.

From 15 to 17 June the gendarmes intercepted seventeen telephone calls in all. The applicant, who was staying with Mr Terrieux at the time and occasionally used his telephone, had been a party to several of the telephone conversations and more especially to one between 9 p.m. and 11 p.m. on 17 June with someone calling him from a public telephone-box in Perpignan (Pyrénées-Orientales).

During their short conversation the two men had spoken in veiled terms about a different case from the Baron case, concerning in particular the murder on 29 May 1982 of Mr Henri Père, an employee of the Gerbe d'Or jewelers in Toulouse ("the Gerbe d'Or case"). The gendarmes reported this the next day to colleagues from the criminal-investigation branch of the police. On 11 June 1982 an investigating judge in Toulouse had issued a warrant to these officers to investigate that case, and they now immediately listened to the recording of the telephone conversation in question, had it transcribed and appended the text to a report drawn up at midnight on 18 June; the original tape remained, sealed, with the gendarmerie.

10. At dawn on 18 June the gendarmes arrested Mr Kruslin at Mr Terrieux's home and held him in custody in connection with the Baron case.

Early that afternoon he was questioned about the Gerbe d'Or case by the police (who had already questioned him on 15 June and then released him after about four hours) and - the next day, it seems - he was charged together with Mr Terrieux and one Patrick Antoine with murder, aggravated theft and attempted aggravated theft. On 25 October 1982 the Toulouse investigating judge held a confrontation of the three men, during which after the seals had been broken in their presence - the aforementioned taperecording was heard in its entirety, including the conversation on the evening of 17 June.

Mr Kruslin adopted the same attitude as when questioned by the police on 18 June: he protested his innocence and denied - in respect of this conversation but not of the others - that the voice was his. Mr Terrieux now said that he did not recognise the voice, whereas he had

identified it earlier.

The tape was resealed, again in the presence of the persons charged. The applicant refused to sign either the report or the form recording the sealing.

He subsequently applied for an examination by experts, and the investigating judge granted the application in an order of 10 February 1983. In their report of 8 June 1983, however, the three experts who were appointed felt able to state "with 80% certainty" that the voice they had analysed was indeed Mr Kruslin's.

11. Before the Indictment Division (*chambre d'accusation*) of the Toulouse Court of Appeal, to which the case was sent after the judicial investigation was completed, the applicant requested that the recording of the disputed conversation should be ruled inadmissible in evidence because it had been made in connection with proceedings which, he claimed, did not concern him - the Baron case. On 16 April 1985 the Indictment Division dismissed this plea in the following terms:

"... while this telephone tapping was ordered by the investigating judge at the Saint-Gaudens tribunal de grande instance in connection with other proceedings, the fact remains that judges are not prohibited by either Article 11 [which lays down the principle that judicial investigations shall be confidential] or Articles R.155 and R.156 of the Code of Criminal Procedure from deciding to include in criminal proceedings evidence from other proceedings which may assist them and help to establish the truth, on the sole condition - which was satisfied in the instant case - that such evidence is added under an adversarial procedure and that it has been submitted to the parties for them to comment on ..."

In so doing, the Indictment Division, it appears, took as its inspiration - and extended by analogy to the field of telephone tapping the settled case-law of the Criminal Division of the Court of Cassation, developed in respect of other investigative measures (see, for example, 11 March 1964, Bulletin (Bull.) no. 86; 13 January 1970, Bull. no. 21; 19 December 1973, Bull. no. 480; 26 May and 30 November 1976, Bull. nos. 186 and 345; 16 March and 2 October 1981, Bull. nos. 91 and 256).

In the same decision the Indictment Division committed Mr Kruslin - with four others, including Mr Terrieux and Mr Antoine - for trial at the Haute-Garonne Assize Court on charges,

in his case, of aiding and abetting a murder, aggravated theft and attempted aggravated theft.

12. The applicant appealed to the Court of Cassation on points of law. In the second of his five grounds of appeal he relied on Article 8 (art. 8) of the Convention. He criticised the Indictment Division of the Toulouse Court of Appeal for having

"refused to rule that the evidence from telephone tapping in connection with other proceedings was inadmissible;

whereas interference by the public authorities with a person's private and family life, home and correspondence is not necessary in a democratic society for the prevention of crime unless it is in accordance with a law that satisfies the following two requirements: it must be of a quality such that it is sufficiently clear in its terms to give citizens an adequate indication of the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence, and it must define the scope and manner of exercise of such a power clearly enough to give the individual adequate protection from arbitrary interference; these requirements are not satisfied by any provision of French law, and particularly not by Article 81 of the Code of Criminal Procedure".

In his supplementary pleadings of 11 June 1985 (pp. 5-8) counsel for Mr Kruslin relied on the case-law of the European Court of Human Rights, both in regard to telephone tapping (*Klass and Others* judgment of 6 September 1978 and *Malone* judgment of 2 August 1984, Series A nos. 28 and 82) and in other respects (*Golder* judgment of 21 February 1975, *Sunday Times* judgment of 26 April 1979 and *Silver and Others* judgment of 25 March 1983, Series A nos. 18, 30 and 61).

The Criminal Division of the Court of Cassation dismissed the appeal in a judgment of 23 July 1985. As regards the point in question it gave the following reasons for its decision:

"...

An examination of the evidence shows that the transcript of a tape recording of conversations in calls made on Terrieux's telephone line was included in the file of the murder investigation then being conducted by the Toulouse investigating judge following the death of Henri Pèrè at the hands of a person or persons

unknown; this recording had been made pursuant to a warrant issued by the investigating judge at Saint-Gaudens in connection with the investigation of another murder, likewise committed by a person or persons unknown; it was because of its relevance to the investigation into Père's death that the transcription was made by senior police officers acting under a warrant issued by the investigating judge in Toulouse;

The tenor of the conversations recorded was made known to the various persons concerned, notably Kruslin, who was asked to account for them both during the inquiries made pursuant to the investigating judge's warrant and after he was charged; furthermore, an examination of the tape recording by an expert, whose report was subsequently added to the evidence, was made pursuant to a lawful decision by the investigating judge;

That being so, the Indictment Division did not lay itself open to the objection raised in the ground of appeal by refusing to rule that the evidence from telephone tapping in connection with other proceedings was inadmissible;

In the first place, there is no statutory provision prohibiting the inclusion in criminal proceedings of evidence from other proceedings which may assist the judges and help to establish the truth; the sole condition is that such evidence should be added under an adversarial procedure - which was so in this case, in which the documents were submitted to the parties for them to comment on;

In the second place, it is clear from Articles 81 and 151 of the Code of Criminal Procedure and from the general principles of criminal procedure that, among other things, firstly, telephone tapping may be ordered by an investigating judge, by means of a warrant, only where there is a presumption that a specific offence has been committed which has given rise to the investigation which the judge has been assigned to undertake, and that it cannot be directed, on the off chance, against a whole category of offences; and, secondly, that the interception ordered must be carried out under the supervision of the investigating judge, without any subterfuge or ruse being employed and in such a way that the exercise of the rights of the defence cannot be jeopardised;

These provisions governing the use of telephone tapping by an investigating judge, which have not been shown to have been infringed in the instant case, satisfy the requirements of Article 8 (art. 8) of the European Convention for the Protection of Human Rights

and Fundamental Freedoms;

..." (Bull. no. 275, pp. 713-715)

13. It appears from the file that the recording of the telephone conversation of 17 June 1982 was a decisive piece of evidence in the proceedings against the applicant. These proceedings ended, on 28 November 1986, with a judgment of the Haute-Garonne Assize Court. Mr Kruslin was acquitted of murder but sentenced to fifteen years' imprisonment for armed robbery and attempted armed robbery; an appeal by him to the Court of Cassation was dismissed on 28 October 1987. He seems always to have protested his innocence.
14. In the Baron case the Indictment Division of the Toulouse Court of Appeal likewise committed the applicant, on 2 June 1987, for trial at the Haute-Garonne Assizes, together with Mr Antoine and one Charles Croce. At that trial too he alleged that the telephone tapping carried out from 15 to 17 June 1982 was inadmissible; on 4 November 1987 the Criminal Division of the Court of Cassation dismissed this plea on grounds identical, mutatis mutandis, to those in its judgment of 23 July 1985 previously cited (see paragraph 12 above - Recueil Dalloz Sirey (DS) 1988, sommaires, p. 195). On 2 December 1988 the Assize Court sentenced the applicant to life imprisonment for premeditated murder; he lodged an appeal on points of law, but this was dismissed by the Criminal Division of the Court of Cassation on 6 November 1989.

The complaints he made to the Commission, however, related solely to the telephone tapping whose results were used in the Gerbe d'Or case.

II. THE RELEVANT LEGISLATION AND CASE-LAW

15. French criminal law adopts the principle that any kind of evidence is admissible: "unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge ..." (Article 427 of the Code of Criminal Procedure).

There is no statutory provision which expressly empowers investigating judges to carry out or order telephone tapping, or indeed to carry out or order various measures which are nonetheless in common use, such as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations of wit-

nesses and reconstructions of crimes. On the other hand, the Code of Criminal Procedure does expressly confer power on them to take several other measures, which it regulates in detail, such as pre-trial detention, seizure of property and searches.

16. Under the old Code of Criminal Procedure the Court of Cassation had condemned the use of telephone tapping by investigating judges, at least in circumstances which it regarded as disclosing, on the part of a judge or the police, a lack of "fairness" incompatible with the rules of criminal procedure and the safeguards essential to the rights of the defence (combined divisions, 31 January 1888, *ministère public c. Vigneau*, Dalloz 1888, jurisprudence, pp. 73-74; Criminal Division, 12 June 1952, *Imbert*, Bull. no. 153, pp. 258-260; Civil Division, second section, 18 March 1955, *époux Jolivot c. époux Lubrano et autres*, DS 1955, jurisprudence, pp. 573-574, and *Gazette du Palais (GP) 1955*, jurisprudence, p. 249). Some trial courts and courts of appeal which had to deal with the issue, on the other hand, showed some willingness to hold that such telephone tapping was lawful if there had been neither "entrapment" nor "provocation"; this view was based on Article 90 of the former Code (Seine Criminal Court, Tenth Division, 13 February 1957, *ministère public contre X*, GP 1957, jurisprudence, pp. 309-310).
17. Since the 1958 Code of Criminal Procedure came into force, the courts have had regard in this respect to, among others, Articles 81, 151 and 152, which provide:

Article 81

(first, fourth and fifth paragraphs)

"The investigating judge shall, in accordance with the law, take all the investigative measures which he deems useful for establishing the truth.

...

If the investigating judge is unable to take all the investigative measures himself, he may issue warrants to senior police officers (*officiers de police judiciaire*) in order to have them carry out all the necessary investigative measures on the conditions and subject to the reservations provided for in Articles 151 and 152.

The investigating judge must verify the information thus gathered.

..."

Article 151

(as worded at the material time)

"An investigating judge may issue a warrant requiring any judge of his court, any district-court judge within the territorial jurisdiction of that court, any senior police officer (*officier de police judiciaire*) with authority in that jurisdiction or any investigating judge to undertake any investigative measures he considers necessary in places coming under their respective jurisdictions.

The warrant shall indicate the nature of the offence to which the proceedings relate. It shall be dated and signed by the issuing judge and shall bear his seal.

It may only order investigative measures directly connected with the prosecution of the offence to which the proceedings relate.

..."

Article 152

"The judges or senior police officers instructed to act shall exercise, within the limits of the warrant, all the powers of the investigating judge.

..."

18. An Act of 17 July 1970 added to the Civil Code an Article 9 guaranteeing to everyone "the right to respect for his private life". It also added to the Criminal Code an Article 368, whereby:

"Anyone who wilfully intrudes on the privacy of others:

1. By listening to, recording or transmitting by means of any device, words spoken by a person in a private place, without that person's consent;

2. ...

shall be liable to imprisonment for not less than two months and not more than one year and a fine ... or to only one of these two penalties."

During the preparatory work, one of the vice-chairmen of the National Assembly's Statutes Committee, Mr Zimmermann, sought "certain assurances" that this enactment "[would] not prevent the investigating judge from issuing strictly within the provisions of the law warrants to have telephones tapped, obviously without making use of any form of inducement and in compliance with all the legal procedures" (*Journal officiel*, National Assem-

bly, 1970 proceedings, p. 2074). The Minister of Justice, Mr René Pleven, replied: "... there is no question of interfering with the powers of investigating judges, who are indeed empowered, in the circumstances laid down by law, to order tapping"; he added a little later: "When an official taps a telephone, he can only do so lawfully if he has a warrant from a judicial authority or is acting on the instructions of a minister" (*ibid.*, p. 2075). Both Houses of Parliament thereupon passed the Bill without amending it on this point.

19. Article 41 of the Post and Telecommunications Code provides that any public servant or anyone authorised to assist with the performance of relevant official duties who breaches the secrecy of correspondence entrusted to the telecommunications service shall be liable to the penalties provided for in Article 187 of the Criminal Code - a fine, imprisonment and temporary disqualification from any public office or employment. Article 42 provides that anyone who, without permission from the sender or the addressee, divulges, publishes or uses the content of correspondence transmitted over the air or by telephone shall be liable to the penalties provided for in Article 378 of the Criminal Code (on professional confidentiality) - a fine or imprisonment.

General Instruction no. 500-78 on the telephone service - intended for Post and Telecommunications Authority officials - contains the following provisions, however, given here in the amended version of 1964 (Article 24 of Part III):

"Postmasters and sub-postmasters are required to comply with any requests that ... calls to or from a specified telephone should be monitored by the relevant authority, made by:

1. An investigating judge (Articles 81, 92 and 94 of the Code of Criminal Procedure) or any judge or senior police officer (*officier de police judiciaire*) to whom a judicial warrant has been issued (Art. 152);

..."

The General Instruction was published in the official bulletin of the Ministry of Post and Telecommunications and was described by the Government as an "implementing regulation".

20. The striking development of various forms of serious crime - large-scale thefts and robberies, terrorism, drug-trafficking - appears in France to have led to a marked increase in the

frequency with which investigating judges resort to telephone tapping. The courts have as a result given many more decisions on the subject than formerly; telephone tapping has not been held to be unlawful in itself, although the courts have occasionally shown some distaste for it (Paris Court of Appeal, Ninth Criminal Division, 28 March 1960, *Cany et Rozenbaum*, GP 1960, jurisprudence, pp. 253-254).

The decisions cited to the Court by the Government, the Commission and the applicant, or of which the Court has had cognisance by its own means, are mostly of later date than the facts of the instant case (June 1982) and have gradually provided a number of clarifications. These do not all stem from judgments of the Court of Cassation, and do not for the time being constitute a uniform body of case-law, because the decisions or reasons given in some of the cases have remained unique. They may be summarised as follows.

- (a) Articles 81 and 151 of the Code of Criminal Procedure (see paragraph 17 above) empower investigating judges - and them alone, as far as judicial investigations are concerned - to carry out telephone tapping or, much more commonly in practice, to issue a warrant to that effect to a senior police officer (*officier de police judiciaire*) within the meaning of Article 16 (see, in particular, Court of Cassation, Criminal Division, 9 October 1980, *Tournet*, Bull. no. 255, pp. 662-664; 24 April 1984, *Peureux, Huvig et autre*, DS 1986, jurisprudence, pp. 125-128; 23 July 1985 - see paragraph 12 above; 4 November 1987 - see paragraph 14 above; 15 February 1988, *Schroeder*, and 15 March 1988, *Arfi*, Bull. no. 128, pp. 327-335). Telephone tapping is an "investigative measure" which may sometimes be "useful for establishing the truth". It is comparable to the seizure of letters or telegrams (see, among other authorities, Poitiers Court of Appeal, Criminal Division, 7 January 1960, *Manchet*, *Juris-Classeur périodique* (JCP) 1960, jurisprudence, no. 11599, and Paris Court of Appeal, Indictment Division, 27 June 1984, *F. et autre*, DS 1985, jurisprudence, pp. 93-96) and it similarly does not offend the provisions of Article 368 of the Criminal Code, having regard to the legislative history and to the principle that any kind of evidence is admissible (see paragraphs 15 and 18 above and Strasbourg tribunal de grande instance, 15 February 1983, *S. et autres*, unreported; Colmar Court

of Appeal, 9 March 1984, Chalignac et autre, unreported but cited by the Government at the Commission hearing on 6 May 1988; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited and judgment of 31 October 1984, Li Siu Lung et autres, GP 1985, *sommaires*, pp. 94-95).

- (b) The investigating judge can only issue such a warrant "where there is a presumption that a specific offence has been committed which has given rise to the investigation" which he is responsible for conducting and not in respect of a whole category of offences "on the off chance"; this is clear not only from Articles 81 and 151 (second and third paragraphs) of the Code of Criminal Procedure but also "from the general principles of criminal procedure" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The French courts do not seem ever to have held that telephone tapping is lawful only where the offences being investigated are of some seriousness or if the investigating judge has specified a maximum duration for it.

- (c) "Within the limits of the warrant" that has been issued to him - if need be by fax (Limagos Court of Appeal, Criminal Division, 18 November 1988, Lecegne et autres, DS 1989, *sommaires*, p. 394) - the senior police officer exercises "all the powers of the investigating judge" (Article 152 of the Code of Criminal Procedure). He exercises these under the supervision of the investigating judge, who by the fifth paragraph of Article 81 is bound to "verify the information ... gathered" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The warrant apparently sometimes takes the form of a general delegation of powers, including - without its being expressly mentioned - the power to tap telephones (Court of Cassation, Civil Division, second section, judgment of 18 March 1955 previously cited, and Paris Court of Appeal, judgment of 28 March 1960 previously cited).

- (d) In no case may a police officer tap tel-

ephones on his own initiative without a warrant, for example during the preliminary investigation preceding the opening of the judicial investigation (see, among other authorities, Court of Cassation, Criminal Division, 13 June 1989, Derrien, and 19 June 1989, Grayo, Bull. no. 254, pp. 635-637, and no. 261, pp. 648-651; full court, 24 November 1989, Derrien, DS 1990, p. 34, and JCP 1990, *jurisprudence*, no. 21418, with the submissions of Mr Advocate-General Emile Robert).

- (e) Telephone tapping must not be accompanied by "any subterfuge or ruse" (see, among other authorities, Court of Cassation, Criminal Division, judgment of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988 and 15 March 1988 previously cited) failing which the information gathered by means of it must be either deleted or removed from the case file (Court of Cassation, Criminal Division, judgments of 13 and 19 June 1989 previously cited).
- (f) The telephone tapping must also be carried out "in such a way that the exercise of the rights of the defence cannot be jeopardised" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988, 15 March 1988 and 19 June 1989 previously cited). In particular, the confidentiality of the relations between suspect or person accused and lawyer must be respected, as must, more generally, a lawyer's duty of professional confidentiality, at least when he is not acting in any other capacity (Aix-en-Provence Court of Appeal, Indictment Division, 16 June 1982 and 2 February 1983, Sadjji Hamou et autres, GP 1982, *jurisprudence*, pp. 645-649, and GP 1983, *jurisprudence*, pp. 313-315; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited).
- (g) With this reservation, it is permissible to tap telephone calls to or from a charged person (Court of Cassation, Criminal Division, judgments of 9 October 1980 and 24 April 1984 previously cited) or a mere suspect, such as Mr Terrieux in the instant case (see paragraph 9 above and also the previously cited judgments of the Strasbourg tribunal de grande instance, 15 February 1983, the Colmar Court of Appeal, 9 March 1984, and

the Indictment Division of the Paris Court of Appeal, 27 June 1984) or even a third party, such as a witness, whom there is reason to believe to be in possession of information about the perpetrators or circumstances of the offence (see, among other authorities, Aix-en-Provence Court of Appeal, judgment of 16 June 1982 previously cited).

- (h) A public telephone-box may be tapped (Seine Criminal Court, Tenth Division, 30 October 1964, *Trésor public et Société de courses c. L. et autres*, DS 1965, jurisprudence, pp. 423-424) just like a private line, irrespective of whether current is diverted to a listening station (Court of Cassation, Criminal Division, 13 June 1989, and full court, 24 November 1989, previously cited).
- (i) The senior police officer supervises the tape or cassette recording of the conversations and their transcription, where he does not carry out these operations himself; when it comes to choosing extracts to submit "for examination by the court", it is for him to determine "what words may render the speaker liable to criminal proceedings". He performs these duties "on his own responsibility and under the supervision of the investigating judge" (Strasbourg tribunal de grande instance, judgment of 15 February 1983 previously cited, upheld by the Colmar Court of Appeal on 9 March 1984; Paris Court of Appeal, judgment of 27 June 1984 previously cited).
- (j) The original tapes - which in the instant case were sealed (see paragraphs 8-9 above) - are "exhibits", not "investigation documents", but have only the weight of circumstantial evidence; their contents are transcribed in reports in order to give them a physical form so that they can be inspected (Court of Cassation, Criminal Division, 28 April 1987, *Allieis*, Bull. no. 173, pp. 462-467).
- (k) If transcription raises a problem of translation into French, Articles 156 et seq. of the Code of Criminal Procedure, which deal with expert opinions, do not apply to the appointment and work of the translator (Court of Cassation, Criminal Division, 6 September 1988, *Fekari*, Bull. no. 317, pp. 861-862 (extracts), and 18 December 1989, *M. et autres*, not yet reported).
- (l) There is no statutory provision prohibiting the inclusion in the file on a criminal case of evidence from other proceedings, such as

tapes and reports containing transcriptions, if they may "assist the judges and help to establish the truth", provided that such evidence is added under an adversarial procedure (Toulouse Court of Appeal, Indictment Division, 16 April 1985 - see paragraph 11 above; Court of Cassation, Criminal Division, 23 July 1985 - see paragraph 12 above - and 6 September 1988 previously cited).

- (m) The defence must be able to inspect the reports containing transcriptions, to hear the original tape recordings, to challenge their authenticity during the judicial investigation and subsequent trial and to apply for any necessary investigative measures - such as an expert opinion, as in the instant case (see paragraph 10 in fine) - relating to their contents and the circumstances in which they were made (see, among other authorities, Court of Cassation, Criminal Division, 23 July 1985 - see paragraph 12 above; 16 July 1986, *Illouz*, unreported; and 28 April 1987, *Allieis*, previously cited).
 - (n) Just as the investigating judge supervises the senior police officer, he is himself supervised by the Indictment Division, to which he - exactly like the public prosecutor - may apply under Article 171 of the Code of Criminal Procedure.
- Trial courts, courts of appeal and the Court of Cassation may have to deal with objections or grounds of appeal as the case may be - particularly by defendants but also, on occasion, by the prosecution (Court of Cassation, judgments of 19 June and 24 November 1989 previously cited) - based on a failure to comply with the requirements summarised above or with other rules which the parties concerned claim are applicable. A failure of this kind, however, would not automatically nullify the proceedings such that a court of appeal could be held to have erred if it had not dealt with them of its own motion; they affect only defence rights (Court of Cassation, Criminal Division, 11 December 1989, *Takrouni*, not yet reported).
21. Since at least 1981, parties have increasingly often relied on Article 8 (art. 8) of the Convention - and, much less frequently, on Article 6 (art. 6) (Court of Cassation, Criminal Division, 23 April 1981, *Pellegrin et autres*, Bull. no. 117, pp. 328-335, and 21 November 1988, *S. et autres*) - in support of their complaints about telephone

tapping; they have sometimes as in the instant case (see paragraph 12 above) - cited the case-law of the European Court of Human Rights.

Hitherto only telephone tapping carried out without a warrant, during the police investigation (see, among other authorities, Court of Cassation, judgments of 13 June and 24 November 1989 previously cited), or in unexplained circumstances (see, among other authorities, Court of Cassation, judgment of 19 June 1989 previously cited) or in violation of defence rights (Paris Court of Appeal, Indictment Division, judgment of 31 October 1984, previously cited) has been held by the French courts to be contrary to Article 8 § 2 (art. 8-2) ("in accordance with the law") or to domestic law in the strict sense. In all other cases the courts have either found no violation (Court of Cassation, Criminal Division, judgments of 24 April 1984, 23 July 1985, 16 July 1986, 28 April 1987, 4 November 1987, 15 February 1988, 15 March 1988, 6 September 1988 and 18 December 1989 previously cited, and 16 November 1988, *S. et autres*, unreported, and the judgments of 15 February 1983 (Strasbourg), 9 March 1984 (Colmar) and 27 June 1984 (Paris) previously cited) or else ruled the plea inadmissible for various reasons (Court of Cassation, Criminal Division, judgments of 23 April 1981, 21 November 1988 and 11 December 1989 previously cited and the unreported judgments of 24 May 1983, *S. et autres*; 23 May 1985, *Y. H. W.*; 17 February 1986, *H.*; 4 November 1986, *J.*; and 5 February 1990, *B. et autres*).

22. While academic opinion is divided as to the compatibility of telephone tapping as carried out in France - on the orders of investigating judges or others - with the national and international legal rules in force in the country, there seems to be unanimous agreement that it is desirable and even necessary for Parliament to try to solve the problem by following the example set by many foreign States (see in particular Gaëtan di Marino, comments on the Tournet judgment of 9 October 1980 (Court of Cassation), *JCP* 1981, jurisprudence, no. 19578; Albert Chavanne, 'Les résultats de l'audio-surveillance comme preuve pénale', *Revue internationale de droit comparé*, 1986, pp. 752-753 and 755; Gérard Cohen-Jonathan, 'Les écoutes téléphoniques', *Studies in honour of Gérard J. Wiarda*, 1988, p. 104; Jean Pradel, 'Écoutes téléphoniques et Convention européenne des Droits de l'Homme', *DS* 1990, chronique, pp. 17-20). In July 1981 the Government set up a study group chaired by Mr Robert Schmelck,

who was then President of the Court of Cassation, and consisting of senators and MPs of various political persuasions, judges, university professors, senior civil servants, judges and a barrister. The group submitted a report on 25 June 1982, but this has remained confidential and has not yet led to a bill being tabled.

PROCEEDINGS BEFORE THE COMMISSION

23. Before the Commission, to which he applied on 16 October 1985 (application no. 11801/85), Mr Kruslin put forward a single ground of complaint: he argued that the interception and recording of his telephone conversation on 17 June 1982 had infringed Article 8 (art. 8) of the Convention.

The Commission declared the application admissible on 6 May 1988. In its report of 14 December 1988 (made under Article 31) (art. 31) it expressed the opinion by ten votes to two that there had indeed been a breach of that Article (art. 8). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

24. At the hearing the Court was requested:
 - (a) by the Agent of the Government to "hold that there ha[d] been no breach of Article 8 (art. 8) of the Convention in the instant case";
 - (b) by the Delegate of the Commission to "conclude that in the instant case there ha[d] been a breach of Article 8 (art. 8)"; and
 - (c) by counsel for the applicant to "find the French Government in breach in this case".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (ART. 8)

25. Mr Kruslin claimed that in the instant case there had been a breach of Article 8 (art. 8), which

provides:

"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 freedoms of others."

The Government disputed that submission, while the Commission agreed with it in substance.

26. Although it was Mr Terrieux's line that they were tapping, the police in consequence intercepted and recorded several of the applicant's conversations, and one of these led to proceedings being taken against him (see paragraphs 9-10 above). The telephone tapping therefore amounted to an "interference by a public authority" with the exercise of the applicant's right to respect for his "correspondence" and his "private life" (see the *Klass and Others* judgment of 8 September 1978, Series A no. 28, p. 21, § 41, and the *Malone* judgment of 2 August 1984, Series A no. 82, p. 30, § 64). The Government did not dispute this.

Such an interference contravenes Article 8 (art. 8) unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 (art. 8-2) and furthermore is "necessary in a democratic society" in order to achieve them.

A. In accordance with the law"

27. The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.
1. *Whether there was a legal basis in French law*
28. It was a matter of dispute before the Commission and the Court whether the first condition was satisfied in the instant case.

The applicant said it was not. Article 368 of the Criminal Code, he claimed, prohibited telephone tapping in principle (see paragraph 18 above). It took precedence over Article 81 of the Code of Criminal Procedure, which did not expressly authorise telephone tapping and required the investigating judge to behave "in accordance with the law" - and therefore in accordance, *inter alia*, with Article 368 of the Criminal Code - when ordering any steps "useful for establishing the truth" (see paragraph 17 above). Articles 151 and 152 (*ibid.*) made no difference, he added, as investigating judges could not delegate to senior police officers powers which they did not have themselves. The Delegate of the Commission agreed as to the latter point.

In the Government's submission, there was no contradiction between Article 368 of the Criminal Code and Article 81 of the Code of Criminal Procedure, at least not if regard was had to the drafting history of the former (see paragraph 18 above). The Code of Criminal Procedure, they argued, did not give an exhaustive list of the investigative means available to the investigating judge - measures as common as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations between witnesses, and reconstructions of crimes, for example, were not mentioned in it either (see paragraph 15 above). The provisions added to Article 81 by Articles 151 and 152 were supplemented in national case-law (see paragraphs 17 and 20-21 above). By "law" as referred to in Article 8 § 2 (art. 8-2) of the Convention was meant the law in force in a given legal system, in this instance a combination of the written law - essentially Articles 81, 151 and 152 of the Code of Criminal Procedure - and the case-law interpreting it.

The Delegate of the Commission considered that in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a "law" for the purposes of Article 8 § 2 (art. 8-2) of the Convention. Admittedly the Court had held that "the word 'law' in the expression 'prescribed by law' covered] not only statute but also unwritten law" (see the *Sunday Times* judgment of 26 April 1979, Series A no. 30, p. 30, § 47, the *Dudgeon* judgment of 22 October 1981, Series A no. 45, p. 19, § 44, and the *Chappell* judgment of 30 March 1989, Series A no. 152, p. 22, § 52), but in those instances the Court was, so the Delegate maintained, thinking only of the

common-law system. That system, however, was radically different from, in particular, the French system. In the latter, case-law was undoubtedly a very important source of law, but a secondary one, whereas by "law" the Convention meant a primary source.

29. Like the Government and the Delegate, the Court points out, firstly, that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the Malone judgment previously cited, Series A no. 82, p. 36, § 79, and the Eriksson judgment of 22 June 1989, Series A no. 156, p. 25, § 62). It is therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges is compatible with Article 368 of the Criminal Code. For many years now, the courts - and in particular the Court of Cassation - have regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping carried out by a senior police officer (*officier de police judiciaire*) under a warrant issued by an investigating judge.

Settled case-law of this kind cannot be disregarded. In relation to paragraph 2 of Article 8 (art. 8-2) of the Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both enactments of lower rank than statutes (see, in particular, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, § 93) and unwritten law. The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but it would be wrong to exaggerate the distinction between common-law countries and Continental countries, as the Government rightly pointed out. Statute law is, of course, also of importance in common-law countries. Conversely, case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts. The Court has indeed taken account of case-law in such countries on more than one occasion (see, in particular, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, § 29, the Salabiaku judgment of 7 October 1988, Series A no. 141, pp. 16-17, § 29, and the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30). Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost

as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" (Series A no. 30, p. 30, § 47). In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.

In sum, the interference complained of had a legal basis in French law.

2. "Quality of the law"

30. The second requirement which emerges from the phrase "in accordance with the law" - the accessibility of the law - does not raise any problem in the instant case.

The same is not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures. As the Court pointed out in the Malone judgment of 2 August 1984, Article 8 § 2 (art. 8-2) of the Convention "does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law". It

"thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... Undoubtedly ..., the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations"

- or judicial investigations -

"as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

... [In its judgment of 25 March 1983 in the

case of *Silver and Others* the Court] held that 'a law which confers a discretion must indicate the scope of that discretion', although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (ibid., Series A no. 61, pp. 33-34, § 88-89). The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter ... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive"

- or to a judge -

"to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference." (Series A no. 82, pp. 32-33, § 67-68)

31. The Government submitted that the Court must be careful not to rule on whether French legislation conformed to the Convention in the abstract and not to give a decision based on legislative policy. The Court was therefore not concerned, they said, with matters irrelevant to Mr Kruslin's case, such as the possibility of telephone tapping in relation to minor offences or the fact that there was no requirement that an individual whose telephone had been monitored should be so informed after the event where proceedings had not in the end been taken against him. Such matters were in reality connected with the condition of "necessity in a democratic society", fulfilment of which had to be reviewed in concrete terms, in the light of the particular circumstances of each case.
32. The Court is not persuaded by this argument. Since it must ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant French "law" in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction. It is none the less concerned with the "quality" of the national legal rules applicable to Mr Kruslin in the instant case.
33. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspond-

ence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.

Before the Commission (supplementary observations of 4 July 1988, pages 4-7, summarised in paragraph 37 of the report) and, in a slightly different form, before the Court, the Government listed seventeen safeguards which they said were provided for in French law (*droit*). These related either to the carrying out of telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government claimed that the applicant had not been deprived of any of them.

34. The Court does not in any way minimise the value of several of the safeguards, in particular the need for a decision by an investigating judge, who is an independent judicial authority; the latter's supervision of senior police officers and the possible supervision of the judge himself by the Indictment Division, by trial courts and courts of appeal and, if need be, by the Court of Cassation; the exclusion of any "subterfuge" or "ruse" consisting not merely in the use of telephone tapping but in an actual trick, trap or provocation; and the duty to respect the confidentiality of relations between suspect or accused and lawyer.

It has to be noted, however, that only some of these safeguards are expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others have been laid down piecemeal in judgments given over the years, the great majority of them after the interception complained of by Mr Kruslin (June 1982). Some have not yet been expressly laid down in the case-law at all, at least according to the information gathered by the Court; the Government appear to infer them either from general enactments or principles or else from an analogical interpretation of legislative provisions - or court decisions - concerning investigative measures different from telephone tapping, notably searches and seizure of property. Although plausible in itself, such "extrapolation" does not provide sufficient legal certainty in the present context.

35. Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped

by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points shows at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case-law.

36. In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr Kruslin did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the Malone judgment previously cited, Series A no. 82, p. 36, § 79). There has therefore been a breach of Article 8 (art. 8) of the Convention.

B. Purpose and necessity of the interference

37. Having regard to the foregoing conclusion, the Court, like the Commission (see paragraph 77 of the report), does not consider it necessary to review compliance with the other requirements of paragraph 2 of Article 8 (art. 8-2) in this case.

II. APPLICATION OF ARTICLE 50 (ART. 50)

38. By Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant claimed, firstly, compensation in the amount of 1,000,000 French francs (FRF) in respect of his fifteen-year prison sentence (see paragraph 13 above), which he alleged to be the direct result of the breach of Article 8 (art. 8) as the telephone tapping complained of had led to the decision to take proceedings against him. He also sought reimbursement of lawyer's fees and expenses: FRF 20,000 in order to prepare his appeal on points of law against the Indictment Division's judgment of 16 April 1985 in the *Gerbe d'Or* case (see paragraph 12 above) plus FRF 50,000 for his defence at the Haute-Garonne Assize Court and the Court of Cassation in the *Baron* case (see paragraph 14 above). He made no claim for the proceedings at Strasbourg, as the Commission and the Court had granted him legal aid.

The Government and the Delegate of the Commission expressed no opinion on the matter.

39. In the circumstances of the case the finding that there has been a breach of Article 8 (art. 8) affords Mr Kruslin sufficient just satisfaction for the alleged damage; it is accordingly unnecessary to award pecuniary compensation.
40. The costs and expenses incurred by the applicant in the *Baron* case cannot be taken into account by the Court; no doubt the telephone tapping was, as he pointed out, made use of in the two cases successively, but the Commission and the Court have only been concerned with considering its compatibility with the Convention in connection with the *Gerbe d'Or* case (see paragraph 14 in fine above).

The sum of FRF 20,000 sought in respect of the latter case, however, is relevant and not excessive, and it should therefore be awarded to him.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. **Holds that there has been a violation of Article 8 (art. 8);**
2. **Holds that this judgment in itself constitutes sufficient just satisfaction as to the alleged damage;**
3. **Holds that the respondent State is to pay the applicant 20,000 (twenty thousand) French francs in respect of costs and expenses;**
4. **Dismisses the remainder of the claims under Article 50 (art. 50).**

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1990.

Rolv RYSSDAL, *President*

Marc-André EISSEN, *Registrar*

ECHR

ECJ

COURT (PLENARY)

CASE OF KLASS AND OTHERS v GERMANY

(Application no. 5029/71)

JUDGMENT

STRASBOURG
6 September 1978

TELEPHONE, TAPPING, SURVEILLANCE, INTERFERENCE,
INTERCEPTION, PRIVATE LIFE, CORRESPONDENCE

IN THE CASE OF KLASS AND OTHERS,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. **G. BALLADORE PALLIERI**, *President*,

Mr. **G. WIARDA**,

Mr. **H. MOSLER**,

Mr. **M. ZEKIA**,

Mr. **J. CREMONA**,

Mr. **P. O'DONOGHUE**,

Mr. **Thór VILHJÁLMSÓN**,

Mr. **W. GANSHOF VAN DER MEERSCH**,

Sir **Gerald FITZMAURICE**,

Mrs **D. BINDSCHEDLER-ROBERT**,

Mr. **P.-H. TEITGEN**,

Mr. **G. LAGERGREN**,

Mr. **L. LIESCH**,

Mr. **F. GÖLCÜKLÜ**,

Mr. **F. MATSCHER**,

Mr. **J. PINHEIRO FARINHA**,

and also Mr. **H. PETZOLD**, *Deputy Registrar*,

Having deliberated in private on 11, 13 and 14 March, and then on 30 June, 1, 3 and 4 July 1978,

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

PROCEDURE

1. The case of Klass and others was referred to the Court by the European Commission of Human Rights (hereinafter called "the Commission"). The case originated in an application against the Federal Republic of Germany lodged with the Commission on 11 June 1971 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter called "the Convention") by five German citizens, namely Gerhard Klass, Peter Lubberger, Jürgen Nussbruch, Hans-Jürgen Pohl and Dieter Selb.
2. The Commission's request, which referred to

Articles 44 and 48, paragraph (a) (art. 44, art. 48-a), and to which was attached the report provided for in Article 31 (art. 31), was lodged with the registry of the Court on 15 July 1977, within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). The purpose of the request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 6 para. 1, 8 and 13 (art. 6-1, art. 8, art. 13) of the Convention.

3. On 28 July, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. H. Mosler, the elected judge of German nationality, and Mr. G. Balladore Pallieri, the President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. J. Cremona, Mr. W. Ganshof van der Meersch, Mr. D. Evrigenis, Mr. G. Lagergren and Mr. F. Gölcüklü (Article 43 in fine of the Convention and Rule 21 para. 4 of the Rules of Court) (art. 43).

Mr. Balladore Pallieri assumed the office of president of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. By an Order of 12 August, the President decided that the Government should file a memorial within a time-limit expiring on 28 November and that the Delegates of the Commission should be entitled to file a memorial in reply within two months of receipt of the Government's memorial.
5. At a meeting held in private on 18 November in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, on the ground "that the case raised serious questions affecting the interpretation of the Convention".
6. The Government filed their memorial on 28 November. On 27 January 1978, a memorial by the Principal Delegate of the Commission was received at the registry; at the same time, the Secretary to the Commission advised the Registrar that the Delegates would reply to the Government's memorial during the oral hearings.

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed by an Order of 24 February 1978 that the oral hearings should open on 10 March.
8. The Court held a preparatory meeting on 10 March, immediately before the opening of the hearings. At that meeting the Court, granting a request presented by the Government, decided that their Agent and counsel would be authorised to address the Court in German at the hearings, the Government undertaking, *inter alia*, responsibility for the interpretation into French or English of their oral arguments or statements (Rule 27 para. 2). In addition, the Court took note of the intention of the Commission's Delegates to be assisted during the oral proceedings by one of the applicants, namely Mr. Pohl; the Court also authorised Mr. Pohl to speak in German (Rules 29 para. 1 in fine and 27 para. 3).
9. The oral hearings took place in public at the Human Rights Building, Strasbourg, on 10 March.

There appeared before the Court:

(a) *for the Government:*

Mrs. **I. MAIER**, Ministerialdirigentin at the Federal Ministry of Justice, *Agent*,

Mr. **H. G. MERK**, Ministerialrat at the Federal Ministry of the Interior,

Mr. **H. STÖCKER**, Regierungsdirektor at the Federal Ministry of Justice,

Mrs. **H. SEIBERT**, Regierungsdirektorin at the Federal Ministry of Justice, *Advisers*;

(b) *for the Commission:*

Mr. **G. SPERDUTI**, *Principal Delegate*,

Mr. **C. A. NØRGAARD**, *Delegate*,

Mr. **H.-J. POHL**, Applicant, assisting the Delegates under Rule 29 para. 1, second sentence.

The Court heard addresses by Mrs. Maier for the Government and by Mr. Sperduti, Mr. Nørgaard and Mr. Pohl for the Commission, as well as their replies to questions put by several members of the Court.

AS TO THE FACTS

10. The applicants, who are German nationals, are Gerhard Klass, an Oberstaatsanwalt, Peter Lubberger, a lawyer, Jürgen Nussbruch, a judge, Hans-Jürgen Pohl and Dieter Selb, lawyers. Mr. Nussbruch lives in Heidelberg, the others in Mannheim.

All five applicants claim that Article 10 para. 2 of the Basic Law (Grundgesetz) and a statute enacted in pursuance of that provision, namely the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications (Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses, hereinafter referred to as "the G 10"), are contrary to the Convention. They do not dispute that the State has the right to have recourse to the surveillance measures contemplated by the legislation; they challenge this legislation in that it permits those measures without obliging the authorities in every case to notify the persons concerned after the event, and in that it excludes any remedy before the courts against the ordering and execution of such measures. Their application is directed against the legislation as modified and interpreted by the Federal Constitutional Court (Bundesverfassungsgericht).

11. Before lodging their application with the Commission, the applicants had in fact appealed to the Federal Constitutional Court. By judgment of 15 December 1970, that Court held that Article 1 para. 5, sub-paragraph 5 of the G 10 was void, being incompatible with the second sentence of Article 10 para. 2 of the Basic Law, in so far as it excluded notification of the person concerned about the measures of surveillance even when such notification could be given without jeopardising the purpose of the restriction. The Constitutional Court dismissed the remaining claims (Collected Decisions of the Constitutional Court, Vol. 30, pp. 1 et seq.).

Since the operative provisions of the aforementioned judgment have the force of law, the competent authorities are bound to apply the G 10 in the form and subject to the interpretation decided by the Constitutional Court. Furthermore, the Government of the Federal Republic of Germany were prompted by this judgment to propose amendments to the G 10, but the parliamentary proceedings have not yet been completed.

12. As regards the applicants' right to apply to the

Constitutional Court, that Court held, inter alia:

"In order to be able to enter a constitutional application against an Act, the applicant must claim that the Act itself, and not merely an implementary measure, constitutes a direct and immediate violation of one of his fundamental rights ... These conditions are not fulfilled since, according to the applicants' own submissions, it is only by an act on the part of the executive that their fundamental rights would be violated. However, because they are not apprised of the interference with their rights, the persons concerned cannot challenge any implementary measure. In such cases, they must be entitled to make a constitutional application against the Act itself, as in cases where a constitutional application against an implementary measure is impossible for other reasons ..." (ibid, pp. 16-17).

13. Although, as a precautionary measure, the applicants claimed before both the Constitutional Court and the Commission that they were being subjected to surveillance measures, they did not know whether the G 10 had actually been applied to them.

On this point, the Agent of the Government made the following declaration before the Court:

"To remove all uncertainty as to the facts of the case and to give the Court a clear basis for its decision, the Federal Minister of the Interior, who has competence in the matter, has, with the G 10 Commission's approval, authorised me to make the following statement:

At no time have surveillance measures provided for by the Act enacted in pursuance of Article 10 of the Basic Law been ordered or implemented against the applicants. Neither as persons suspected of one or more of the offences specified in the Act nor as third parties within the meaning of Article 1, paragraph 2, sub-paragraph 2, of the G 10 have the applicants been subjected to such measures. There is also no question of the applicants' having been indirectly involved in a surveillance measure directed against another person - at least, not in any fashion which would have permitted their identification. Finally, there is no question of the applicants' having been subjected to surveillance by mistake - for example through confusion over a telephone number -, since in such cases the person concerned is notified of the surveillance measure."

The contested legislation

14. After the end of the Second World War, the

surveillance of mail, post and telecommunications in Germany was dealt with by the occupying powers. As regards the Federal Republic, neither the entry into force on 24 May 1949 of the Basic Law nor the foundation of the State of the Federal Republic on 20 September 1949 altered this situation which continued even after the termination of the occupation régime in 1955. Article 5 para. 2 of the Convention of 26 May 1952 on Relations between the Three Powers (France, the United States and the United Kingdom) and the Federal Republic - as amended by the Paris Protocol of 23 October 1954 - specified in fact that the Three Powers temporarily retained "the rights ... heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic". Under the same provision, these rights were to lapse "when the appropriate German authorities (had) obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order".

15. The Government wished to substitute the domestic law for the rights exercised by the Three Powers and to place under legal control interferences with the right, guaranteed by Article 10 of the Basic Law, to respect for correspondence. Furthermore, the restrictions to which this right could be subject appeared to the Government to be inadequate for the effective protection of the constitutional order of the State. Thus, on 13 June 1967, the Government introduced two Bills as part of the Emergency Legislation. The first sought primarily to amend Article 10 para. 2 of the Basic Law; the second - based on Article 10 para. 2 so amended - was designed to limit the right to secrecy of the mail, post and telecommunications. The two Acts, having been adopted by the federal legislative assemblies, were enacted on 24 June and 13 August 1968 respectively.

The Three Powers had come to the view on 27 May that these two texts met the requirements of Article 5 para. 2 of the above-mentioned Convention. Their statements declared:

"The rights of the Three Powers heretofore held or exercised by them which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained pursuant to that provision will accordingly lapse as each of the above-mentioned texts, as laws, becomes ef-

fective."

16. In its initial version, Article 10 of the Basic Law guaranteed the secrecy of mail, post and telecommunications with a proviso that restrictions could be ordered only pursuant to a statute. As amended by the Act of 24 June 1968, it now provides:

"(1) Secrecy of the mail, post and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a statute. Where such restrictions are intended to protect the free democratic constitutional order or the existence or security of the Federation or of a Land, the statute may provide that the person concerned shall not be notified of the restriction and that legal remedy through the courts shall be replaced by a system of scrutiny by agencies and auxiliary agencies appointed by the people's elected representatives."

17. The G 10, adopting the solution contemplated by the second sentence of paragraph 2 of the above-quoted Article 10, specifies (in Article 1 para. 1) the cases in which the competent authorities may impose the restrictions provided for in that paragraph, that is to say, may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversations. Thus, Article 1 para. 1 empowers those authorities so to act in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic and the security of "the troops of one of the Three Powers stationed in the Land of Berlin". According to Article 1 para. 2, these measures may be taken only where there are factual indications (tatsächliche Anhaltspunkte) for suspecting a person of planning, committing or having committed certain criminal acts punishable under the Criminal Code, such as offences against the peace or security of the State (sub-paragraph 1, no. 1), the democratic order (sub-paragraph 1, no. 2), external security (sub-paragraph 1, no. 3) and the security of the allied armed forces (sub-paragraph 1, no. 5).

Paragraph 2 of Article 1 further states that the surveillance provided for in paragraph 1 is permissible only if the establishment of the facts by another method is without prospects of success or considerably more difficult (aussichtslos oder wesentlich erschwert). The surveillance may cover only "the suspect or such oth-

er persons who are, on the basis of clear facts (bestimmter Tatsachen), to be presumed to receive or forward communications intended for the suspect or emanating from him or whose telephone the suspect is to be presumed to use" (sub-paragraph 2).

18. Article 1 para. 4 of the Act provides that an application for surveillance measures may be made only by the head, or his substitute, of one of the following services: the Agencies for the Protection of the Constitution of the Federation and the Länder (Bundesamt für Verfassungsschutz; Verfassungsschutzbehörden der Länder), the Army Security Office (Amt für Sicherheit der Bundeswehr) and the Federal Intelligence Service (Bundesnachrichtendienst).

The measures are ordered, on written application giving reasons, either by the supreme Land authority in cases falling within its jurisdiction or by a Federal Minister empowered for the purpose by the Chancellor. The Chancellor has entrusted these functions to the Ministers of the Interior and of Defence each of whom, in the sphere falling within his competence, must personally take the decision as to the application of the measures (Article 1 para. 5, sub-paragraphs 1 and 2).

Measures ordered must be immediately discontinued once the required conditions have ceased to exist or the measures themselves are no longer necessary (Article 1 para. 7, sub-paragraph 2). The measures remain in force for a maximum of three months and may be renewed only on fresh application (Article 1 para. 5, sub-paragraph 3).

19. Under the terms of Article 1 para. 5, sub-paragraph 5, the person concerned is not to be notified of the restrictions affecting him. However, since the Federal Constitutional Court's judgment of 15 December 1970 (see paragraph 11 above), the competent authority has to inform the person concerned as soon as notification can be made without jeopardising the purpose of the restriction. To this end, the Minister concerned considers *ex officio*, immediately the measures have been discontinued or, if need be, at regular intervals thereafter, whether the person concerned should be notified. The Minister submits his decision for approval to the Commission set up under the G 10 for the purpose of supervising its application (hereinafter called "the G 10 Commission"). The G 10 Commission may direct the Minister to inform the person concerned that he has been subjected

to surveillance measures.

20. Implementation of the measures ordered is supervised by an official qualified for judicial office (Article 1 para. 7, sub-paragraph 1). This official examines the information obtained in order to decide whether its use would be compatible with the Act and whether it is relevant to the purpose of the measure. He transmits to the competent authorities only information satisfying these conditions and destroys any other intelligence that may have been gathered.

The information and documents so obtained may not be used for other ends and documents must be destroyed as soon as they are no longer needed to achieve the required purpose (Article 1 para. 7 sub-paragraphs 3 and 4).

21. The competent Minister must, at least once every six months, report to a Board consisting of five Members of Parliament on the application of the G 10; the Members of Parliament are appointed by the Bundestag in proportion to the parliamentary groupings, the opposition being represented on the Board (Article 1 para. 9, sub-paragraph 1, of the G 10 and Rule 12 of the Rules of Procedure of the Bundestag). In addition, the Minister is bound every month to provide the G 10 Commission with an account of the measures he has ordered (Article 1 para. 9). In practice and except in urgent cases, the Minister seeks the prior consent of this Commission. The Government, moreover, intend proposing to Parliament to amend the G 10 so as to make such prior consent obligatory.

The G 10 Commission decides, *ex officio* or on application by a person believing himself to be under surveillance, on both the legality of and the necessity for the measures; if it declares any measures to be illegal or unnecessary, the Minister must terminate them immediately (Article 1 para. 9, sub-paragraph 2). Although not required by the Constitutional Court's judgment of 15 December 1970, the Commission has, since that judgment, also been called upon when decisions are taken on whether the person concerned should be notified of the measures affecting him (see paragraph 19 above).

The G 10 Commission consists of three members, namely, a Chairman, who must be qualified to hold judicial office, and two assessors. The Commission members are appointed for the current term of the Bundestag by the above-mentioned Board of five Members of Parliament after consultation with the Govern-

ment; they are completely independent in the exercise of their functions and cannot be subject to instructions.

The G 10 Commission draws up its own rules of procedure which must be approved by the Board; before taking this decision, the Board consults the Government.

For the Länder, their legislatures lay down the parliamentary supervision to which the supreme authorities are subject in the matter. In fact, the Länder Parliaments have set up supervisory bodies which correspond to the federal bodies from the point of view of organisation and operation.

22. According to Article 1 para. 9, sub-paragraph 5, of the G 10:

"... there shall be no legal remedy before the courts in respect of the ordering and implementation of restrictive measures."

The official statement of reasons accompanying the Bill contains the following passage in this connection:

"The surveillance of the post and telecommunications of a certain person can serve a useful purpose only if the person concerned does not become aware of it. For this reason, notification to this person is out of the question. For the same reason, it must be avoided that a person who intends to commit, or who has committed, the offences enumerated in the Act can, by using a legal remedy, inform himself whether he is under surveillance. Consequently, a legal remedy to impugn the ordering of restrictive measures had to be denied ...

The Bill presented during the 4th legislative session ... provided for the ordering (of such measures) by an independent judge. The Federal Government abandoned this solution in the Bill amending Article 10 of the Basic Law, introduced as part of the Emergency Legislation, mainly because the Executive, which is responsible before the Bundestag, should retain the responsibility for such decisions in order to observe a clear separation of powers. The present Bill therefore grants the power of decision to a Federal Minister or the supreme authority of the Land. For the (above-)mentioned reasons ..., the person concerned is deprived of the opportunity of having the restrictive measures ordered examined by a court; on the other hand, the constitutional principle of government under the rule of law demands an independent control of interference by the Executive with the rights of citizens. Thus, the Bill, in pursuance of the Bill amending Article

10 of the Basic Law ..., prescribes the regular reporting to a Parliamentary Board and the supervision of the ordering of the restrictive measures by a Control Commission appointed by the Board ..." (Bundestag document V/1880 of 13 June 1967, p. 8).

23. Although access to the courts to challenge the ordering and implementation of surveillance measures is excluded in this way, it is still open to a person believing himself to be under surveillance pursuant to the G 10 to seek a constitutional remedy: according to the information supplied by the Government, a person who has applied to the G 10 Commission without success retains the right to apply to the Constitutional Court. The latter may reject the application on the ground that the applicant is unable to adduce proof to substantiate a complaint, but it may also request the Government concerned to supply it with information or to produce documents to enable it to verify for itself the individual's allegations. The authorities are bound to reply to such a request even if the information asked for is secret. It is then for the Constitutional Court to decide whether the information and documents so obtained can be used; it may decide by a two-thirds majority that their use is incompatible with State security and dismiss the application on that ground (Article 26 para. 2 of the Constitutional Court Act).

The Agent of the Government admitted that this remedy might be employed only on rare occasions.

24. If the person concerned is notified, after the measures have been discontinued, that he has been subject to surveillance, several legal remedies against the interference with his rights become available to him. According to the information supplied by the Government, the individual may: in an action for a declaration, have reviewed by an administrative court declaration, the legality of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law.
25. Article 2 of the G 10 has also amended the Code of Criminal Procedure by inserting therein two Articles which authorise measures

of surveillance of telephone and telegraphic communications.

Under Article 100 (a), these measures may be taken under certain conditions, in particular, when there are clear facts on which to suspect someone of having committed or attempted to commit certain serious offences listed in that Article. Under Article 100 (b), such measures may be ordered only by a court and for a maximum of three months; they may be renewed. In urgent cases, the decision may be taken by the public prosecutor's department but to remain in effect it must be confirmed by a court within three days. The persons concerned are informed of the measures taken in their respect as soon as notification can be made without jeopardising the purpose of the investigation (Article 101 para. 1 of the Code of Criminal Procedure).

These provisions are not, however, in issue in the present case.

PROCEEDINGS BEFORE THE COMMISSION

26. In their application lodged with the Commission on 11 June 1971, the applicants alleged that Article 10 para. 2 of the Basic Law and the G 10 - to the extent that these provisions, firstly, empower the authorities to monitor their correspondence and telephone communications without obliging the authorities to inform them subsequently of the measures taken against them and, secondly, exclude the possibility of challenging such measures before the ordinary courts - violate Articles 6, 8 and 13 (art. 6, art. 8, art. 13) of the Convention.

On 18 December 1974, the Commission declared the application admissible. It found, as regards Article 25 (art. 25) of the Convention:

"... only the victim of an alleged violation may bring an application. The applicants, however, state that they may be or may have been subject to secret surveillance, for example, in course of legal representation of clients who were themselves subject to surveillance, and that persons having been the subject of secret surveillance are not always subsequently informed of the measures taken against them. In view of this particularity of the case the applicants have to be considered as victims for the purpose of Article 25 (art. 25)."

27. Having been invited by the Government to

consider the application inadmissible under Article 29 in conjunction with Articles 25 and 27 para. 2 (art. 29+25, art. 29+27-2) of the Convention, the Commission declared in its report of 9 March 1977 that it saw no reason to accede to this request. In this connection, the report stated:

"The Commission is ... still of the opinion ... that the applicants must be considered as if they were victims. Some of the applicants are barristers and it is theoretically excluded that they are in fact subject to secret surveillance in consequence of contacts they may have with clients who are suspected of anti-constitutional activities.

As it is the particularity of this case that persons subject to secret supervision by the authorities are not always subsequently informed of such measures taken against them, it is impossible for the applicants to show that any of their rights have been interfered with. In these circumstances the applicants must be considered to be entitled to lodge an application even if they cannot show that they are victims."

The Commission then expressed the opinion:

- by eleven votes to one with two abstentions, that the present case did not disclose any breach of Article 6 para. 1 (art. 6-1) of the Convention insofar as the applicants relied on the notion "civil rights";
- unanimously, that the present case did not disclose any breach of Article 6 para. 1 (art. 6-1) in so far as the applicants relied on the notion "criminal charge";
- by twelve votes in favour with one abstention, that the present case did not disclose any breach of Article 8 (art. 8) or of Article 13 (art. 13).

The report contains various separate opinions.

28. In her memorial of 28 November 1977, the Agent of the Government submitted in conclusion:

"I ... invite the Court

to find that the application was inadmissible;

in the alternative, to find that the Federal Republic of Germany has not violated the Convention."

She repeated these concluding submissions at the hearing on 10 March 1978.

29. For their part, the Delegates of the Commission made the following concluding submissions to the Court:

"May it please the Court to say and judge

1. Whether, having regard to the circumstances of the case, the applicants could claim to be 'victims' of a violation of their rights guaranteed by the Convention by reason of the system of surveillance established by the so-called G 10 Act;

2. And, if so, whether the applicants are actually victims of a violation of their rights set forth in the Convention by the very existence of that Act, considering that it gives no guarantee to persons whose communications have been subjected to secret surveillance that they will be notified subsequently of the measures taken concerning them."

AS TO THE LAW

I. ON ARTICLE 25 PARA. 1 (ART. 25-1)

30. Both in their written memorial and in their oral submissions, the Government formally invited the Court to find that the application lodged with the Commission was "inadmissible". They argued that the applicants could not be considered as "victims" within the meaning of Article 25 para. 1 (art. 25-1) which provides as follows:

"The Commission may receive petitions addressed to the Secretary-General of the Council of Europe 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 set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions ..."

In the Government's submission, the applicants were not claiming to have established an individual violation, even potential, of their own rights but rather, on the basis of the purely hypothetical possibility of being subject to surveillance, were seeking a general and abstract review of the contested legislation in the light of the Convention.

31. According to the reply given by the Delegates at the hearing, the Commission agreed with the Government that the Court is competent

to determine whether the applicants can claim to be "victims" within the meaning of Article 25 para. 1 (art. 25-1). However, the Commission disagreed with the Government in so far as the latter's proposal might imply the suggestion that the Commission's decision on the admissibility of the application should as such be re-viewed by the Court.

The Delegates considered that the Government were requiring too rigid a standard for the notion of a "victim" of an alleged breach of Article 8 (art. 8) of the Convention. They submitted that, in order to be able to claim to be the victim of an interference with the exercise of the right conferred on him by Article 8 para. 1 (art. 8-1), it should suffice that a person is in a situation where there is a reasonable risk of his being subjected to secret surveillance. In the Delegates' view, the applicants are not only to be considered as constructive victims, as the Commission had in effect stated: they can claim to be direct victims of a violation of their rights under Article 8 (art. 8) in that under the terms of the contested legislation everyone in the Federal Republic of Germany who could be presumed to have contact with people involved in subversive activity really runs the risk of being subject to secret surveillance, the sole existence of this risk being in itself a restriction on free communication.

The Principal Delegate, for another reason, regarded the application as rightly declared admissible. In his view, the alleged violation related to a single right which, although not expressly enounced in the Convention, was to be derived by necessary implication; this implied right was the right of every individual to be informed within a reasonable time of any secret measure taken in his respect by the public authorities and amounting to an interference with his rights and freedoms under the Convention.

32. The Court confirms the well-established principle of its own case-law that, once a case is duly referred to it, the Court is endowed with full jurisdiction and may take cognisance of all questions of fact or of law arising in the course of the proceedings, including questions which may have been raised before the Commission under the head of admissibility. This conclusion is in no way invalidated by the powers conferred on the Commission under Article 27 (art. 27) of the Convention as regards the admissibility of applications. The task which this Article assigns to the Commission is one

of sifting; the Commission either does or does not accept the applications. Its decision to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence (see the *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, pp. 29 and 30, paras. 47-54; see also the judgment of 9 February 1967 on the preliminary objection in the "*Belgian Linguistic*" case, Series A no. 5, p. 18; the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 20, para. 41; and the judgment of 18 January 1978 in the case of *Ireland v. the United Kingdom*, Series A no. 25, p. 63, para. 157).

The present case concerns, *inter alia*, the interpretation of the notion of "victim" within the meaning of Article 25 (art. 25) of the Convention, this being a matter already raised before the Commission. The Court therefore affirms its jurisdiction to examine the issue arising under that Article (art. 25).

33. While Article 24 (art. 24) allows each Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25 (art. 25), claim "to be the victim of a violation ... of the rights set forth in (the) Convention". Thus, in contrast to the position under Article 24 (art. 24) - where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application - Article 25 (art. 25) requires that an individual applicant should claim to have been actually affected by the violation he alleges (see the judgment of 18 January 1978 in the case of *Ireland v. the United Kingdom*, Series A no. 25, pp. 90-91, paras. 239 and 240). Article 25 (art. 25) does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment. Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of

any specific measure of implementation. In this connection, the Court recalls that, in two previous cases originating in applications lodged in pursuance of Article 25 (art. 25), it has itself been faced with legislation having such an effect: in the "Belgian Linguistic" case and the case of Kjeldsen, Busk Madsen and Pedersen, the Court was called on to examine the compatibility with the Convention and Protocol No. 1 of certain legislation relating to education (see the judgment of 23 July 1968, Series A no. 6, and the judgment of 7 December 1976, Series A no. 23, especially pp. 22-23, para. 48).

34. Article 25 (art. 25), which governs the access by individuals to the Commission, is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention. This machinery involves, for an individual who considers himself to have been prejudiced by some action claimed to be in breach of the Convention, the possibility of bringing the alleged violation before the Commission provided the other admissibility requirements are satisfied. The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (*l'effet utile*) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.

35. In the light of these considerations, it has now to be ascertained whether, by reason of the

particular legislation being challenged, the applicants can claim to be victims, in the sense of Article 25 (art. 25), of a violation of Article 8 (art. 8) of the Convention - Article 8 (art. 8) being the provision giving rise to the central issue in the present case.

36. The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 (art. 8) could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8 (art. 8), or even to be deprived of the right granted by that Article (art. 8), without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.

In this connection, it should be recalled that the Federal Constitutional Court in its judgment of 15 December 1970 (see paragraphs 11 and 12 above) adopted the following reasoning:

"In order to be able to enter a constitutional application against an Act, the applicant must claim that the Act itself, and not merely an implementary measure, constitutes a direct and immediate violation of one of his fundamental rights ... These conditions are not fulfilled since, according to the applicants' own submissions, it is only by an act on the part of the executive that their fundamental rights would be violated. However, because they are not apprised of the interference with their rights, the persons concerned cannot challenge any implementary measure. In such cases, they must be entitled to make a constitutional application against the Act itself, as in cases where a constitutional application against an implementary measure is impossible for other reasons ..."

This reasoning, in spite of the possible differences existing between appeals to the Federal Constitutional Court under German law and the enforcement machinery set up by the Convention, is valid, *mutatis mutandis*, for applications lodged under Article 25 (art. 25).

The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 (art. 25), since otherwise Article 8 (art.

8) runs the risk of being nullified.

37. As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification in the circumstances laid down in the Federal Constitutional Court's judgment (see paragraph 11 above). To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore, as the Delegates rightly pointed out, this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8 (art. 8).

At the hearing, the Agent of the Government informed the Court that at no time had surveillance measures under the G 10 been ordered or implemented in respect of the applicants (see paragraph 13 above). The Court takes note of the Agent's statement. However, in the light of its conclusions as to the effect of the contested legislation the Court does not consider that this retrospective clarification bears on the appreciation of the applicants' status as "victims".

38. Having regard to the specific circumstances of the present case, the Court concludes that each of the applicants is entitled to "(claim) to be the victim of a violation" of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance. The question whether the applicants were actually the victims of any violation of the Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions.

Accordingly, the Court does not find it necessary to decide whether the Convention implies a right to be informed in the circumstances mentioned by the Principal Delegate.

II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (ART. 8)

39. The applicants claim that the contested legisla-

tion, notably because the person concerned is not informed of the surveillance measures and cannot have recourse to the courts when such measures are terminated, violates Article 8 (art. 8) of the Convention which provides as follows:

"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 freedoms of others."

40. According to Article 10 para. 2 of the Basic Law, restrictions upon the secrecy of the mail, post and telecommunications may be ordered but only pursuant to a statute. Article 1 para. 1 of the G 10 allows certain authorities to open and inspect mail and post, to read telegraphic messages and to monitor and record telephone conversations (see paragraph 17 above). The Court's examination under Article 8 (art. 8) is thus limited to the authorisation of such measures alone and does not extend, for instance, to the secret surveillance effect in pursuance of the Code of Criminal Procedure (see paragraph 25 above).
41. The first matter to be decided is whether and, if so, in what respect the contested legislation, in permitting the above-mentioned measures of surveillance, constitutes an interference with the exercise of the right guaranteed to the applicants under Article 8 para. 1 (art. 8-1).

Although telephone conversations are not expressly mentioned in paragraph 1 of Article 8 (art. 8-1), the Court considers, as did the Commission, that such conversations are covered by the notions of "private life" and "correspondence" referred to by this provision.

In its report, the Commission expressed the opinion that the secret surveillance provided for under the German legislation amounted to an interference with the exercise of the right set forth in Article 8 para. 1 (art. 8-1). Neither before the Commission nor before the Court did the Government contest this issue. Clearly, any of the permitted surveillance measures, once applied to a given individual, would result in an interference by a public authority with the exercise of that individual's right to respect for his

private and family life and his correspondence. Furthermore, in the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for private and family life and for correspondence.

The Court does not exclude that the contested legislation, and therefore the measures permitted thereunder, could also involve an interference with the exercise of a person's right to respect for his home. However, the Court does not deem it necessary in the present proceedings to decide this point.

42. The cardinal issue arising under Article 8 (art. 8) in the present case is whether the interference so found is justified by the terms of paragraph 2 of the Article (art. 8-2). This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.
43. In order for the "interference" established above not to infringe Article 8 (art. 8), it must, according to paragraph 2 (art. 8-2), first of all have been "in accordance with the law". This requirement is fulfilled in the present case since the "interference" results from Acts passed by Parliament, including one Act which was modified by the Federal Constitutional Court, in the exercise of its jurisdiction, by its judgment of 15 December 1970 (see paragraph 11 above). In addition, the Court observes that, as both the Government and the Commission pointed out, any individual measure of surveillance has to comply with the strict conditions and procedures laid down in the legislation itself.
44. It remains to be determined whether the other requisites laid down in paragraph 2 of Article 8 (art. 8-2) were also satisfied. According to the Government and the Commission, the interference permitted by the contested legislation was "necessary in a democratic society in the interests of national security" and/or "for the prevention of disorder or crime". Before the Court the Government submitted that the interference was additionally justified "in the

interests of... public safety" and "for the protection of the rights and freedoms of others".

45. The G 10 defines precisely, and thereby limits, the purposes for which the restrictive measures may be imposed. It provides that, in order to protect against "imminent dangers" threatening "the free democratic constitutional order", "the existence or security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic or the security of "the troops of one of the Three Powers stationed in the Land of Berlin", the responsible authorities may authorise the restrictions referred to above (see paragraph 17).
46. The Court, sharing the view of the Government and the Commission, finds that the aim of the G 10 is indeed to safeguard national security and/or to prevent disorder or crime in pursuance of Article 8 para. 2 (art. 8-2). In these circumstances, the Court does not deem it necessary to decide whether the further purposes cited by the Government are also relevant.

On the other hand, it has to be ascertained whether the means provided under the impugned legislation for the achievement of the above-mentioned aim remain in all respects within the bounds of what is necessary in a democratic society.

47. The applicants do not object to the German legislation in that it provides for wide-ranging powers of surveillance; they accept such powers, and the resultant encroachment upon the right guaranteed by Article 8 para. 1 (art. 8-1), as being a necessary means of defence for the protection of the democratic State. The applicants consider, however, that paragraph 2 of Article 8 (art. 8-2) lays down for such powers certain limits which have to be respected in a democratic society in order to ensure that the society does not slide imperceptibly towards totalitarianism. In their view, the contested legislation lacks adequate safeguards against possible abuse.
48. As the Delegates observed, the Court, in its appreciation of the scope of the protection offered by Article 8 (art. 8), cannot but take judicial notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of es-

pionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.

49. As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (cf., *mutatis mutandis*, the *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the *Golder* judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45; cf., for Article 10 para. 2, the *Engel and others* judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100, and the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.

50. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.

The functioning of the system of secret surveillance established by the contested legislation, as modified by the Federal Constitutional Court's judgment of 15 December 1970, must

therefore be examined in the light of the Convention.

51. According to the G 10, a series of limitative conditions have to be satisfied before a surveillance measure can be imposed. Thus, the permissible restrictive measures are confined to cases in which there are factual indications for suspecting a person of planning, committing or having committed certain serious criminal acts; measures may only be ordered if the establishment of the facts by another method is without prospects of success or considerably more difficult; even then, the surveillance may cover only the specific suspect or his presumed "contact-persons" (see paragraph 17 above). Consequently, so-called exploratory or general surveillance is not permitted by the contested legislation.

Surveillance may be ordered only on written application giving reasons, and such an application may be made only by the head, or his substitute, of certain services; the decision thereon must be taken by a Federal Minister empowered for the purpose by the Chancellor or, where appropriate, by the supreme Land authority (see paragraph 18 above). Accordingly, under the law there exists an administrative procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. In addition, although not required by the Act, the competent Minister in practice and except in urgent cases seeks the prior consent of the G 10 Commission (see paragraph 21 above).

52. The G 10 also lays down strict conditions with regard to the implementation of the surveillance measures and to the processing of the information thereby obtained. The measures in question remain in force for a maximum of three months and may be renewed only on fresh application; the measures must immediately be discontinued once the required conditions have ceased to exist or the measures themselves are no longer necessary; knowledge and documents thereby obtained may not be used for other ends, and documents must be destroyed as soon as they are no longer needed to achieve the required purpose (see paragraphs 18 and 20 above).

As regards the implementation of the measures, an initial control is carried out by an official qualified for judicial office. This official examines the information obtained before transmitting to the competent services such

information as may be used in accordance with the Act and is relevant to the purpose of the measure; he destroys any other intelligence that may have been gathered (see paragraph 20 above).

53. Under the G 10, while recourse to the courts in respect of the ordering and implementation of measures of surveillance is excluded, subsequent control or review is provided instead, in accordance with Article 10 para. 2 of the Basic Law, by two bodies appointed by the people's elected representatives, namely, the Parliamentary Board and the G 10 Commission.

The competent Minister must, at least once every six months, report on the application of the G 10 to the Parliamentary Board consisting of five Members of Parliament; the Members of Parliament are appointed by the Bundestag in proportion to the parliamentary groupings, the opposition being represented on the Board. In addition, the Minister is bound every month to provide the G 10 Commission with an account of the measures he has ordered. In practice, he seeks the prior consent of this Commission. The latter decides, *ex officio* or on application by a person believing himself to be under surveillance, on both the legality of and the necessity for the measures in question; if it declares any measures to be illegal or unnecessary, the Minister must terminate them immediately. The Commission members are appointed for the current term of the Bundestag by the Parliamentary Board after consultation with the Government; they are completely independent in the exercise of their functions and cannot be subject to instructions (see paragraph 21 above).

54. The Government maintain that Article 8 para. 2 (art. 8-2) does not require judicial control of secret surveillance and that the system of review established under the G 10 does effectively protect the rights of the individual. The applicants, on the other hand, qualify this system as a "form of political control", inadequate in comparison with the principle of judicial control which ought to prevail.

It therefore has to be determined whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" resulting from the contested legislation to what is "necessary in a democratic society".

55. Review of surveillance may intervene at three stages: when the surveillance is first ordered,

while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8-2), are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

56. Within the system of surveillance established by the G 10, judicial control was excluded, being replaced by an initial control effected by an official qualified for judicial office and by the control provided by the Parliamentary Board and the G 10 Commission.

The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

Nevertheless, having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. The Parliamentary Board and the G 10 Commission are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise an effective and continuous control. Furthermore, the democratic character is reflected in the balanced membership of the Parliamentary Board. The opposi-

tion is represented on this body and is therefore able to participate in the control of the measures ordered by the competent Minister who is responsible to the Bundestag. The two supervisory bodies may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling.

The Court notes in addition that an individual believing himself to be under surveillance has the opportunity of complaining to the G 10 Commission and of having recourse to the Constitutional Court (see paragraph 23 above). However, as the Government conceded, these are remedies which can come into play only in exceptional circumstances.

57. As regards review a posteriori, it is necessary to determine whether judicial control, in particular with the individual's participation, should continue to be excluded even after surveillance has ceased. Inextricably linked to this issue is the question of subsequent notification, since there is in principle little scope for recourse to the courts by the individual concerned unless he is advised of the measures taken without his knowledge and thus able retrospectively to challenge their legality.

The applicants' main complaint under Article 8 (art. 8) is in fact that the person concerned is not always subsequently informed after the suspension of surveillance and is not therefore in a position to seek an effective remedy before the courts. Their preoccupation is the danger of measures being improperly implemented without the individual knowing or being able to verify the extent to which his rights have been interfered with. In their view, effective control by the courts after the suspension of surveillance measures is necessary in a democratic society to ensure against abuses; otherwise adequate control of secret surveillance is lacking and the right conferred on individuals under Article 8 (art. 8) is simply eliminated.

In the Government's view, the subsequent notification which must be given since the Federal Constitutional Court's judgment (see paragraphs 11 and 19 above) corresponds to the requirements of Article 8 para. 2 (art. 8-2). In their submission, the whole efficacy of secret surveillance requires that, both before and after the event, information cannot be divulged if thereby the purpose of the investigation is, or would be retrospectively, thwarted. They stressed that recourse to the courts is no longer excluded after notification has been given,

various legal remedies then becoming available to allow the individual, inter alia, to seek redress for any injury suffered (see paragraph 24 above).

58. In the opinion of the Court, it has to be ascertained whether it is even feasible in practice to require subsequent notification in all cases.

The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, as the Federal Constitutional Court rightly observed, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. In the Court's view, in so far as the "interference" resulting from the contested legislation is in principle justified under Article 8 para. 2 (art. 8-2) (see paragraph 48 above), the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the "interference". Moreover, it is to be recalled that, in pursuance of the Federal Constitutional Court's judgment of 15 December 1970, the person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardising the purpose of the restriction (see paragraphs 11 and 19 above).

59. Both in general and in relation to the question of subsequent notification, the applicants have constantly invoked the danger of abuse as a ground for their contention that the legislation they challenge does not fulfil the requirements of Article 8 para. 2 (art. 8-2) of the Convention. While the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the Court's present review are the likelihood of such action and the safeguards provided to protect against it.

The Court has examined above (at paragraphs 51 to 58) the contested legislation in the light, inter alia, of these considerations. The Court notes in particular that the G 10 contains various provisions designed to reduce the effect of surveillance measures to an unavoidable

minimum and to ensure that the surveillance is carried out in strict accordance with the law. In the absence of any evidence or indication that the actual practice followed is otherwise, the Court must assume that in the democratic society of the Federal Republic of Germany, the relevant authorities are properly applying the legislation in issue.

The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention (see, *mutatis mutandis*, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, para. 5). As the Preamble to the Convention states, "Fundamental Freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend". In the context of Article 8 (art. 8), this means that a balance must be sought between the exercise by the individual of the right guaranteed to him under paragraph 1 (art. 8-1) and the necessity under paragraph 2 (art. 8-2) to impose secret surveillance for the protection of the democratic society as a whole.

60. In the light of these considerations and of the detailed examination of the contested legislation, the Court concludes that the German legislature was justified to consider the interference resulting from that legislation with the exercise of the right guaranteed by Article 8 para. 1 (art. 8-1) as being necessary in a democratic society in the interests of national security and for the prevention of disorder or crime (Article 8 para. 2) (art. 8-2). Accordingly, the Court finds no breach of Article 8 (art. 8) of the Convention.

III. ON THE ALLEGED VIOLATION OF ARTICLE 13 (ART. 13)

61. The applicants also alleged a breach of Article 13 (art. 13) which provides:

"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."

62. In the applicants' view, the Contracting States are obliged under Article 13 (art. 13) to provide

an effective remedy for any alleged breach of the Convention; any other interpretation of this provision would render it meaningless. On the other hand, both the Government and the Commission consider that there is no basis for the application of Article 13 (art. 13) unless a right guaranteed by another Article of the Convention has been violated.

63. In the judgment of 6 February 1976 in the Swedish Engine Drivers' Union case, the Court, having found there to be in fact an effective remedy before a national authority, considered that it was not called upon to rule whether Article 13 (art. 13) was applicable only when a right guaranteed by another Article of the Convention has been violated (Series A no. 20, p. 18, para. 50; see also the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 46, para. 95). The Court proposes in the present case to decide on the applicability of Article 13 (art. 13), before examining, if necessary, the effectiveness of any relevant remedy under German law.

64. Article 13 (art. 13) states that any individual whose Convention rights and freedoms "are violated" is to have an effective remedy before a national authority even where "the violation has been committed" by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated. In the Court's view, Article 13 (art. 13) requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 (art. 13) must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated.

65. Accordingly, although the Court has found no breach of the right guaranteed to the applicants by Article 8 (art. 8), it falls to be ascertained whether German law afforded the applicants "an effective remedy before a national authority" within the meaning of Article 13 (art.

13).

The applicants are not claiming that, in relation to particular surveillance measures actually applied to them, they lacked an effective remedy for alleged violation of their rights under the Convention. Rather, their complaint is directed against what they consider to be a shortcoming in the content of the contested legislation. While conceding that some forms of recourse exist in certain circumstances, they contend that the legislation itself, since it prevents them from even knowing whether their rights under the Convention have been interfered with by a concrete measure of surveillance, thereby denies them in principle an effective remedy under national law. Neither the Commission nor the Government agree with this contention. Consequently, although the applicants are challenging the terms of the legislation itself, the Court must examine, *inter alia*, what remedies are in fact available under German law and whether these remedies are effective in the circumstances.

66. The Court observes firstly that the applicants themselves enjoyed "an effective remedy", within the meaning of Article 13 (art. 13), in so far as they challenged before the Federal Constitutional Court the conformity of the relevant legislation with their right to respect for correspondence and with their right of access to the courts. Admittedly, that Court examined the applicants' complaints with reference not to the Convention but solely to the Basic Law. It should be noted, however, that the rights invoked by the applicants before the Constitutional Court are substantially the same as those whose violation was alleged before the Convention institutions (*cf.*, *mutatis mutandis*, the judgment of 6 February 1976 in the Swedish Engine Drivers' Union case, Series A no. 20, p. 18, para. 50). A reading of the judgment of 15 December 1970 reveals that the Constitutional Court carefully examined the complaints brought before it in the light, *inter alia*, of the fundamental principles and democratic values embodied in the Basic Law.
67. As regards the issue whether there is "an effective remedy" in relation to the implementation of concrete surveillance measures under the G 10, the applicants argued in the first place that to qualify as a "national authority", within the meaning of Article 13 (art. 13), a body should at least be composed of members who are impartial and who enjoy the safeguards of judicial independence. The Government in reply sub-

mitted that, in contrast to Article 6 (art. 6), Article 13 (art. 13) does not require a legal remedy through the courts.

In the Court's opinion, the authority referred to in Article 13 (art. 13) may not necessarily in all instances be a judicial authority in the strict sense (see the Golder judgment of 21 February 1975, Series A no. 18, p. 16, para. 33). Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective.

68. The concept of an "effective remedy", in the applicants' submission, presupposes that the person concerned should be placed in a position, by means of subsequent information, to defend himself against any inadmissible encroachment upon his guaranteed rights. Both the Government and the Commission were agreed that no unrestricted right to notification of surveillance measures can be deduced from Article 13 (art. 13) once the contested legislation, including the lack of information, has been held to be "necessary in a democratic society" for any one of the purposes mentioned in Article 8 (art. 8).

The Court has already pointed out that it is the secrecy of the measures which renders it difficult, if not impossible, for the person concerned to seek any remedy of his own accord, particularly while surveillance is in progress (see paragraph 55 above). Secret surveillance and its implications are facts that the Court, albeit to its regret, has held to be necessary, in modern-day conditions in a democratic society, in the interests of national security and for the prevention of disorder or crime (see paragraph 48 above). The Convention is to be read as a whole and therefore, as the Commission indicated in its report, any interpretation of Article 13 (art. 13) must be in harmony with the logic of the Convention. The Court cannot interpret or apply Article 13 (art. 13) so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 (art. 8) in order to ensure the efficacy of surveillance measures (see paragraphs 58 to 60 above). Consequently, the Court, consistently with its conclusions concerning Article 8 (art. 8), holds that the lack of notification does not, in the circumstances of the case, entail a breach of Article 13 (art. 13).

69. For the purposes of the present proceedings, an "effective remedy" under Article 13 (art. 13)

must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance. It therefore remains to examine the various remedies available to the applicants under German law in order to see whether they are "effective" in this limited sense.

70. Although, according to the G 10, there can be no recourse to the courts in respect of the ordering and implementation of restrictive measures, certain other remedies are nevertheless open to the individual believing himself to be under surveillance: he has the opportunity of complaining to the G 10 Commission and to the Constitutional Court (see paragraphs 21 and 23 above). Admittedly, the effectiveness of these remedies is limited and they will in principle apply only in exceptional cases. However, in the circumstances of the present proceedings, it is hard to conceive of more effective remedies being possible.
71. On the other hand, in pursuance of the Federal Constitutional Court's judgment of 15 December 1970, the competent authority is bound to inform the person concerned as soon as the surveillance measures are discontinued and notification can be made without jeopardising the purpose of the restriction (see paragraphs 11 and 19 above). From the moment of such notification, various legal remedies - before the courts - become available to the individual. According to the information supplied by the Government, the individual may: in an action for a declaration, have reviewed by an administrative court the lawfulness of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law (see paragraph 24 above).
72. Accordingly, the Court considers that, in the particular circumstances of this case, the aggregate of remedies provided for under German law satisfies the requirements of Article 13 (art. 13).

IV. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (ART. 6-1)

73. The applicants finally alleged a breach of Article 6 para. 1 (art. 6-1) which provides:

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

74. According to the applicants, the surveillance measures which can be taken under the contested legislation amount both to an interference with a "civil right", and to the laying of a "criminal charge" within the meaning of Article 6 para. 1 (art. 6-1). In their submission, the legislation violates this Article (art. 6-1) in so far as it does not require notification to the person concerned in all cases after the termination of surveillance measures and excludes recourse to the courts to test the lawfulness of such measures. On the other hand, both the Government and the Commission concur in thinking that Article 6 para. 1 (art. 6-1) does not apply to the facts of the case under either the "civil" or the "criminal" head.
75. The Court has held that in the circumstances of the present case the G 10 does not contravene Article 8 (art. 8) in authorising a secret surveillance of mail, post and telecommunications subject to the conditions specified (see paragraphs 39 to 60 above).

Since the Court has arrived at this conclusion, the question whether the decisions authorising such surveillance under the G 10 are covered by the judicial guarantee set forth in Article 6 (art. 6) - assuming this Article (art. 6) to be applicable - must be examined by drawing a distinction between two stages: that before, and that after, notification of the termination of surveillance.

As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of

the person concerned, within the meaning of Article 6 (art. 6); as a consequence, it of necessity escapes the requirements of that Article.

The decision can come within the ambit of the said provision only after discontinuance of the surveillance. According to the information supplied by the Government, the individual concerned, once he has been notified of such discontinuance, has at his disposal several legal remedies against the possible infringements of his rights; these remedies would satisfy the requirements of Article 6 (art. 6) (see paragraphs 24 and 71 above).

The Court accordingly concludes that, even if it is applicable, Article 6 (art. 6) has not been violated.

FOR THESE REASONS, THE COURT

1. **Holds unanimously that it has jurisdiction to rule on the question whether the applicants can claim to be victims within the meaning of Article 25 (art. 25) of the Convention;**
2. **Holds unanimously that the applicants can claim to be victims within the meaning of the aforesaid Article (art. 25);**
3. **Holds unanimously that there has been no breach of Article 8, Article 13 or Article 6 (art. 8, art. 13, art. 6) of the Convention.**

Done in French and English, both texts being authentic, at the Human Rights Building, Strasbourg, this sixth day of September, nineteen hundred and seventy-eight.

Gérard WIARDA, *Vice-President*
Herbert PETZOLD, *Deputy Registrar*

The separate opinion of Judge PINHEIRO FARINHA is annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

SEPARATE OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I agree with the judgment's conclusions, but on dif-

ferent grounds.

1. The G 10 Act specifies, in Article 1 para. 1, the cases in which the competent authorities may impose restrictions, that is to say, may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversations. It empowers those authorities so to act, *inter alia*, in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic and the security of "the troops of one of the Three Powers stationed in the Land of Berlin". According to Article 1 para. 2, these measures may be taken only where there are factual indications (*tatsächliche Anhaltspunkte*) for suspecting a person of planning, committing, or having committed certain criminal acts punishable under the Criminal Code, such as offences against the peace or security of the State (sub-paragraph 1, no. 1), the democratic order (sub-paragraph 1, no. 2), external security (sub-paragraph 1, no. 3) and the security of the allied armed forces (sub-paragraph 1, no. 5) (see paragraph 17 of the judgment).

For all those persons to whom the G 10 can be applied, the mere facts of its existence creates a very real menace that their exercise of the right to respect for their private and family life and their correspondence may be the subject of surveillance.

Clearly, therefore, a person may claim to be a victim for the purposes of Article 25 (art. 25) of the Convention. Consequently, the applicants have a direct interest (*Jose Alberto dos Reis, Código do Processo Civil Anotado*, vol. 1, p. 77), which is an ideal condition (*Carnelutti, Sistema del diritto processuale civile*, vol. 1, pp. 361 and 366) for an application to the Commission.

In my view, the applicants are the victims of a menace and for this reason can claim to be victims within the meaning of Article 25 (art. 25).

2. I would mention in passing one point of concern, namely, that the majority opinion, contained in paragraph 56, could take the interpretation of Article 8 (art. 8) in a direction which, if I may say so, might not be without risk.

The measures are ordered, on written application giving reasons, either by the supreme Land authority in cases falling within its jurisdiction or by a Federal Minister empowered for

the purpose by the Chancellor. The Chancellor has entrusted these functions to the Ministers of the Interior and of Defence, each of whom, in the sphere falling within his competence, must personally take the decision as to the application of the measures (Article 1 para. 5, sub-paragraphs 1 and 2) (see paragraph 18 of the judgment).

Implementation of the measures ordered is supervised by an official qualified for judicial office (Article 1 para. 7, sub-paragraph 1) (see paragraph 20 of the judgment).

I believe that separation of powers is a basic principle of a democratic society and that, since the measures can be ordered where there are mere factual indications that criminal acts are about to be or are in the course of being committed, this principle requires that the measures be ordered by an independent judge - as was in fact contemplated by the German legislature (see paragraph 22 of the judgment).

I have difficulty in accepting that the political authority may decide by itself whether there exist factual indications that criminal acts are about to be or are in the course of being committed.

3. Acting in the general interest, the States, as the High Contracting Parties, safeguard the Convention against any breaches attributable to another State; such breaches can consist in the danger and threat to democracy which the publication of a law in itself may pose.

In cases originating in an application by individuals, it is necessary to show, in addition to the threat or danger, that there has been a specific violation of the Convention of which they claim to be the victims.

There is no doubt that a law can in itself violate the rights of an individual if it is directly applicable to that individual without any specific measure of implementation.

This is the case with a law which denies those who reside in a particular area access to certain educational establishments, and with a law which makes sex education one of the compulsory subjects on the curriculum: these laws are applicable without the need for any implementing measure (see the "Belgian Linguistic" case and the *Kjeldsen, Busk Madsen and Pedersen* case).

The same does not hold true for the German G 10.

The Act certainly makes provision for telephone-tapping and inspection of mail, although it delimits the scope of such measures and regulates the methods of enforcing them.

Surveillance of an "exploratory" or general kind is not, however, authorised by the legislation in question. If it were, then the Act would be directly applicable.

Instead, the measures cannot be applied without a specific decision by the supreme Land authority or the competent Federal Minister who must, in addition, consider whether there exist any factual indications that a criminal act is about to be or is in the course of being committed.

Thus, only where a surveillance measure has been authorised and taken against a given individual does any question arise of an interference by a public authority with the exercise of that individual's right to respect for his private and family life and his correspondence.

So far as the case sub judice is concerned, on the one hand, the applicants do not know whether the G 10 has in fact been applied to them (see paragraph 12 of the judgment) and, on the other hand, the respondent Government state - and we have no reason to doubt this statement - that "at no time have surveillance measures provided for by the Act passed in pursuance of Article 10 of the Basic Law been ordered or implemented against the applicants.

The applicants have not been subjected to such measures either as persons suspected of one or more of the offences specified in the Act or as third parties within the meaning of Article 1, paragraph 2, sub-paragraph 2, of the G 10.

There is also no question of the applicants' having been indirectly involved in a surveillance measure directed against another person - at least, not in any fashion which would have permitted their identification.

Finally, there is no question of the applicants' having been subjected to surveillance by mistake - for example through confusion over a telephone number -, since in such cases the person concerned is notified of the surveillance measure" (see paragraph 13 of the judgment).

The Court may take into consideration only the case of the applicants (*Engel and others* judgment of 8 June 1976, Series A no. 22, p. 43, para. 106) and not the situation of other persons not

having authorised them to lodge an application with the Commission in their name.

These are the reasons which lead me to conclude, as the Court does, that the case sub judice does not disclose any violation of the Convention.

ECHR

ECJ

GRAND CHAMBER

CASE OF GUJA v MOLDOVA

(Application no. 14277/04)

JUDGMENT

STRASBOURG
12 February 2008

DISCLOSURE, SECRET INFORMATION, PRIVATE PERSON,
PUBLIC INTEREST, DEMOCRACY, CONFIDENTIALITY

IN THE CASE OF GUJA V. MOLDOVA,

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

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Francoise Tulkens,
Giovanni Bonello,
Josep Casadevall,
Rait Maruste,
Kristaq Traja,
Snejana Botoucharova,
Stanislav Pavlovski,
Lech Garlicki,
Alvina Gyulumyan,
Ljiljana Mijović,
Mark Villiger,
Päivi Hirvelä, *judges*,
and **Erik Fribergh**, *Registrar*,

Having deliberated in private on 6 June 2007 and 9 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 14277/04) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Iacob Guja ("the applicant") on 30 March 2004.
2. The applicant was represented by Mr V. Gribincea and Mr V. Zamă, lawyers practising in Chişinău and members of the non-governmental organisation "Lawyers for Human Rights". The Moldovan Government ("the Government") were represented by their Agents, Mr V. Pârlog and Mr V. Grosu.

3. The applicant alleged a breach of his right to freedom of expression under Article 10 of the Convention, in particular the right to impart information, as a result of his dismissal from the Prosecutor General's Office for divulging two documents which in his opinion disclosed interference by a high-ranking politician in pending criminal proceedings.
4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 28 March 2006 a Chamber of that Section decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. On 20 February 2007 a Chamber composed of Nicolas Bratza, *President*, Josep Casadevall, Giovanni Bonello, Ljiljana Mijović, Kristaq Traja, Stanislav Pavlovski and Lech Garlicki, *judges*, and also of Lawrence Early, *Section Registrar*, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).
5. The composition of the Grand Chamber was determined according to the provisions of Article 27 § 2 and 3 of the Convention and Rule 24 of the Rules of Court.
6. The applicant and the Government each filed observations on the admissibility and merits. The parties replied in writing to each other's observations.
7. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 June 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr V. Grosu, *Agent*,

Mr G. Zamisnii, *Adviser*;

(b) *for the applicant*

Mr V. Gribincea,

Mr V. Zamă, *Counsel*,

Mr I. Guja, *Applicant*.

The Court heard addresses by Mr Grosu, Mr Gribincea and Mr Zamă.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, Mr Iacob Guja, was born in 1970 and lives in Chişinău. At the material time he was the Head of the Press Department of the Prosecutor General's Office.

1. Background to the case

9. On 21 February 2002 four police officers (M.I., B.A., I.P. and G.V.) arrested ten persons suspected of offences related to the Parliamentary elections; one of them was also suspected of being the leader of a criminal gang. Later the suspects were released from detention and complained to the Prosecutor's Office of ill-treatment and illegal detention by the four police officers. As a result of their complaint a criminal investigation was initiated against the police officers on charges of, *inter alia*, ill-treatment and unlawful detention.

10. In June 2002 the four police officers wrote letters, which they signed jointly, to President Voronin, Prime Minister Tarlev and Deputy Speaker of Parliament Mişin seeking protection from prosecution. They set out their views on the criminal proceedings and complained that the actions of the Prosecutor's Office were abusive. They asked for the legality of the criminal charges that had been brought against them to be verified. On 21 June 2002 Mr Mişin forwarded the letter he had received, with an accompanying note, to the Prosecutor General's Office. The note was written on the official headed notepaper of the Parliament and was not marked as being confidential. It stated as follows:

"Dear Mr Rusu,

A question arises after reading this letter: is the Deputy Prosecutor General fighting crime or the police? This issue is made even more pressing by the fact that the policemen concerned are from one of the best teams in the Ministry of Internal Affairs, whose activity is now being blocked as a result of the efforts of employees of the Prosecutor General's Office. I ask you to get personally involved in this case and solve it in strict compliance with the law."

11. In January 2003 Mr Voronin made a visit to the Centre for Fighting Economic Crime and Corruption during which he discussed, *inter alia*, the problem of the undue pressure some pub-

lic officials were putting on law-enforcement bodies in respect of pending criminal proceedings. The President made a call to fight corruption and asked law-enforcement officers to disregard any attempts by public officials to put them under pressure. The declarations of the President were made public by the media.

12. On an unspecified date the criminal proceedings against the police officers were discontinued.

2. The leaking of the documents

13. A few days after Mr Voronin made his call to fight corruption, the applicant sent to a newspaper, the *Jurnal de Chişinău*, copies of two letters ("the letters") that had been received by the Prosecutor General's Office.

14. The first was the note written by Mr Mişin (see paragraph 10 above). The second had been written by Mr A. Ursachi, a deputy minister in the Ministry of Internal Affairs, and was addressed to a deputy prosecutor general. It was written on the official headed notepaper of the Ministry of Internal Affairs and was not marked confidential. It stated, *inter alia*:

"... Police Major M.I. [one of the four officers: see paragraph 9 above] was convicted on 12 May 1999 ... of offences under Articles 116(2) [illegal detention endangering life or health or causing physical suffering], 185(2) [abuse of power accompanied by acts of violence, the use of a firearm or torture] and 193(2) [extracting a confession by acts of violence and insults] of the Criminal Code and sentenced to a fine of 1440 Moldovan lei (MDL) (128 euros (EUR)). Under section 2 of the Amnesty Act, he was exempted from paying the fine.

... on 24 October 2001, Major M.I. was reinstated in his post at the Ministry of Internal Affairs."

3. The article in the *Jurnal de Chişinău*

15. On 31 January 2003 the *Jurnal de Chişinău* published an article entitled: "Vadim Mişin intimidates the prosecutors". The article stated *inter alia*:

"At the end of last week, during a meeting at the Centre for Fighting Economic Crime and Corruption, the President called on law-enforcement institutions to co-operate in the fight against organised crime and corruption and asked them to ignore telephone calls from senior public officials concerning cases that were pending before them.

The President's initiative is not accidental. The phenomenon has become very widespread, especially during the last few years, and has been the subject of debate in the mass media and by international organisations.

Recently the press reported on the case of the Communist Parliamentarian A.J., who had attempted to influence a criminal investigation in respect of an old friend and high-ranking official at the Ministry of Agriculture who had been caught red-handed. However, no legal action was taken. ...

Also, the press reported that Mr Mişin had requested the Prosecutor General to sack two prosecutors, I.V. and P.B. involved in the investigation into the disappearance of the Chief of the Information Technology Department, P.D., apparently after they had found evidence implicating Ministry of Internal Affairs' officials in wrongdoing.

The results of the internal investigation into the activities of these two prosecutors are not yet known. However, sources at the Prosecutor's Office have told this newspaper that even though I.V. and P.B. have not been found guilty, they have been asked to leave at the insistence of someone in authority.

Now, while the declarations of the President concerning trading in influence are still fresh in the mind, we reveal a new investigation concerning high-ranking officials.

The Deputy Speaker of Parliament is attempting to protect four police officers who are under criminal investigation. Mr Mişin's affinity with policemen is not new, since his roots are in the police force. Our sources stated that this is not the only case in which Mr Mişin has intervened on behalf of policemen in trouble with the law.

...

The Ciocana Prosecutor's Office initiated criminal proceedings against four police officers ... after they had used force during the unlawful arrest of a group of people.

... [The] police officers assaulted the detainees by punching and kicking them... Furthermore, it was found that one of the officers had made false statements in the police report on the arrest... The four police officers were also being investigated for forcibly extracting confessions...

The investigation lasted for more than a year. When it was almost over ... the police officers started to seek protection from those in authority.

...

On 20 June 2002 the police officers wrote letters to President Vladimir Voronin, Prime-Minister Vasile Tarlev and the Deputy Speaker of Parliament, Vadim Mişin, asking them to intervene to end the investigation, which they said was unwarranted.

...

The first to react to their letter was the Deputy Speaker of Parliament, Vadim Mişin. On 21 June 2002 ... he sent the Prosecutor General a letter, in which, in a commanding tone, he asked him personally to intervene in the case of the four policemen. Even though he instructed the Prosecutor General to get involved in this case 'in strict compliance with the law', the tone of the letter clearly shows that he was giving an order to examine the case very quickly.

As a result of the intervention of the State's most influential figures, the Prosecutor General's Office discontinued the criminal investigation against the policemen and ordered an internal investigation into the correctness of the decision to bring criminal proceedings against them...

...

... Sources from the Ministry of Internal Affairs confirmed that the officer M.I. [one of the four policemen] had [previously] been convicted by the Court of Appeal, and ordered to pay a criminal fine of MDL 1,440. In accordance with the Amnesty Act, he was exempted from paying the fine. Moreover, on 24 October 2001 ... he was reinstated at the Ministry of Internal Affairs.

Without commenting on the judgment of the Court of Appeal, we wish to make some remarks. M.I. was convicted on the basis of Articles 116, 185 and 193 of the Criminal Code of abuse of power, forcibly extracting confessions and unlawful detention. For these offences, the Criminal Code lays down sentences of one to five years' imprisonment. He was only given a fine.

Moreover, the Ministry of Internal Affairs reinstated him while he was still under investigation."

16. The newspaper article was accompanied by pictures of the letters signed by Mr Mişin and Mr Ursachi.

4. *The reaction of the Prosecutor General's Office*

17. On an unspecified date the applicant was requested by the Prosecutor General to explain how the two letters had come to be published by the press.
18. On 14 February 2003 the applicant wrote to the Prosecutor General admitting that he had sent the two letters to the newspaper. He stated *inter alia*:

"My act was a reaction to the declarations made by the [President] concerning the fight against corruption and trading in influence. I did this because I was convinced that I was helping to fight the scourge of trading in influence (*trafic de influență*), a phenomenon which has become increasingly common of late.

I believed and still believe that if each of us were to help uncover those who abuse their position in order to obstruct the proper administration of justice, the situation would change for the better.

Further, I consider that the letters I handed over to the *Jurnal de Chișinău* were not secret. My intention was not to do a disservice to the Prosecutor's Office, but on the contrary to create a positive image of it."

19. On an unspecified date a prosecutor, I.D., who was suspected of having furnished the letters to the applicant, was dismissed.
20. On 17 February 2003 the applicant wrote a further letter to the Prosecutor General informing him that the letters had not been obtained through I.D. He added:

"If the manner in which I acted is considered a breach of the internal regulations, then I am the one who should bear responsibility.

I acted in compliance with the Access to Information Act, the Prosecuting Authorities Act and the Criminal Code. I believed that the declarations of the [President] decrying acts of corruption and trading in influence were sincere. To my great regret, I note that the Prosecutor General's Office has elevated a letter from a public official (which in my opinion is a clear example of direct political involvement in the administration of justice) to the status of State secret. This fact, coupled with I.D.'s dismissal, concerns me and causes me seriously to doubt that the rule of law and human rights are respected in the Republic of Moldova."

21. On 3 March 2003 the applicant was dismissed.

The letter of dismissal stated, *inter alia*, that the letters disclosed by the applicant to the newspaper were secret and that he had failed to consult the heads of other departments of the Prosecutor General's Office before handing them over, in breach of sections 1.4 and 4.11 of the Internal Regulations of the Press Department (see paragraph 31 below).

5. *The reinstatement proceedings brought by the applicant*

22. On 21 March 2003 the applicant brought a civil action against the Prosecutor General's Office seeking reinstatement. He argued, *inter alia*, that the letters he had disclosed to the newspaper had not been classified as secret in accordance with the law, that he was not obliged to consult the heads of other departments before contacting the press, that he had given the letters to the newspaper at the newspaper's request, and that his dismissal constituted a breach of his right to freedom of expression.
23. On 16 September 2003 the Chișinău Court of Appeal dismissed the applicant's action. It stated, *inter alia*, that the applicant had breached his obligations under paragraph 1.4 of the Internal Regulations of the Press Department by not consulting other departmental heads and under paragraph 4.11 of the Regulations by disclosing secret documents.
24. The applicant appealed. He relied on the same arguments as in his initial court action. He also argued that the disclosure of the letters to the newspaper had not in any way prejudiced his employer.
25. On 26 November 2003 the Supreme Court of Justice dismissed the appeal on the same grounds as the Chișinău Court of Appeal. Referring to the applicant's submissions concerning freedom of expression, the Supreme Court stated that obtaining information through the abuse of one's position was not part of freedom of expression (*dreptul la exprimare nu presupune dobândirea informației abuziv, folosind atribuțiile de serviciu*).
26. Neither the Prosecutor General's Office nor the Deputy Speaker of Parliament Mr Mișin appear to have contested the authenticity of the letters published in the *Jurnal de Chișinău* or the truthfulness of the information contained in the article of 31 January 2003 or to have taken any further action.

6. *The criminal complaint by the Jurnal de Chişinău*

27. Since the Prosecutor General's Office did not react in the manner the *Jurnal de Chişinău* had anticipated after the publication of the article on 31 January 2003 (see paragraph 15 above), the latter initiated court proceedings for an order requiring the Prosecutor General's Office to initiate a criminal investigation into the alleged interference by Mr Mişin with an ongoing criminal investigation. The newspaper argued, *inter alia*, that under the Code of Criminal Procedure, newspaper articles and letters published in newspapers could serve as a basis for the institution of criminal proceedings and that the Prosecutor General was under a duty to order an investigation.
28. The newspaper's action was dismissed by the Râşcani District Court on 25 March 2003 and by the Chişinău Regional Court on 9 April 2003. The courts found, *inter alia*, that the newspaper did not have legal standing to lodge a complaint and that, in any event, the article of 31 January 2003 was merely a newspaper article expressing a personal point of view, not an official request to initiate a criminal investigation.
- ### 7. *The follow-up article by the Jurnal de Chişinău*
29. On 14 March 2003 the *Jurnal de Chişinău* published a follow-up to its article of 31 January 2003, entitled "Mişin has launched a crackdown on prosecutors". The piece described the events that had followed the publication of the first article and stated that Mr Mişin had been infuriated by the article and had ordered the Prosecutor General to identify and punish those responsible for disclosing his note to the press. The Prosecutor General had acquiesced and declared war on subordinates who refused to tolerate political intervention in the workings of the criminal-justice system. The article stated that the actions of the Prosecutor General were in line with the general trend that had been observed in recent years of replacing people with considerable professional experience who were not prepared to comply with the rules instituted by the new Government with people from dubious backgrounds. It claimed that sources from the Prosecutor General's Office had told the newspaper that the Prosecutor General's Office had received systematic indications from Mr Mişin and the advisers to the President concerning who should be employed or dismissed. In the previ-

ous year alone, thirty experienced prosecutors had been dismissed from the Chişinău Prosecutor's Office.

The article also gave an account of the applicant's dismissal as a result of pressure from Mr Mişin, and stated that sources at the Prosecutor General's Office had told the newspaper that the Office had received tens of letters from Mr Mişin and V.S. (another high-ranking public official) in connection with ongoing criminal investigations.

According to the newspaper's sources, two prosecutors had been dismissed at the insistence of Mr Mişin because they had discovered incriminating material against him during an investigation into the disappearance of an important businessman, P.D. After their dismissal that criminal investigation had been brought to an end.

II. RELEVANT NON-CONVENTION MATERIALS

A. Domestic law and practice

1. *The Labour Code*

30. Article 263/1 of the Labour Code provided at the material time that employees of the central public authorities could be dismissed for a serious breach of their professional duties.

2. *The Internal Regulations of the Press Department of the Prosecutor General's Office*

31. Sections 1.4 and 4.11 of the Internal Regulations of the Press Department of the Prosecutor General's Office read as follows:

"1.4 The Press Department shall plan and organise, in conjunction with the editorial offices of newspapers, magazines, and radio and television stations and with the heads of other departments of the Prosecutor General's Office, items for publication in the mass media concerning the activities of the Prosecutor General's Office.

...

4.11 [The Head of the Press Department] is responsible for the quality of the published materials, the veracity of the information received and supplied and for preserving confidentiality in accordance with the legislation of the Republic of Moldova".

32. At the material time neither the Internal Regu-

lations of the Prosecutor's Office nor Moldovan legislation in general contained any provision concerning the disclosure by employees of acts of wrongdoing at their place of work.

3. *The Criminal Code and the Code of Criminal Procedure*

33. The Criminal Code at the material time contained in Article 190/1 a provision prohibiting any interference with a criminal investigation. It stated:

"Any interference with a criminal investigation, namely the illegal exercise of influence in any form over the person carrying out the investigation ... shall be punished with imprisonment of up to two years or a fine of up to one hundred times the minimum wage."

34. Article 90 of the Code of Criminal Procedure provided at the material time that, *inter alia*, information about offences contained in newspaper articles or notes or letters published in a newspaper could constitute a ground for a prosecutor to commence a criminal investigation.

35. Article 122 of the Code of Criminal Procedure provided that at the investigation stage materials from a criminal file could not be disclosed except with the authorisation of the person in charge of the investigation.

4. *The organisation of the prosecuting authority in Moldova*

36. According to Article 125 of the Constitution, prosecutors are independent.
37. The relevant parts of the Prosecuting Authorities Act read as follows:

"Section 3. The fundamental principles governing the activity of the Prosecutor's Office

1. The Prosecutor's Office:

- shall exercise its functions independently of the public authorities ... in accordance with the law; ...

3. ...Prosecutors and investigators are precluded from membership of any political party or other socio-political organisations and shall only be accountable before the law..."

"Section 13. The Prosecutor General

1. The Prosecutor General shall:

(i) be appointed by Parliament on a proposal by the Speaker of Parliament for a term of of-

fice of 5 years; and

(ii) have a senior deputy and ordinary deputies, who shall be appointed by Parliament on the basis of his or her proposals..."

5. *The Petitions Act and the Status of Members of Parliament Act*

38. The Petitions Act requires civil servants or government bodies to reply to written requests within thirty days. If they lack competence, they must forward the request to the competent body within three days.
39. The relevant provisions of the Status of Members of Parliament Act of 7 April 1994 provide:

Section 22(1)

"Members of Parliament shall have the right to contact any State body, non-governmental organisation or official about problems pertaining to the activity of a Member of Parliament and to participate in their examination."

Section 23

"(1) Members of Parliament, in their capacity as representatives of the supreme legislative authority, shall have the right to demand the immediate cessation of any unlawful conduct. In case of necessity they may request official bodies or persons to intervene to cause the unlawful conduct to cease..."

B. Reports concerning the separation of powers and independence of the judiciary in Moldova

40. The relevant sections of the 2004 report of the International Commission of Jurists (ICJ) on the rule of law in Moldova stated:

"...The mission to Moldova carried out by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (ICJ/CIJL) has concluded that, despite efforts by the post-independence Moldovan Government to reform its system of justice, the rule of law suffers serious shortcomings that must be addressed. The ICJ/CIJL found that the breakdown in the separation of powers has again resulted in a judiciary that is largely submissive to the dictates of the Government. The practice of 'telephone justice' has returned. The executive is able to substantially influence judicial appointments through the Supreme Council of Magistracy that lacks independence. Beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years, resulting in court decisions that can pervert the course of

justice when the interests of the Government are at stake....”

41. The 2003 Freedom House report on Moldova stated, *inter alia*, that:

“... In 2002, the principle of the rule of law was under challenge in Moldova... Also affecting the fragile balance of power among the legislative, executive, and judicial branches of government in 2002 were a series of judicial nominations based on loyalty to the ruling party, the dismissal of the ombudsman, and attempts to limit the independence of the Constitutional Court... In April 2002, the Moldovan Association of Judges (MAJ) signalled that the government had started a process of 'mass cleansing' in the judicial sector. Seven judges lost their jobs. ... The situation worsened when President Voronin refused to prolong the mandates of 57 other judges...”

42. The 2003 Report by Open Society Justice Initiative and Freedom House Moldova stated, *inter alia*, the following:

“... there has been instituted the practice of 'taking under control' certain files, presenting interest to the Communist leaders or to state authorities. This practice implies the following: the High Council of the Magistracy (HCM) or the Supreme Court (both institutions are chaired by the same person) receives instructions from the President's office, from Government or Parliament, referring to the concerned case and required solution (such instructions also exist in oral form). Following these instructions, the Supreme Court or HCM addresses directly to the chairman of the court, where the particular case is being considered with the order to 'take under personal control' the examination of one or other particular file. The so-called 'taking under control' in fact represents direct instructions on solutions for specific cases.”

C. Materials from the United Nations

43. The Termination of Employment Convention no. 158 of the International Labour Organisation, which was ratified by Moldova on 14 February 1997, reads in so far as relevant:

Article 5

“The following, *inter alia*, shall not constitute valid reasons for termination:

...

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or re-

course to competent administrative authorities;

...”

44. The United Nations Convention against Corruption, which was adopted by the General Assembly by resolution no. 58/4 of 31 October 2003 and has been in force since 14 December 2005, reads in so far as relevant:

Article 33

“Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

At the date on which this judgment was adopted, the Convention had been signed by 140 countries and ratified or acceded to by 77 countries, not including the Republic of Moldova.

D. Materials of the Council of Europe

45. The Council of Europe's Criminal Law Convention on Corruption of 27 January 1999 reads in so far as relevant:

“Preamble

The member States of the Council of Europe and the other States signatory hereto,

...

Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society;

...

Have agreed as follows:

...

Article 22 – Protection of collaborators of justice and witnesses

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

a. those who report the criminal offences es-

established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b. witnesses who give testimony concerning these offences.”

The Explanatory Report to this Convention states as follows with regard to Article 22:

“111. ... the word 'witnesses' refers to persons who possess information relevant to criminal proceedings concerning corruption offences as contained in Articles 2 – 14 of the Convention and includes whistleblowers.”

This Convention was signed by Moldova on 24 June 1999 and entered into force in respect of Moldova on 1 May 2004.

46. The Council of Europe's Civil Law Convention on Corruption of 4 November 1999 reads in so far as relevant:

“Preamble

The member States of the Council of Europe, the other States and the European Community, signatories hereto,

...

Emphasising that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies;

Recognising the adverse financial consequences of corruption to individuals, companies and States, as well as international institutions;

...

Have agreed as follows:

...

Article 9 – Protection of employees

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”

The Explanatory Report to this Convention states with regard to Article 9:

“66. This Article deals with the need for each Party to take the necessary measures to protect employees, who report in good faith and

on the basis of reasonable grounds their suspicions on corrupt practices or behaviours, from being victimised in any way.

67. As regards the necessary measures to protect employees provided for by Article 9 of the Convention, the legislation of Parties could, for instance, provide that employers be required to pay compensation to employees who are victims of unjustified sanctions.

68. In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong.

69. The 'appropriate protection against any unjustified sanction' implies that, on the basis of this Convention, any sanction against employees based on the ground that they had reported an act of corruption to persons or authorities responsible for receiving such reports, will not be justified. Reporting should not be considered as a breach of the duty of confidentiality. Examples of unjustified sanctions may be a dismissal or demotion of these persons or otherwise acting in a way which limits progress in their career.

70. It should be made clear that, although no one could prevent employers from taking any necessary action against their employees in accordance with the relevant provisions (e.g. in the field of labour law) applicable to the circumstances of the case, employers should not inflict unjustified sanctions against employees solely on the ground that the latter had reported their suspicion to the responsible person or authority.

71. Therefore the appropriate protection which Parties are required to take should encourage employees to report their suspicions to the responsible person or authority. Indeed, in many cases, persons who have information of corruption activities do not report them mainly because of fear of the possible negative consequences.

72. As far as employees are concerned, this protection provided covers only the cases where they have reasonable ground to report their suspicion and report them in good faith. In other words, it applies only to genuine cases and not to malicious ones.”

This Convention was signed by Moldova on 4 November 1999 and entered into force in respect of Moldova on 1 July 2004.

47. The Recommendation on Codes of Conduct for Public Officials adopted by the Committee

of Ministers of the Council of Europe on 11 May 2000 (Rec(2000)10), in so far as relevant, reads:

“Article 11

Having due regard for the right of access to official information, the public official has a duty to treat appropriately, with all necessary confidentiality, all information and documents acquired by him or her in the course of, or as a result of, his or her employment.

Article 12 – Reporting

...

5. The public official should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment. The investigation of the reported facts shall be carried out by the competent authorities.

6. The public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith.”

THE LAW

48. The applicant complained that his dismissal for the disclosure of the impugned letters to the *Jurnal de Chişinău* amounted to a breach of his right to freedom of expression and in particular of his right to impart information and ideas to third parties. Article 10 of the Convention reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of

the judiciary.”

I. THE ADMISSIBILITY OF THE CASE

A. The complaint under Article 6 of the Convention

49. In his initial application, the applicant submitted a complaint under Article 6 of the Convention about the failure of the domestic courts to consider the arguments he had made in the reinstatement proceedings. However, in his subsequent submissions, the applicant asked the Court not to proceed with the examination of that complaint. Accordingly the Court will not examine it.

B. The complaint under Article 10 of the Convention

50. The Government did not contest the authenticity of the letter that had been sent by Mr Mişin to the Prosecutor General. However, they argued that there had been no interference with the applicant's right to freedom of expression because he was not the author of the articles that had been published in the *Jurnal de Chişinău* and had not been dismissed for exercising his freedom of expression but simply for breaching the internal regulations of the Prosecutor General's Office. In their view, since the applicant's complaints were in essence related to his labour rights, Article 10 was inapplicable.

51. The applicant argued that Article 10 was applicable in the present case, irrespective of the fact that he was not the author of the letters that had been sent to the newspaper. Relying on the cases of *Thoma v. Luxembourg* (no. 38432/97, ECHR 2001-III) and *Jersild v. Denmark* (judgment of 23 September 1994, Series A no. 298) he submitted that the Court had already found that freedom of expression also covered the right to disseminate information received from third parties.

52. The Court reiterates that the protection of Article 10 extends to the workplace in general and to public servants in particular (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, § 53; *Wille v. Liechtenstein* [GC], no. 28396/95, § 41, ECHR 1999-VII; *Ahmed and Others v. the United Kingdom*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 56; and *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

53. The applicant sent the letters to the newspaper, which subsequently published them.

Since Article 10 includes the freedom to impart information and since the applicant was dismissed for his participation in the publication of the letters, the Court dismisses the Government's preliminary objection.

54. The Court considers that the applicant's complaint under Article 10 of the Convention raises questions of fact and law which are sufficiently serious for their determination to depend on an examination of the merits, and no grounds for declaring it inadmissible have been established. The Court therefore declares the application admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. THE MERITS OF THE CASE

A. Existence of an interference

55. The Court found in paragraph 53 above that Article 10 was applicable to the present case. It further holds that the applicant's dismissal for making the letters public amounted to an "interference by a public authority" with his right to freedom of expression under the first paragraph of that Article.
56. Such interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims.

B. Whether the interference was "prescribed by law"

57. In his initial submissions, the applicant argued that the interference had not been prescribed by law since the law relied upon by the domestic authorities was not sufficiently foreseeable. However, in his subsequent oral pleadings he did not pursue this point.
58. The Court notes that the applicant was dismissed on the basis of Article 263/1 of the Labour Code for having violated paragraphs 1.4 and 4.11 of the Internal Regulations of the Press Department of the Prosecutor General's Office (see paragraph 31 above). However, since the parties did not argue this point further before the Court, it will continue its examination on the assumption that the provisions contained in paragraphs 1.4 and 4.11 of the Internal Regulations satisfied the requirement for the inter-

ference to be "prescribed by law".

C. Whether the interference pursued a legitimate aim

59. The applicant argued that the interference did not pursue any legitimate aim. The Government submitted that the legitimate aims pursued in this case were to maintain the authority of the judiciary, to prevent crime and to protect the reputation of others. The Court, for its part, is ready to accept that the legitimate aim pursued was the prevention of the disclosure of information received in confidence. In so deciding, the Court finds it significant that at the time of his dismissal the applicant refused to disclose the source of the information, which suggests that it was not easily or publicly available (see *Haseldine v. the United Kingdom*, no. 18957/91, Commission decision of 13 May 1992, Decisions and Reports (DR) 73). The Court must therefore examine whether the interference was necessary in a democratic society, in particular whether there was a proportionate relationship between the interference and the aim thereby pursued.

D. Whether the interference was necessary in a democratic society

1. *The parties' submissions*

(a) **The applicant**

60. According to the applicant, the disclosure of the letters had to be regarded as whistle-blowing on illegal conduct.
61. He pointed first to the fact that he had acted in good faith and that, when he disclosed the letters to the newspaper, he was convinced that they contained information concerning the commission of a serious offence by the Deputy Speaker of Parliament. The only reason for his disclosing it was to help fight corruption and trading in influence. He disagreed that the purpose of Mr Mişin's note had simply been to pass the police officers' letter to the Prosecutor General in accordance with the Petitions Act (see paragraph 38 above) and with the contention that Mr Mişin's actions had been in accordance with sections 22 and 23 of the Status of Members of Parliament Act (see paragraph 39 above). He further argued that the letters were not part of a criminal case-file.

The applicant contended that in the light of the manner in which the Prosecutor General and his deputies were appointed and in view of the predominant position of the Communist

party in Parliament, the Prosecutor General's Office was perceived by the public as being strongly influenced by Parliament. The independence of the Prosecutor General's Office was guaranteed in theory but not in practice. In the applicant's submission, the Prosecutor General could be dismissed at will by Parliament without any reasons being given. In the years 2002-2003 more than thirty prosecutors who were not considered loyal to the Communist Party had been dismissed. Moreover, Mr Mişin, who was one of the leaders of the ruling party and a deputy speaker of Parliament, was also perceived as systematically using his position to influence the outcome of judicial proceedings.

The applicant added that the language of the letter written by Mr Mişin unequivocally suggested that its author intended to influence the outcome of the criminal proceedings against the four police officers. Such conduct constituted an offence under Article 190/1 of the Criminal Code (see paragraph 33 above). The applicant also pointed to the fact that after receiving the letter in question, the Prosecutor General had ordered the re-opening of the criminal investigation and shortly thereafter the criminal proceedings had been discontinued. According to the applicant, the fact that the four police officers decided to ask State representatives at the highest level to investigate the legality of the criminal charges against them indicated the existence of a practice in the Republic of Moldova that was contrary to the principle of the separation of powers. It was highly unlikely that police officers dealing with the investigation of crime would be unaware that the authorities to whom they had addressed their letters had no judicial functions.

According to the applicant, the information disclosed by him was thus of major public interest.

62. In order to disclose the information, he had had no alternative but to go to a newspaper. As there was no whistle-blowing legislation in Moldova, employees had no procedure for disclosing wrongdoing at their place of work. It would have been pointless to bring the problem to the attention of the Prosecutor General, as he lacked independence. Even though he had been aware of Mr Mişin's letter for about six months, it would appear that he had simply concealed its existence while at the same time complying with its terms. The refusal of the Prosecutor's Office to initiate criminal pro-

ceedings against Mr Mişin after the publication of the newspaper articles (see paragraphs 15 and 29 above) supported the view that any disclosure to the Prosecutor's Office would have been in vain. Furthermore, the applicant had had reasonable grounds for fearing that the evidence would be concealed or destroyed if he disclosed it to his superiors.

The applicant also submitted that it would have been unreasonable to expect him to complain to Parliament because 71 of its 101 members were from the ruling Communist Party and there was no precedent of an MP from that party being prosecuted for a criminal offence. Moreover, between 2001 and 2004 no initiative by the opposition that was contrary to the interests of the ruling party had ever been successful in Parliament.

63. The applicant also complained about the severity of the sanction that had been imposed on him and pointed out that it was at the highest end of the range of possible penalties.

(b) The Government

64. In the Government's view, the disclosure in question did not amount to whistle-blowing.
65. They considered that the letters were internal documents to which the applicant would not normally have had access by virtue of his functions. He had thus effectively "stolen" them. Moreover, the letters disclosed by the applicant were confidential and part of a criminal file. Under the Code of Criminal Procedure, materials in a criminal case file could not be made public without the authorisation of the person conducting the investigation (see paragraph 35 above).

The applicant's good faith was questionable also because the letter written by Mr Mişin could not reasonably be considered to have put undue pressure on the Prosecutor General. The expression "I ask you to get personally involved in this case and solve it in strict compliance with the law" was a normal form of communication between different State bodies in accordance with the law. Mr Mişin had simply passed the letter received from the four police officers to the competent body – the Prosecutor General's Office – in accordance with the Petitions Act (see paragraph 38 above) and the Status of Members of Parliament Act (see paragraph 39 above). Under the latter Act, an MP had the right, *inter alia*, to examine petitions from citizens, to pass them to competent

authorities, to participate in their examination and to monitor compliance with the law.

There was no causal link between Mr Mişin's letter and the subsequent decision to discontinue the criminal proceedings against the four police officers. In the Government's submission, the Prosecutor General's Office was a truly independent body whose independence was guaranteed by the Constitution and law of Moldova (see paragraphs 36 and 40 above).

Moreover, the applicant had not given the domestic courts the same reason for his actions as he had given his employer (see paragraphs 18 and 20 above). In the Government's view, this also indicated a lack of good faith on his part and showed that the real motive behind the disclosure was not the fight against corruption but an attempt to embarrass those concerned.

66. Since, as outlined above, Mr Mişin was not attempting to put pressure on the Prosecutor General, the information contained in his letter was not of public interest.
67. Moreover, the applicant had not disclosed the information to a competent authority and had acted hastily. There had been no information of an urgent or irreversible nature concerning life, health or the environment. The applicant was entitled to make a disclosure externally only if it was not possible to do so internally. Any such disclosure should in the first instance have been to the top echelons of the Prosecutor General's Office and thereafter to the Parliament (including the Parliamentary Commissions, factions and opposition), rather than going directly to the press.

In support of their submission, the Government sent the Court copies of several complaints that had been lodged by citizens with the Parliament concerning alleged illegalities in employment and other matters. All the complaints appeared to have been forwarded by the Parliament to the competent organs, such as the Prosecutor General's Office and the Superior Council of Magistrates, without any other parliamentary involvement.

The Government argued that twenty-one states in the United States of America did not afford protection to disclosures made to the media, while in the United Kingdom protection for external whistle-blowing was possible only in extremely rare and strictly defined circumstances.

68. In view of the nature of the duties and responsibilities of civil servants, the margin of appreciation enjoyed by the States in interfering with their right to freedom of expression was very large. The Government submitted, lastly, that the severity of the penalty was proportionate to the gravity of the applicant's acts.

2. The Court's assessment

(a) The general principles applicable in this case

69. The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have been summed up as follows (see, among other authorities, *Jersild v. Denmark*, cited above, p. 23, § 31; *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2329-30, § 46; and *Steel and Morris v. the United Kingdom*, no. 68416/01 68416/01, § 87, ECHR 2005-II):

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion

reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts..."

70. The Court further reiterates that Article 10 applies also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression (see paragraph 52 above). At the same time, the Court is mindful that employees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion (see *Vogt v. Germany*, cited above, § 53; *Ahmed and Others v. the United Kingdom*, cited above, § 55; and *De Diego Nafria v. Spain*, no. 46833/99 46833/99, § 37, 14 March 2002).
71. Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically elected government, the duty of loyalty and reserve assumes special significance for them (see, *mutatis mutandis*, *Ahmed and Others v. the United Kingdom*, cited above, § 53.) In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one.
72. To date, however, the Court has not had to deal with cases where a civil servant publicly disclosed internal information. To that extent the present case raises a new issue which can be distinguished from that raised in *Stoll v. Switzerland* ([GC], no. 69698/01, 10 December 2007) where the disclosure took place without the intervention of a civil servant. In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The

Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large. In this context, the Court has had regard to the following statement from the Explanatory Report to the Council of Europe's Civil Law Convention on Corruption (see paragraph 46 above):

"In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong".

73. In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public (see, *mutatis mutandis*, *Haseldine*, cited above). In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.
74. In determining the proportionality of an interference with a civil servant's freedom of expression in such a case the Court must also have regard to a number of other factors. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence (see *Fresoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; and *Radio Twist, A.S. v. Slovakia*, no. 62202/00, ECHR 2006-...).

75. The second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent State authorities to adopt measures intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 46). Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable (see, *mutatis mutandis*, *Morissens v. Belgium*, no. 11389/85, Commission decision of 3 May 1988, DR 56, p. 127; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).
76. On the other side of the scales, the Court must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed (see, *mutatis mutandis*, *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, § 45; and *Stoll v. Switzerland*, cited above, § 130). In this connection, the subject-matter of the disclosure and the nature of the administrative authority concerned may be relevant (see *Haseldine*, cited above).
77. The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection (see *Haseldine*, cited above). It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her.
78. Lastly, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, attentive analysis of the penalty imposed on the applicant and its consequences is required (see *Fuentes Bobo*, cited above, § 49).
79. The Court will now assess the facts of the present case in the light of the above principles.
- (b) Application of the above principles in the present case**
- i *Whether the applicant had alternative channels for making the disclosure*
80. The applicant argued that he did not have at his disposal any effective alternative channel to make the disclosure, while the Government argued that, on the contrary, the applicant could have raised the issue with his superiors in the first instance and later with the Parliament or the Ombudsman if necessary.
81. The Court notes that neither the Moldovan legislation nor the internal regulations of the Prosecutor General's Office contained any provision concerning the reporting of irregularities by employees (see paragraph 32 above). It appears, therefore, that there was no authority other than the applicant's superiors to which he could have reported his concerns and no prescribed procedure for reporting such matters.
82. It also appears that the disclosure concerned the conduct of a Deputy Speaker of Parliament, who was a high-ranking official, and that despite having been aware of the situation for some six months the Prosecutor General had shown no sign of having any intention to respond but instead gave the impression that he had succumbed to the pressure that had been imposed on his office.
83. As to the alternative means of disclosure suggested by the Government (see paragraph 67 above), the Court finds that it has not been presented with any satisfactory evidence to counter the applicant's submission that none of the proposed alternatives would have been effective in the special circumstances of the present case.
84. In the light of the foregoing, the Court considers that in the circumstances of the present case external reporting, even to a newspaper, could be justified.
- ii *The public interest in the disclosed information*
85. The applicant submitted that Mr Mişin's note constituted evidence of political interference in the administration of justice. The Government disagreed.
86. The Court notes that the police officers' letter requested Mr Mişin to verify the legality of the criminal charges brought against them

by the Prosecutor's Office (see paragraph 10 above). Mr Mişin reacted by sending an official letter to the Prosecutor General. The Government submitted that Mr Mişin's actions were in compliance, *inter alia*, with the Status of Members of Parliament Act. In this context the Court considers it necessary to reiterate that in a democratic society both the courts and the investigation authorities must remain free from political pressure. Any interpretation of any legislation establishing the rights of Members of Parliament must abide by that principle.

Having examined the note which Mr Mişin wrote to the Prosecutor General, the Court cannot accept that it was intended to do no more than to transmit the police officers' letter to a competent body as suggested by the Government (see paragraph 65 above). Moreover, in view of the context and of the language employed by Mr Mişin, it cannot be excluded that the effect of the note was to put pressure on the Prosecutor General's Office, irrespective of the inclusion of the statement that the case was to be "examined in strict compliance with the law" (see paragraph 10 above).

87. Against this background, the Court notes that the President of Moldova has campaigned against the practice of interference by politicians with the criminal-justice system and that the Moldovan media has widely covered the subject (see paragraph 11 above). It also notes the reports of the international non-governmental organisations (see paragraphs 40-42 above) which express concern about the breakdown of separation of powers and the lack of judicial independence in Moldova.

88. In the light of the above, the Court considers that the letters disclosed by the applicant had a bearing on issues such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude towards police brutality (see paragraphs 10 and 14 above). There is no doubt that these are very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.

iii *The authenticity of the disclosed information*

89. It is common ground that the letters disclosed by the applicant to the *Jurnal de Chişinău* were genuine (see paragraph 26 above).

iv *The detriment to the Prosecutor General's*

Office

90. The Court observes that it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State (see, *mutatis mutandis*, *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 34). The letters sent by the applicant to the newspaper were not written by officials of the Prosecutor General's Office and, according to the Government, the letter from Mr Mişin was a normal communication between State bodies which had not affected the decision of the Prosecutor General's Office to discontinue the proceedings against the police officers. Nevertheless, the conclusion drawn by the newspaper in its articles that the Prosecutor General's Office was subject to undue influence may have had strong negative effects on public confidence in the independence of that institution.

91. However, the Court considers that the public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed is so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office. It reiterates in this context that open discussion of topics of public concern is essential to democracy and regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters (see, *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149, § 29).

v *Whether the applicant acted in good faith*

92. The applicant argued that his sole motive for disclosing the letters was to help fight corruption and trading in influence. This statement was not disputed by his employer. The Government, on the other hand, expressed doubt about the applicant's good faith, arguing, *inter alia*, that he had not given this explanation before the domestic courts.

93. On the basis of the materials before it, the Court does not find any reason to believe that the applicant was motivated by a desire for personal advantage, held any personal grievance against his employer or Mr Mişin, or that there was any other ulterior motive for his actions. The fact that he did not make before the domestic courts his submissions about the fight against corruption and trading in influence is, in the Court's opinion, inconclusive since he may have been focused on challenging the

reasons advanced by his employer for dismissing him and might well have considered it unnecessary to refer to matters that his employer did not dispute.

94. Accordingly, the Court comes to the conclusion that the applicant's motives were as stated by him and that he acted in good faith.

vi *The severity of the sanction*

95. Finally, the Court notes that the heaviest sanction possible was imposed on the applicant. While it had been open to the authorities to apply a less severe penalty, they chose to dismiss the applicant, which undoubtedly is a very harsh measure (see *Vogt*, cited above, § 60). This sanction not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct. Moreover, in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees.
96. The Court observes that the Government have argued that the applicant had in fact "stolen" the letter, which in their view was secret and part of a criminal file. The Government also stated that Mr Mişin's letter had not placed any undue pressure on the Public Prosecutor. It was a normal communication between State bodies and was unconnected with the decision to discontinue the proceedings against the police officers. In these circumstances, the Court finds that it is difficult to justify such a severe sanction being applied.

(c) Conclusion

97. Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the present case, the Court comes to the conclusion that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not "necessary in a democratic society".

Accordingly, there has been a violation of Article 10

of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

99. The applicant claimed EUR 15,000 in respect of pecuniary and non-pecuniary damage made up as follows: EUR 6,000 for loss of earnings for the period of unemployment after his dismissal, EUR 6,000 for lost career prospects and EUR 3,000 for non-pecuniary damage.
100. The Government contested the claim and argued that the applicant's claims were ill-founded and excessive.
101. The Court considers that the applicant must have suffered pecuniary and non-pecuniary damage as a result of his dismissal. Making its assessment on an equitable basis, it awards him EUR 10,000.

B. Costs and expenses

102. The applicant's representatives claimed EUR 6,843 for legal fees, of which EUR 4,400 was claimed in respect of Mr Gribincea and EUR 2,443 in respect of Mr Zamă. They submitted a detailed time-sheet and a contract indicating that the lawyers' hourly rates were EUR 80 and EUR 70 respectively. The calculation in the time-sheet did not include time spent on the complaint under Article 6, which was subsequently withdrawn by the applicant.
103. They argued that the number of hours they had spent on the case was not excessive and was justified by its complexity and the fact that the observations had to be written in English.
104. As to the hourly rate, the applicant's lawyers argued that it was within the limits recommended by the Moldovan Bar Association, which were between EUR 40 and 150.
105. The applicant's representatives also claimed EUR 2,413 for expenses linked to the hearing of 6 June 2007, which sum included travel ex-

penses, visa costs, insurance costs and a subsistence allowance.

106. The Government contested the amount claimed for the applicant's representation. They said that it was excessive and disputed the number of hours that had been spent by the applicant's lawyers and the hourly rates, notably that charged by Mr Zamă, who, in their opinion, lacked the necessary experience to command such high fees.
107. As to the other expenses claimed by the applicant, the Government argued that they should have been claimed from the Court.
108. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-III). In the present case, regard being had to the itemised list that has been submitted and the complexity of the case, the Court awards the entire amount claimed by Mr Gribincea, EUR 1,600 for Mr Zama's fee and the entire amount claimed by the applicant's representatives for the expenses incurred in connection with the hearing of 6 June 2007.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. Declares the application admissible;
2. Holds that there has been a violation of Article 10 of the Convention;
3. Holds
 - (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros) in respect of pecuniary damage and non-pecuniary damage and EUR 8,413 (eight thousand four hundred and thirteen euros) in respect of costs and expenses, plus any tax that may be chargeable, which sums are to be converted into the currency of the respondent

State at the rate applicable at the date of payment;

- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 February 2008.

Erik Fribergh, Registrar

Jean-Paul Costa, President

ECHR

ECJ

FORMER THIRD SECTION

CASE OF SATIK v TURKEY (NO2)

(Application no. 60999/00)

JUDGMENT

STRASBOURG

8 July 2008

FINAL

08/10/2008

ESPIONAGE, SPY, MILITARY, TRIBUNAL, COURT, ADJUDICATION, TRIAL, WAR TIME, PEACE TIME, CIVILIAN

IN THE CASE OF SATIK V. TURKEY (NO2),

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

Boštjan M. Zupančič, *President*,

Corneliu Bîrsan,

Rıza Türmen,

Elisabet Fura-Sandström,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele, *judges*,

and **Santiago Quesada**, *Section Registrar*,

Having deliberated in private on 17 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 60999/00) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Kadir Satik ("the applicant"), on 14 July 2000.
2. The applicant, who had been granted legal aid, was represented by Mrs A. Topuz, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.
3. The applicant alleged that he had been subjected to ill-treatment in police custody and that he had also been denied a fair hearing by an independent and impartial tribunal in violation of Articles 3 and 6 of the Convention.
4. On 25 April 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.
5. On 1 February 2008 the Court changed the

composition of its Sections (Rule 25 § 1). However this case remained in the Third Section as composed before that date.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1966 and lives in Ankara.
7. On an unspecified date, the National Intelligence Service (*Milli İstihbarat Teşkilatı*, hereinafter MIT) began to record the telephone conversations of S.K., a Greek attaché working at the Consulate of Greece in Izmir and allegedly a member of the Greek Intelligence Service (EIP). The authorities noticed suspicious telephone conversations between S.K. and the applicant and initiated an investigation concerning the applicant.
8. On 18 February 1998 a military prosecutor and MIT officers searched the applicant's shop in Istanbul. According to the preliminary investigation report, several photographs of military bases, two maps (one of which was marked as "top secret") and telephone and credit cards were found in the shop. V.A.Ö. was present when MIT officers carried out a search in the applicant's shop and told them that the photos of the military bases did not belong to him but to the applicant. The latter was then taken into custody on suspicion of transmitting official and confidential information to Greek intelligence service members. He was brought before a doctor, N.A., who noted that he was in good health. During his custody period, the applicant was allegedly subjected to ill-treatment by the MIT officers.
9. On 20 February 1998 the applicant was brought before the 3rd Army Corps Command Military Court. Before this court, he maintained that he had met someone who worked at the Consulate of Greece in Istanbul and that he had sold this person books and silver accessories. He received money from this person for what he had sold. The applicant further contended that this person asked him to provide military information about Turkey. The applicant denied the allegation that he had given confidential information to this person. He stated that the maps and the photographs found in his shop did not belong to him.

10. On the same day, the court ordered the applicant's detention on remand. He was then examined by N.A. who once again noted that there was no trace of ill-treatment on the applicant's body. The applicant was then remanded in the Davutpaşa Military Prison. He filed an objection to the detention order.
11. On 23 February 1998, following his objection to the findings contained in the previous medical reports, the applicant underwent a third medical examination in prison. According to the prison doctor's report, the applicant had ecchymoses on both arms, which were possibly three to four days old.
12. On 5 March 1998 the applicant filed a further objection to the detention order. On the same day the Navy Command Military Court dismissed his objection.
13. On 19 March 1998 the General Staff Military Prosecutor filed a bill of indictment with the General Staff Military Court, charging the applicant under Article 56 § 1 (D) of the Military Criminal Code and Articles 133 § 1, 31, 33 and 36 of the Criminal Code, with disloyalty to national defence by way of espionage.
14. The applicant maintained before the General Staff Military Court that he had been coerced by MIT officers into signing a statement while in custody. He claimed that he had sold the shop to V.A.Ö. and that the photographs and maps did not belong to him. He requested that V.A.Ö. be heard by the court. He further contended that the search in the shop was illegal and that he had not been informed of the charges against him by the officials who had conducted the search. The applicant reiterated that he had sold books and silver accessories to a Greek official, L.K. and that this person had requested him to provide confidential information. He also contended that he had contacted L.K. and another Greek official, S.K., whom he knew as "Yorgo", in order to maintain his business and that the information that he had given was false. The applicant's representative stressed that the applicant's statements had been taken under torture by MIT officers. She referred in this connection to the medical report dated 23 February 1998 prepared by the Davutpaşa military prison doctor who noted the presence of three to four day-old ecchymoses on the applicant's arms. The applicant's representative also argued that the telephone conversations of the applicant, which were the sole evidence against him, had been obtained unlawfully by the MIT officers since there was no decision of a judge permitting them to tap his conversations on a public telephone. She therefore claimed that, in the absence of sufficient evidence, the applicant was innocent of the alleged crime.
15. During the proceedings, the General Staff Military Court issued a summons requiring V.A.Ö. to give evidence. However, this person could not be found.
16. On an unspecified date, a fingerprint expert conducted an analysis on the photographs and maps from the applicant's shop. He observed that none of the fingerprints found belonged to the applicant.
17. On 15 June 1999 the General Staff Military Court convicted the applicant as charged. The court considered that the information that the applicant had given could not be considered to be confidential. However, it held that, although the applicant had provided non-confidential or imaginary information in order to maintain his business contacts with the Greek officials, he had committed the offence of disloyalty to national defence by accepting their proposal to provide information. The court sentenced the applicant to twelve years and six months' imprisonment, which was the minimum penalty prescribed by Article 56 § 1 (D) of the Military Criminal Code and Articles 133 § 1, 31, 33 and 36 of the Criminal Code. While the court dismissed the applicant's defence submissions, it did not address directly his allegations that his statements to the MIT officers had been obtained under torture and that his telephone conversations were unlawfully tapped by the MIT officers.
18. On 2 August 1999 the applicant appealed. He claimed that he was innocent of the crime since he had given false information to the Greek Intelligence Service and that he had never intended to betray his country. Relying on Article 6 of the Convention, the applicant further argued that the first instance court had convicted him on the basis of unlawfully obtained evidence, in particular the unlawful tapping and recording of his telephone conversations by the MIT. He also complained that the court had not secured the attendance of V.A.Ö. as a witness. Referring to the medical report dated 23 February 1998 indicating ecchymoses on his arms, the applicant noted that the security forces had resorted to habitual methods to secure his conviction.

19. On 17 November 1999 the Military Court of Cassation upheld the judgment of 15 June 1999. It approved the reasoning of the first instance court's judgment and noted that the latter had already accepted that the maps and photos had not belonged to the applicant and that it had not relied on the statements given by V.A.Ö. in the course of the preliminary investigation since he had not attended the trial. Accordingly, there was no deficiency or unlawfulness in the investigation leading to the applicant's conviction. The court therefore rejected the applicant's appeal.
20. On 24 January 2000 the Military Court of Cassation's decision was served on the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. A full description of the domestic law at the relevant time may be found in *Bati and Others v. Turkey*, nos. 33097/06 and 57834/00, § § 95-99, ECHR 2004-IV; and *Ergin v. Turkey (no. 6)*, no. 47533/99, § § 15-18, 4 May 2006.
22. Section 11 of the Constitution of Military Courts Act then in force read as follows:

Section 11

"Trial of civilians by military courts:

... the offences referred to in Articles ... and 56 of the Military Penal Code [come within the jurisdiction of the military courts]."

23. According to Article 138 of the Constitution of Military Courts Act, hearings to be held by military courts shall be open to public. However, the military court may decide to close a part or whole of the hearing to the public if public morality or security so requires. Article 139 further provides that the military court may also decide to remove the public when it holds a hearing to consider a request to close the hearings to the public.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

24. The applicant complained that he had been subjected to ill-treatment during his detention in police custody in violation of Article 3 of the Convention, which reads as follows:

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

A. Admissibility

25. Relying on the Court's judgments in the cases of *Ahmet Sadik v. Greece* (judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 34) and *Cardot v. France* (judgment of 19 March 1991, Series A no. 200, § 30), the Government claimed that the applicant had failed to raise, even in substance, his complaints of ill-treatment before the national authorities and that therefore he had not availed himself of the remedies in domestic law.
26. The applicant submitted that he had raised his complaint of ill-treatment before the domestic authorities in the course of the criminal proceedings against him but no action had been taken to investigate his allegations.
27. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies which are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. However, Article 35 § 1 does not require that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey* judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, § § 51-52).
28. The Court notes that, contrary to the Government's assertion, the applicant can be considered to have brought the substance of his complaint to the notice of the national authorities when he challenged the admissibility of his statements taken by the MIT officers as evidence (see paragraph 13 above). The applicant's representative also claimed that the applicant's statements had been obtained under torture and drew the General Staff Military Court's attention to the medical report issued by the prison doctor who noted the presence of ecchymoses on the applicant's arms (*ibid.*). However, although the court took note of the applicant's complaints, the authorities did nothing to follow-up the allegation that he had been tortured while in custody (see paragraph 17 above).

29. In the Court's opinion, these allegations should have been sufficient in themselves to alert the authorities to the need for action, especially since there was medical evidence in the file indicating bruising to his arms. Having regard to these circumstances, the Court considers that the applicant can be considered to have done all that could be expected of him to bring his complaint to the attention of the authorities with a view to obtaining an investigation into his allegation. In the light of the foregoing reasons the Court dismisses the Government's objection to the admissibility of the complaint under Article 3 of the Convention. It also considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds.

B. Merits

30. The Government alleged that it had not been established with sufficient certainty that the ecchymoses observed on the applicant's body had occurred during his detention in police custody since the prison doctor stated the ecchymoses were *possibly* three to four days old. They therefore denied that the applicant had suffered ill-treatment during his detention in custody.

31. The Court reiterates that where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 62; *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, § § 108-111; and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

32. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*,

judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

33. In the instant case, the Court observes that the applicant underwent three medical examinations prior to and subsequent to his detention in police custody (see paragraphs 8, 10 and 11). Dr N.A. who carried out the first two examinations noted in his reports that the applicant was in good health and that there was no sign of ill-treatment on his body. However, following the applicant's objection to his findings, a third examination was carried out by the prison doctor who observed ecchymoses on the applicant's arms which were possibly three to four days old (see paragraph 11 above). According to the applicant, the third medical report confirmed his allegation that he had been subjected to torture while in detention in police custody. However, the Government denied this allegation.

34. The Court observes that in the proceedings before the General Staff Military Court the applicant confined himself to challenging the admissibility of his statements to the police officers. Apart from the allegation that his statements were taken under torture, he did not at any stage give any indication of the sort of ill-treatment which he allegedly suffered. Furthermore, the applicant did not specifically set out in his application form to the Court the details of the alleged ill-treatment inflicted upon him during his detention in police custody. In particular, he failed to explain the type of ill-treatment which caused the ecchymoses on his arms. This being so, the Court is of the opinion that the applicant has not laid the basis of an arguable claim that he had been subjected to ill-treatment, as alleged.

35. It follows that there has been no violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The applicant complained that he had been

denied a fair hearing by an independent and impartial tribunal since he had been tried by a military court. He maintained that he had been convicted on the basis of tape-recorded telephone conversations which had been unlawfully obtained. He also alleged that the court had failed to hold a public hearing and to secure the attendance of a witness who was important for his defence. In this connection, he relied on Article 6 § 1 of the Convention which provides as relevant:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. Alleged lack of independence and impartiality of the General Staff Military Court

1. Admissibility

37. The Government alleged that the applicant had failed to exhaust domestic remedies since he had not raised this complaint before the domestic authorities.
38. The applicant maintained that, even if he had raised his complaint concerning the independence of the General Staff Military Court before the domestic authorities, this would have had no prospect of success.
39. The Court observes that the establishment and composition of the general staff military courts were expressly prescribed by law. The applicant has never argued that this legislation was incorrectly applied in his case. Accordingly, any challenge by the applicant to the composition of the court for the simple reason that the judges sitting on the bench were members of the army would have been doomed to failure. Thus, such a request before the national authorities would not have remedied the situation complained of. It follows that this objection should be dismissed. The Court also considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds.

2. Merits

40. The applicant alleged that the General Staff Court which tried him could not be regarded as an independent and impartial tribunal, given that it was composed of two military judges and an officer, all of whom were bound by the orders and instructions of the Ministry of De-

fence and the general staff which appointed them. In that connection he submitted that, as a civilian, he should not have been tried in a military court.

41. The Government submitted that only in exceptional circumstances was a civilian tried in a military court in Turkey. On that point, they maintained that the applicant was tried by a military court because he was charged with an offence concerning national security. The Government further maintained that the domestic law provided necessary safeguards to guarantee the independence and impartiality of military courts. Finally, they pointed out that, with the adoption of Law no. 4963, Turkish legislation had been amended to bring it into line with the Convention.
42. The Court notes that it has examined a similar grievance, finding a violation of Article 6 § 1 of the Convention in its *Ergin v. Turkey* (no. 6) judgment (no. 47533/99 47533/99, § 54, 4 May 2006). In that judgment, the Court held that it was understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. On that account the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. Consequently, the applicant's doubts about that court's independence and impartiality may be regarded as objectively justified (*ibid*).
43. Although the Court accepted that the Convention did not absolutely exclude the jurisdiction of military courts to try cases in which civilians were implicated, it affirmed that only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6. In this connection, it held that the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation. The existence of such reasons had to be substantiated in each specific case. It was not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto* (see, *Ergin* (no. 6), cited above, § 5 42-47).
44. Furthermore, having examined the decisions or practices of international judicial bodies over

the last decade, the Court found that there was an emerging international consensus against any military jurisdiction over civilians (see, *Ergin* (no. 6), cited above, § 22-25).

45. As regards the situation in Europe, it appears that there is a prevailing view among the member States of the Council of Europe that civilians should not be tried by military courts in peacetime. Although there is some diversity in legislation governing the jurisdiction of military courts to try civilians, in the great majority of legal systems that jurisdiction is either non-existent or limited to certain very precise situations, such as complicity between a member of the military and a civilian in the commission of an offence punishable under the ordinary criminal code or the military penal code (see, *Ergin* (no. 6), cited above, § 21).
46. In the instant case, however, Article 145 of the Constitution of Turkey explicitly provides that military courts may try civilians in peacetime. Moreover, former Article 11 of the Military Courts Act stated that the offence under Article 56, with which the applicant was charged and convicted of, came within the jurisdiction of the military courts.
47. In the light of the foregoing, and particularly of the prevailing view at international and regional level, the Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to his purported agreement to betray information prejudicial to army concerns, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings.
48. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant's doubts about the independence and impartiality of that court can therefore be regarded as objectively justified (see, *mutatis mutandis*, *Incal*, cited above, p. 1573, § 72 *in fine*).
49. There has therefore been a violation of Article 6 § 1 of the Convention.

B. Alleged use of unlawfully obtained evidence

50. The applicant also complained under Article 6 § 1 of the Convention that the domestic courts had convicted him on the basis of his

tape-recorded telephone conversations which had been unlawfully obtained by the MIT officers.

51. The applicant claimed that the MIT tapped his conversations in non-compliance with the domestic law *i.e.* there was no decision given by a judge authorising listening in to his conversations.
52. The Government contended that the applicant's telephone conversations had been tapped in the framework of the MIT's counter-intelligence activities as permitted by Article 4 of Law no. 2937. Article 6 of the said law permitted MIT members to carry out counter-intelligence activities and granted them the rights and powers enjoyed by the regular police. The MIT officers had decided to intercept and record the applicant's conversations with a view to protecting national security. The measure in question had complied with the requirements of proportionality. Furthermore, the recorded telephone conversations of the applicant were not the sole evidence against him. The photographs of military bases, two maps, one of which was designated "top secret", telephone and credit cards found in the applicant's possessions had constituted the basis of his conviction. Given that the applicant's defence rights protected by Article 6 of the Convention had been respected, his complaints under this heading should be declared inadmissible.
53. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 5 45-46; *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, Reports 1998-IV, p. 1462, § 34).
54. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which

must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

55. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited above, § § 35, 37; *Allan*, cited above, § 43).
56. As regards, in particular, the examination of the nature of the Convention violation found, the Court recalls that notably in the cases of *Khan* (cited above, § § 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, § § 37-38) it has found the use of covert listening devices to be in breach of Article 8 where recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants’ right to respect for private life were not “in accordance with the law”. Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.
57. In the instant case, the Government relied on Articles 4 and 6 of Law no. 2937 as the legal basis of tapping and recording the applicant’s telephone conversations and argued that the impugned measure was justified in the circumstances for protection of national security. However, the Court has already found that at the time of the facts giving rise to the present application there was no domestic law which regulated telephone tapping and recording (see *Ağaoğlu v. Turkey*, no. 27310/95, § § 54-

55, 6 December 2005). Thus the lack of legal basis for such interference lead the Court to conclude that the telephone recordings in question were unlawfully- obtained evidence in the circumstances of the case.

58. Nonetheless, the Court cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible (see, *Schenk*, cited above, p. 29, § 46). It must therefore ascertain whether the proceedings as a whole were fair, regard being had to whether the rights of the defence have been respected. In this connection, it notes that the applicant was given opportunity to challenge the way this evidence was obtained and opposed its use against him in the course of his trial (see paragraph 14 above). Although the trial court did not address the applicant’s challenge directly, it dismissed his defence submissions and convicted him on the basis of other available evidence, such as the applicant’s admission of having provided non-confidential information to the Greek officials (see paragraphs 14 and 17 above).
 59. Having regard to the foregoing, the Court considers that the use of at the admission of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.
 60. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.
- C. Alleged failure to hold a public hearing**
61. The applicant complained that his right to a public hearing enshrined in Article 6 had also been violated.
 62. The Government noted that, according to Article 138 of the Military Court Organisation and Proceedings Law, hearings before military courts were public. However, the military court could hold hearings *in camera* if public morality and safety so required. In the instant case, since the applicant had been tried on charges of military espionage, exclusion of public was necessary for the purposes of national security.
 63. The Court reiterates that the purpose of the exhaustion rule, contained in Article 35 § 1 of the Convention, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court.

Accordingly, this rule requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts.

64. In the instant case, however, it does not appear from the applicant's submissions that he has raised this complaint before the domestic courts. Nor does it transpire from the documents that the applicant challenged the decision to hold hearings *in camera* before the trial court or in his appeal to the Court of Cassation. It follows that this complaint must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 § 1 and 4 of the Convention.

D. Alleged failure to secure the attendance of a witness

65. The applicant complained that he had been denied a fair hearing since the trial court had failed to secure the attendance of V.A.Ö. who could have testified for his defence.
66. The Government contended that the trial court had made sufficient efforts to secure the attendance of the witness in question. However, he could not be found.
67. The Court reiterates that as a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of the evidence which an accused seeks to adduce, and in particular whether it is appropriate to call witnesses in autonomous sense given to that term in the Convention system (see *Perna v. Italy*, no. 48898/99, § 26, 25 July 2001). Furthermore, the purpose of Article 6 § 3 (d) is to place the defendant on an equal footing with the prosecution regarding the hearing of witnesses (see *Touvier v. France*, no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports (DR) 88, p. 148).
68. The Court notes that the General Staff Court summoned V.A.Ö. at the applicant's request but he could not be found. Furthermore, as observed by the Military Court of Cassation, the trial court disregarded V.A.Ö.'s statements made to the police officers since he could not be questioned in relation to his allegations (see paragraph 19 above). The Court, noting that the trial court did not consider it necessary to examine that witness in order to ascertain the truth, does not find any particular failure to respect the applicant's right to a fair hearing.

69. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must also be rejected pursuant to Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

71. The applicant claimed 118,000 euros (EUR) in respect of pecuniary damage and EUR 120,000 for non-pecuniary damage.
72. The Government submitted that the amounts claimed were excessive and unjustified.
73. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it accepts that the applicant must have suffered non-pecuniary damage, such as distress and frustration in the circumstances of the case, which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the circumstances of the case and having regard to its case-law, the Court awards the applicant EUR 1,000 for non-pecuniary damage.
74. The Court considers that where an individual, as in the present case, has been convicted by a court which did not satisfy the conditions of independence and impartiality required by the Convention, an appropriate form of redress would, in principle, be for the applicant to be given a retrial or for the proceedings to be reopened if he or she so requests (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-...).

B. Costs and expenses

75. The applicant also claimed EUR 19,000 for the costs and expenses incurred before the Court.
76. The Government contended that no award should be under this heading since the applicant had failed to furnish any documents in support of his claim.

77. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information and documents in its possession as well as the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for costs and expenses before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. Declares unanimously the applicant's complaints concerning the alleged ill-treatment inflicted on him during his detention in police custody and his conviction by a tribunal which lacked independence and impartiality admissible and the remainder of the application inadmissible;
2. Holds unanimously that there has been no violation of Article 3 of the Convention;
3. Holds by 6 votes to 1 that there has been a violation of Article 6 § 1 of the Convention as a result of the applicant's trial and conviction by the General Staff Military Court;
4. Holds by 6 votes to 1
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into new Turkish liras at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above

amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 8 July 2008, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Santiago Quesada, *Registrar*

Boštjan M. Zupančič, *President*

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

- concurring opinion of Judge Ziemele;
- dissenting opinion of Judge Türmen.

CONCURRING OPINION OF JUDGE ZIEMELE

I voted for the finding of a violation of Article 6 § 1 on the grounds that the applicant was tried and convicted by the General Staff Military Court. However, I do not fully share the reasoning of the majority on this point. The judgment relies heavily on the case of *Ergin v. Turkey* (no. 6), no. 47533/99, ECHR 2006- (extracts). In the *Ergin* case the applicant was the editor of a newspaper and was charged with incitement, by publication of an article, to evade military service. In the present case, the applicant was convicted of espionage (§ § 12, 16). Clearly, the two offences are of a very different nature. The judgment takes note of the prevailing practice in the Council of Europe Member States and points to a strong trend at the international level to limit the jurisdiction of military courts (§ § 43 – 44). However, it does not go as far as to say that in times of peace military courts should not try civilians no matter what the offence is. The Court's position is that "the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation. The existence of such reasons [has] to be substantiated in each specific case. It [is] not sufficient for the national legislation to allocate certain categories of offences to military courts *in abstracto*" (§ 42).

If the jurisdiction of military courts over civilians in

some circumstances may still be accepted by the Court, it remains unclear where the line should be drawn. Normally, it is necessary to have a clear delimitation in national legislation of the jurisdiction of courts by defining in criminal codes the types of offences that might fall within the system of military justice or at least its competence in times of state of emergency. It would have been preferable if the Court had further elaborated on the meaning of the “compelling reasons” approach. A case of espionage was a good opportunity to do so. However, if the Court considered that military courts should not try civilians in peacetime since it was incompatible with the fair trial guarantees of Article 6 § 1, it ought to have ruled on that principle.

DISSENTING OPINION OF JUDGE TÜRMEK

I regret that I am unable to agree with the majority in finding a violation of Article 6 § 1 of the Convention.

I do agree that in principle military criminal justice should not be extended to civilians. However, this is not an absolute rule and decisions should be reached on a case-by-case basis after examination of the circumstances of each case. Elements such as the nature of the offence and the guarantees provided by the national legislation to ensure the independence and impartiality of the judges certainly play an important role.

The case-law of the Court also supports this view. In *Ergin v. Turkey (no. 6)*, no. 47533/99, ECHR 2006- (extracts), the Court stated that the Convention did not absolutely exclude the jurisdiction of military courts to try cases in which civilians were implicated. It held however that the existence of such jurisdiction should be subjected to particularly careful scrutiny. The Court also considered that the power of military criminal justice should not extend to civilians unless there were compelling reasons justifying such a situation, and if so, only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case (see *Ergin*, cited above, § § 46 and 47).

It is to be recalled that the applicant was convicted of disloyalty to national defence by way of espionage, an offence which was prescribed by Article 56 § 1 (D) of the Military Criminal Code and Article 133 § 1 of the Criminal Code. In convicting the applicant, the General Staff Court had to assess the nature of the acts he had committed and found that the information he had provided to the Greek

officials was not confidential military information. On that basis the court mitigated the applicant’s sentence and imposed the minimum period of imprisonment foreseen by the above-mentioned provisions.

The issues to be determined by the General Staff Court required a measure of professional knowledge or experience since the acts committed by the applicant were exclusively related to military information and consequently to national security (see *mutatis mutandis*, *Tsfayo v. the United Kingdom*, no. 60860/00, § § 43 and 45, 14 November 2006). In this respect, the circumstances of the present case differ from those of the *Ergin* case and other similar cases (see *Düzgören v. Turkey*, no. 56827/00, 9 November 2006) where the assessment of the acts at issue did not require special expertise and did not concern national security.

On the other hand, “espionage” in criminal law has a special status as it constitutes a threat to the defence and security of the State.

In the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land it is stated that a spy will be treated as a prisoner of war, that is to say, a combatant (Article 31). The 1949 Geneva Convention IV on Protection of Civilian Persons in Time of War stipulates that a civilian person detained as a spy shall be regarded as having forfeited rights of communication, meaning that he will be regarded as a prisoner of war, a member of the military (Article 5).

Moreover, under Article 68 of the same Convention, the Occupying Power may impose the death penalty on a protected person (a civilian) in cases where the person is guilty of espionage.

It is true that all these provisions are applicable in time of war and not in time of peace. Nevertheless, they are indications as to the special character of the offence where a civilian convicted of espionage is treated as a person belonging to the military.

Accordingly, in the instant case, I find there are sufficient compelling reasons that justify the trial of the applicant by a military court on charges of military offences which had a clear and foreseeable basis in domestic law.

It is to be noted that the Court has already had occasion to look into the question of the General Staff Court’s organic independence from the executive, and has held that the appointment of military judges and the safeguards accorded to them in the performance of their duties were compatible with the requirements of Article 6 § 1 of the Convention

(see *Hakan Önen v. Turkey* (dec.), no. 32860/96, 10 February 2004).

Against this background, and having regard to the special circumstances of the present case, I conclude that there has been no violation of Article 6 § 1 of the Convention in respect of the applicant's trial.

ECHR

ECJ

SECOND SECTION

CASE OF STOLL v SWITZERLAND

(Application no. 69698/01)

JUDGMENT

STRASBOURG
10 December 2007

SECRET INFORMATION, ESPIONAGE, SPY, FREEDOM OF EXPRESSION, NATIONAL SECURITY, PUBLIC INTEREST, DISCLOSURE OF INFORMATION, SENSITIVE DATA, DEMOCRACY

IN THE CASE OF STOLL V. SWITZERLAND,

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

Mr **J.-P. Costa**, *President*,

Mr **L. Wildhaber**,

Mr **B.M. Zupančič**,

Mr **P. Lorenzen**,

Mr **R. Türmen**,

Mrs **M. Tsatsa-Nikolovska**,

Mr **A.B. Baka**,

Mr **M. Ugrekhelidze**,

Mr **A. Kovler**,

Mr **V. Zagrebelsky**,

Mrs **A. Mularoni**,

Mrs **E. Fura-Sandström**,

Mrs **R. Jaeger**,

Mr **E. Myjer**,

Mr **D. Popović**,

Mrs **I. Ziemele**,

Mrs **I. Berro-Lefèvre**, *judges*,

and Mr **V. Berger**, *Jurisconsult*,

Having deliberated in private on 7 February and 7 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 69698/01) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Martin Stoll ("the applicant"), on 14 May 2001.
2. The applicant was represented by Mrs H. Keller, a lawyer practising in Zürich. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, Head of the Human Rights and Council of Europe Section of the Federal Office of Justice.
3. The applicant alleged that his conviction for publishing "secret official deliberations" had been contrary to Article 10 of the Convention.
4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
6. On 3 May 2005 the application was declared admissible by a Chamber composed of the following judges: Sir Nicolas Bratza, *President*, Mr J. Casadevall, Mr L. Wildhaber, Mr M. Pellonpää, Mr R. Maruste, Mr J. Borrego Borrego and Mr J. Šikuta, *judges*, and of Mr M. O'Boyle, *Section Registrar*.
7. On 25 April 2006 the Chamber delivered a judgment in which it held, by four votes to three, that there had been a violation of Article 10 of the Convention. It considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The applicant did not submit any claim for costs and expenses.
8. On 14 July 2006 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73 of the Rules of Court. The panel of the Grand Chamber granted the request on 13 September 2006.
9. The composition of the Grand Chamber was determined according to the provisions of Article 27 § § 2 and 3 of the Convention and Rule 24 of the Rules of Court.
10. The Government, but not the applicant, filed written observations on the merits. The applicant submitted his claim for just satisfaction.
11. In addition, third-party comments were received from the French and Slovakian Governments, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).
12. A hearing took place in public in the Human

Rights Building, Strasbourg, on 7 February 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr **F. Schürmann**, Head of the Human Rights and Council of Europe Section of the Federal Office of Justice, Federal Department of Justice, *Agent*,

Mr **P. Seger**, Ambassador, Jurisconsult, Head of the International Public Law Directorate, Federal Department of Foreign Affairs,

Mr **A. Scheidegger**, Deputy Head of the Human Rights and Council of Europe Section,

Mrs **D. Steiger**, legal assistant, Human Rights and Council of Europe Section, *Counsel*;

(b) *for the applicant*

Mrs **H. Keller**, *Representative*,

Mr **S. Canonica**, legal adviser, TA Media,

Mr **A. Durisch**, editor, *Sonntags-Zeitung*,

Mr **A. Fischer**, lecturer, University of Zürich,

Mrs **D. Kühne**, lecturer, University of Zürich,

Mrs **M. Forowicz**, lecturer, University of Zürich, *Advisers*.

The applicant was also present.

The Court heard addresses by Mrs H. Keller, Mr F. Schürmann and Mr P. Seger. The parties' representatives replied to the questions asked by one judge.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The applicant was born in 1962 and lives in Switzerland.

A. Background to the case

14. In 1996 and 1997 negotiations were conducted between, among others, the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.

15. Against that background Carlo Jagmetti, who

was the Swiss ambassador to the United States at the time, drew up on 19 December 1996 a "strategy paper", classified as "confidential", which was faxed to Thomas Borer, head of the task force that had been set up to deal with the question within the Federal Department of Foreign Affairs in Berne. Copies were sent to nineteen other individuals in the Swiss Government and the federal authorities and to the Swiss diplomatic missions in Tel Aviv, New York, London, Paris and Bonn.

16. Below are some extracts from the document, based on the article "That's all we need", which appeared in the *Tages-Anzeiger* on 27 January 1997, the day after the applicant's articles were published (unofficial translation):

"Ambassador,

The campaign against Switzerland and the huge claims accompanying it, reflected in the activities of the Jewish organisations, the statements of American politicians and the class actions, will greatly occupy the authorities and public opinion on both sides of the Atlantic for some time to come ... However, the real reverberations will not be felt until the inquiries which are to be launched have been completed, those claims that are well-founded have been met, the proceedings have been concluded and matters have been put right in historical, political, legal and moral terms. That will take at least three years, possibly much longer. Moreover, it is impossible to predict today the course of Swiss domestic and foreign policy in the years ahead. In any event, the political, economic and social challenges facing the country internally and the uncertainty surrounding the European issue (the EU, security, etc.) and globalisation are already prompting some painful soul-searching by the Swiss people.

The comments now coming from America are all we need. Suddenly, on top of the present and future uncertainties, we must come to terms with the past. The campaign against Switzerland, therefore, is being conducted in an already difficult climate...

All Switzerland's efforts are aimed at preserving the country's integrity, forestalling or at least warding off dangers and maintaining international relations (in particular with the United States) during the crisis and beyond while avoiding any lasting damage. All interim goals must be viewed solely in relation to the main objective. Short-lived successes such as 'truces', temporarily positive reactions from the media, satisfaction at seeing certain

projects put in hand, historical insights which may be favourable to Switzerland or constructive remarks from our negotiating partners abroad should not blind us to the long-term reality. Individual battles may be important, but ultimately it is the war that Switzerland must win...

If we assume that the demands of the Jewish organisations and Senator D'Amato must be satisfied as a matter of urgency, and that then calm will be restored, an actual deal might be struck with the organisations concerned. Instead of just making the 'gesture' currently being speculated on, we could act immediately to resolve the matter by paying a lump sum in order to settle all the claims once and for all. Given that a large number of groups and countries are affected by this issue and that Switzerland is now being called to account, as it were, by the international community, the plan must have both a national and an international dimension and be based on a long-term strategy. It might look something like this:

- the measures planned up to now (publication of the experts' report on the compensation agreement with the countries of eastern Europe, commencement of the work of the historical commission, inquiries by the Volcker Committee) will be effectively implemented by Switzerland using the necessary resources and within a realistic time frame, with any difficulties being overcome in a determined manner;

- the dialogue with all the groups concerned must be continued in a correct and conciliatory manner, without making interim concessions which could jeopardise the entire process;

- as far as the activities of foreign governments and parliaments are concerned (particularly in the United States and the United Kingdom), the aim should be to bring about courteous bilateral cooperation focusing primarily on establishing the truth and avoiding any polemics. Where necessary, of course, a clear and firm stance should be taken, particularly if Switzerland is disparaged or accused without absolutely clear-cut reasons;

- when significant interim findings have been obtained and, especially, when all the inquiries have been completed, negotiations will need to be conducted on the conclusions to be drawn and on how any funds released should be used. These should be conducted at governmental level, either multilaterally, if possible with all the countries concerned (including the Allies, those countries that were

neutral at the time, Israel and Germany), bilaterally with Israel (which would mean giving up a long-standing position and accepting the risk of adverse reactions from the Arab world), or with non-governmental organisations. Much will depend on the strategy of our adversaries. However, the issue must be made an international one and other countries must be held to account. Switzerland, which has set a good example with its inquiries, should assume a leading role and hence seize the initiative...

It must also be borne in mind that scenarios and strategies are not immune to outside influences and that events may occur or a new trend emerge at any time, calling everything into question or at least requiring considerable flexibility. Accordingly, a mix of action based on international law and interim payments would, if possible, be more realistic. Opting for this kind of mix from the outset would almost inevitably mean taking a pragmatic approach that evolves from day to day and scarcely deserves the ambitious description of a 'strategy'... Switzerland cannot afford to just muddle through in this matter.

Whatever strategy is chosen, action will be needed on the external front to lend credibility to Swiss efforts. This can be done by taking the same – essentially reactive – stance taken hitherto or by adopting a more innovative approach. As part of the latter I would advocate campaigning systematically in political circles and in the media, maintaining ongoing contacts with the American administration in order to compare results and refine methods, cultivating relations with the Jewish organisations wherever possible in a friendly manner but without servility and conducting a well-orchestrated public relations campaign including, for instance, seminars and round-table sessions. On the subject of public relations, however, statements should be made only if there is something new to be said and the time and place are right. Pilgrimages abroad are best avoided on tactical grounds and in view of the domestic policy aspects...

The advantages and drawbacks of the different approaches are fairly obvious. However, it is clear that, from a historical, political and legal perspective, a 'deal' will never be satisfactory. Ideally, all the same, the legal strategy should be chosen. This places considerable demands on all concerned and calls for initiative, time and energy, to say nothing of the cost. In view of the main objective, however, we would be well advised to change the habit of a lifetime and make the necessary funds available without unseemly haggling. Let me

repeat: this is a war Switzerland must wage and win on the external and domestic fronts. Most of our adversaries are not to be trusted. The potential damage to Switzerland from a boycott or perhaps even legislative action by other countries is immense. Even the figures for our national pensions insurance scheme or the cost of the new trans-Alpine rail links, for instance, are liable to look modest by comparison. Switzerland must present a united and determined front...

Carlo Jagmetti, Swiss ambassador"

17. The applicant obtained a copy. It seems clear that he could not have acquired possession of the document without a breach of official secrecy by a person whose identity remains unknown.

B. The impugned articles by the applicant

18. On Sunday 26 January 1997 the Zürich Sunday newspaper the *Sonntags-Zeitung* published the following article by the applicant (unofficial translation):

"Ambassador Jagmetti insults the Jews [original title in German: Botschafter Jagmetti beleidigt die Juden]

Secret document: 'Our adversaries are not to be trusted' [*Geheimpapier: 'Mann kann dem Gegner nicht vertrauen'*]

by [the applicant]

Berne/Washington – Another scandal involving the Swiss ambassador to the United States: Carlo Jagmetti, in a confidential strategy paper on the assets of Holocaust victims, talks of the 'war Switzerland must wage', and of 'adversaries' who 'are not to be trusted'.

The paper is classified as 'confidential'. It was written by Carlo Jagmetti, Swiss ambassador to the United States. On 19 December the 64-year-old high-ranking diplomat in Washington sent the task force in Berne his views on what he described as a 'campaign against Switzerland'. This report has been obtained by the *Sonntags-Zeitung*, and is dynamite. In terms of its content, it is an unremarkable assessment of the situation. But the aggressive language used by Carlo Jagmetti has the effect of an electric shock on the reader. 'It is a war', writes the ambassador, 'a war Switzerland must wage and win on the external and domestic fronts'. He describes Senator D'Amato and the Jewish organisations as 'adversaries', saying that 'most of our adversaries are not to be trusted'.

In his paper, Carlo Jagmetti mentions the possibility of concluding an agreement, because 'the demands of the Jewish organisations and Senator D'Amato must be satisfied as a matter of urgency'. He uses the word 'deal' in this context. Ambassador Jagmetti suggests 'paying a lump sum' to the Jews in order to settle 'all the claims once and for all'. Then, he writes, 'calm will be restored'.

Speaking of the 'external front', Carlo Jagmetti says that Switzerland should 'campaign systematically in political circles and in the media'. Relations with Jewish organisations should be 'cultivated in a friendly manner but without servility', with the help of a firm of lawyers, and a 'well-orchestrated public relations campaign [should be conducted] including ... seminars and round-table sessions'.

No comments on this strategy paper by the eminent diplomat – due to retire in the spring – were forthcoming yesterday either from Flavio Cotti [head of the Swiss diplomatic service] at the Federal Department of Foreign Affairs or from the task force headed by Thomas Borer. Carlo Jagmetti had no comment to make to this newspaper.

Martin Rosenfeld, President of the Swiss Federation of Jewish Communities (SIG/FSCI) described Carlo Jagmetti's remarks as 'shocking and profoundly insulting'. He said he foresaw 'a difficult run-up to retirement' for Mr Jagmetti."

19. In the same edition of the *Sonntags-Zeitung* of 26 January 1997, another article by the applicant read (unofficial translation):

"The ambassador in bathrobe and climbing boots puts his foot in it [*Mit Bademantel und Bergschuhen in den Fettnapf*]

Swiss Ambassador Carlo Jagmetti's diplomatic blunderings [*Der Schweizer Botschafter Carlo Jagmetti trampelt übers diplomatische Parkett*]

By [the applicant]

Berne/Washington – Swiss ambassador Carlo Jagmetti constantly gets himself noticed on the diplomatic scene. With his insensitive remarks on the assets of Holocaust victims, he has thrown Swiss foreign policy into turmoil – and not for the first time.

Early on Friday morning the temperature began to rise in the offices of the Swiss embassy in Washington. 'We do not comment on internal documents' said an embassy spokesman emphatically to this newspaper... By the following day, nevertheless,... [an] editor on the

[daily newspaper] *Neue Zürcher Zeitung* had already leapt to the defence of his close friend Carlo Jagmetti. Under the heading 'Leaks continue unabated', he announced that 'this balanced document, some parts of which might, of course, be mischievously construed, may be published this weekend'.

Damage limitation, therefore, was the name of the game in Washington on Friday. Ambassador Carlo Jagmetti, who has represented Switzerland abroad for 34 years, was clearly aware of the explosive nature of his strategy paper, dated 19 December 1996, on the subject of unclaimed Jewish assets. In his paper, he talks about a 'war Switzerland must wage and win on the external and domestic fronts'. He winds up with a flourish by observing: 'Most of our adversaries are not to be trusted'.

The Swiss Embassy in Washington is however, experienced in crisis management. Carlo Jagmetti, who heads the embassy, regularly puts his foot in it. In 1993, a few months after moving into his office in the prestigious Cathedral Avenue, this senior diplomat committed his first *faux pas*. In an interview with the *Schweizer Illustrierte*, he complained about the American administration, saying 'I've observed a certain lack of courtesy'. Even Bill Clinton, who was said to 'burst out laughing sometimes at inopportune moments', was criticised during the interview. Apparently, Mr Clinton had 'kept [Carlo Jagmetti] waiting for four months' before he was accredited. And, according to the ambassador, it was legitimate to ask, on a general note, 'who [was] actually governing the United States'.

Berne reprimanded the ambassador for his ill-chosen remarks and for an unconventional public appearance (Carlo Jagmetti and his wife were pictured [in an article in the magazine *Schweizer Illustrierte*] in their bathrobes), but the ambassador did not prove much more reticent in his subsequent utterances. And in the highly topical debate concerning the assets of Holocaust victims, Carlo Jagmetti has also given the impression of somebody blundering onto the diplomatic stage in outside boots. He rebuked the Holocaust survivor Gerda Beer in front of the assembled American press, saying that her claims were unfounded as her uncle had emptied the Swiss bank account in question. The incident-prone diplomat based his remarks, however, not on proven facts, but on unsubstantiated rumours which had been circulating.

Berne was left with no choice but to apologise for his undiplomatic remarks in a bid to limit the damage.

These remarks, which have now been made public, are all the more embarrassing since the tension seemed to be easing. Only last Friday Senator D'Amato and the World Jewish Congress had for the first time welcomed Switzerland's agreeing to set up a fund for Holocaust victims.

Swiss diplomats are now engaged in behind-the-scenes efforts to head off the impending crisis by stressing the fact that Carlo Jagmetti is due to retire shortly. In any event, they argue, Mr Jagmetti played only a minor role in the recently concluded negotiations between Jewish organisations and the American Senator D'Amato.

Carlo Jagmetti himself has declined to comment. He absented himself from the major press conference held by Senator D'Amato on Friday before the world's press. He was reportedly on holiday in Florida."

C. Other press articles

20. A third article, which also appeared in the *Sonntags-Zeitung* on 26 January 1997 and was written by the editor Ueli Haldimann, was entitled "The ambassador with a bunker mentality" (*Botschafter mit Bunkermentalität*).
21. On Monday 27 January 1997 the Zürich daily the *Tages-Anzeiger* reproduced lengthy extracts from the strategy paper in an article entitled "That's all we need" (*Das hat gerade noch gefehlt*). Subsequently, another newspaper, the *Nouveau Quotidien*, also published extracts from the paper.

D. The Swiss Press Council opinion

22. Following publication of these articles, the Swiss Federal Council (*Bundesrat*) requested the Swiss Press Council (*Presserat*) to examine the case.
23. The Swiss Press Council acts as a complaints body for media-related issues. It is an institution under Swiss private law set up by four associations of journalists which formed a foundation (*Stiftung*) to organise and fund the activities of the Press Council. According to the Press Council rules, its activities are intended to contribute to the discussion of fundamental ethical issues in relation to the media. Its task is to uphold freedom of the press and freedom of information, and it adopts opinions, on its own initiative or in response to complaints, on issues concerning journalistic ethics. The Swiss Press Council has adopted a "Declaration on the rights and responsibilities of journalists"

which is available on the Internet.

24. Its opinion (*Stellungnahme*) of 4 March 1997 concerning the present case (no. 1/97, C.J./*Sonntags-Zeitung*) reads as follows (unofficial translation):

"II. Considerations

...

2. With regard to the publishing of confidential information, the following extracts from the Declaration on the rights and responsibilities of journalists are of relevance:

(a) '[Journalists'] responsibility to the public [shall take precedence over] their responsibility ... towards the ... authorities ... in particular' (Preamble).

(b) Journalists shall have free access 'to all sources of information and [shall have the] right to investigate without hindrance any facts which are in the public interest; objections of secrecy in public or private matters may be raised only in exceptional cases, with sufficient reasons given in each case' (point a. of the Declaration of rights).

(c) Journalists shall publish only 'such information, documents [or] images whose origin is known to them; [they shall not suppress] information or essential elements [and shall not] distort any text, document, image ... or opinion expressed by another. [They shall] present unsubstantiated news items very clearly as such [and] make clear when pictures have been edited'. They shall comply with reasonable deadlines (point 3 of the Declaration of responsibilities).

(d) Journalists shall not make use of 'unfair methods in order to obtain information, ... images or documents' (point 4 of the Declaration of responsibilities).

(e) They shall respect 'editorial secrecy and shall not reveal the sources of information obtained in confidence' (point 6 of the Declaration of responsibilities).

(f) They shall not accept 'any favours or promises which might compromise their professional independence or their ability to express their own opinions' (point 9 of the Declaration of responsibilities).

...

5. It must first be established whether diplomats' reports come under the heading of vital interests. The federal authorities and those who share their point of view argue that these

reports are highly sensitive and comparable to the negotiations conducted by the Federal Council and the reports preceding such negotiations. These documents, they argue, merit greater protection than, for instance, expert reports or minutes of parliamentary committees. The Federal Department of Foreign Affairs and the Federal Council cannot form an accurate picture of international relations unless the ambassadors provide them with additional information, different from and more sensitive than that provided by the media. Diplomats also provide information they have obtained from confidential sources, behind the scenes or off the record. They need, for instance, to be able to express in plain language their views about violations of human rights and political relations in Iran, the involvement of leading Colombian politicians in drug trafficking and the true picture with regard to the balance of power and intrigue in the Kremlin. If, despite everything, reports of this kind are published, the ambassador concerned will almost automatically be declared *persona non grata* in the host country. If reports of this kind were to be published on a regular basis, ambassadors would no longer be able to report on everything that was going on. That would have an adverse impact on Swiss foreign policy, perhaps even paralysing it completely. And if everything were to be made public, Switzerland might just as well recall its diplomats and replace them with the media. In exercising their function as critic and watchdog, the media must always remain mindful of their responsibilities. This applies with particular force in the sphere of foreign policy, as the reports relating to foreign policy are also read abroad. If only for this reason, they are more sensitive than reports on domestic policy matters.

...

The Press Council acknowledges the importance of the principle that diplomatic correspondence should remain confidential. In the past, the Swiss media have observed that principle in substance and have not set out to expose the internal workings of diplomacy to public view. Disclosures in the foreign policy sphere have been the exception rather than the rule in Switzerland. Media bosses are clearly aware of the responsibilities inherent in the media's role as critic and watchdog in this sphere.

At the same time, it should not be forgotten that disclosures by the media in the field of foreign policy are commonplace in other countries, particularly in the United States, but also in the United Kingdom and Israel. Clearly, other governments and diplomats have long

had to contend with this risk of disclosures concerning foreign policy, and have learned to live with it. Whether they like it or not, the Swiss authorities must also learn to adjust to a situation in which foreign policy is as much the focus of media attention as domestic policy, and in which revelations may come not just from the Swiss media but also from foreign media. An approach which places confidentiality before the public interest in too rigid a manner is neither realistic nor legitimate, particularly since diplomatic reports are regularly forwarded to a large number of authorities.

There can be no doubt that the revelations in the *Sonntags-Zeitung* and the *Tages-Anzeiger* were a source of embarrassment and problems for those responsible for Swiss foreign policy, but they did not restrict their room for manoeuvre substantially. Diplomatic reports are confidential by right, but when the conditions that allow confidential reports to be published are met, freedom of the press must take precedence (Opinion 2/94, Moser/Reimann parliamentary questions).

6. The Press Council must now examine whether the content of Mr Jagmetti's strategy paper is of such importance that it was appropriate to invoke the public interest, and whether it should have been published. In the view of Ueli Haldimann, editor of the *Sonntags-Zeitung*, the public interest lay in the fact that it was important to let people know how the Swiss ambassador in Washington perceived the complex issue of Holocaust victims' assets and the way Switzerland was coming to terms with its past, and what kind of aggressive language he used. According to Haldimann, his newspaper did not publish any leaked information unless the public interest was at stake. Although there were more leaks now than previously, they were not damaging in principle, and were often the only remaining means of putting a stop to harmful conduct...

From the Press Council's standpoint, the next step is to assess the strategic importance of Mr Jagmetti's paper. Mr Jagmetti set out in this document to make a perfectly reasonable analysis of the situation, making a number of constructive proposals. He explored two 'extreme' options – the first involving some kind of 'deal' and the second involving a 'legal strategy'. The paper testifies to a fundamental concern to get at the truth, to find a generous financial solution and to protect Swiss interests and the country's good relations with the United States. However, it could not escape the attention of even the most casual reader that Mr Jagmetti used very bellicose language

and that he regarded his negotiating partners as adversaries who were not to be trusted and who might be amenable to some kind of deal. The language used betrays attitudes which are problematic even in an internal document, since attitudes are liable to be reflected also in negotiations and informal contacts. In that connection, Mr Jagmetti was to have been engaged in important discussions concerning the assets of Holocaust victims during the last six months of his tenure.

The Press Council is mindful of the fact that the degree of public interest of confidential information cannot be determined in a wholly objective manner, but depends on the ideological, cultural, economic and advertising context in which the medium operates. Nevertheless, in the case of Mr Jagmetti's strategy paper, the public interest was clear, as the debate surrounding the assets of Holocaust victims and Switzerland's role in the Second World War was highly topical in late 1996 and early 1997 and had an international dimension, and because the Swiss ambassador in Washington was to occupy a prominent position in the forthcoming discussions. Knowing what that ambassador thought and how he formulated his opinions was relevant, and not a trivial concern. Leaving aside the question of the public interest and the relevance of the ambassador's remarks, the publication of this supposedly confidential paper was justified from an ethical viewpoint, since only as a result of its publication did it become clear that those in charge still had no very clear idea, despite the creation of the task force, as to the question of Swiss responsibility and what steps should be taken. From the perspective of political transparency, publication of the confidential paper, despite the fact that it was more than a month old and that in the meantime there had been talk of setting up a fund for Holocaust victims, might have spurred the Government on to engage in debate in order to overcome the problems, demonstrate leadership and devise convincing solutions.

7. Finally, it is necessary to assess whether the information was made public in the most appropriate form. According to one school of thought, the media are in a position of power, since not only do they inform, they also suggest by the way in which they present the information how it is to be assessed. In the present case the *Sonntags-Zeitung*, it is argued, presented an internal analysis of foreign policy in truncated form and, by publishing it alongside comments from third parties who had not seen the original text, planted in people's minds the idea that Ambassador Jagmetti had 'insulted the Jews'. The newspaper, by ac-

cusing Mr Jagmetti of anti-Semitism, started a rumour in an irresponsible manner. Reproducing the full text would not have placed Mr Jagmetti under the same kind of pressure and would not have forced him to resign. The manner in which the information was published, therefore, was a source of problems and consternation.

The opposing school of thought argues that it is vital to analyse the salient points of Mr Jagmetti's remarks. According to the *Sonntags-Zeitung*, there was no question of accusing Ambassador Jagmetti of anti-Semitism. Nevertheless, the newspaper's editors have acknowledged off the record that it would have been wiser to publish the strategy paper in full. They maintain that, on the day of publication, it would have been virtually impossible to add another page to the newspaper and that plans to publish the full text on the Internet were abandoned owing to technical problems.

The Press Council regards these arguments as spurious, and agrees with the criticism regarding the manner of publication. The *Sonntags-Zeitung* did not make sufficiently clear that Ambassador Jagmetti had outlined several options in his strategy paper, of which the 'deal' was just one. Nor did it make the timing of the events sufficiently clear, particularly since the document was already five weeks old and had reached the addressees before the interview given by the outgoing Swiss President on the programme *24 heures/Tribune de Genève*. The newspaper unnecessarily made the affair appear shocking and scandalous and, by its use of the headline 'Ambassador Jagmetti insults the Jews', misled the reader and made it appear that the remarks had been made the previous day. It was incorrect to assert that Mr Jagmetti's letter undermined the process which had begun in January, particularly since the document had been circulated beforehand and had not previously been in the public domain, and could not therefore adversely affect the talks with the country's partners at home and abroad. When the *Sonntags-Zeitung* attempted to contact Mr Jagmetti on Friday 24 January in order to obtain a comment, and failed to reach him because he was in Florida, the newspaper's editors should have considered whether it might not be wiser to delay publication by a week so as to be able to publish an interview with Carlo Jagmetti alongside the extracts from his paper. The fact that publication went ahead in spite of everything in the next issue can only have been prompted by the fear of competition, which on no account constitutes sufficient justification for immediate publica-

tion. Hence, by publishing the strategy paper in the way it did, the *Sonntags-Zeitung* omitted vital pieces of information, in breach of the Declaration on the rights and responsibilities of journalists (point 3 of the Declaration of responsibilities).

...

III. Findings

1. Freedom of the press is too fundamental a right to be made subservient as a matter of principle to the interests of the State. The role of critic and watchdog played by the media requires them to make information public where the public interest is at stake, whether the source of information is freely accessible or confidential.

2. As to the publication of confidential information, the pros and cons must be weighed up carefully, with an eye to whether interests which merit protection are liable to be damaged in the process.

3. Internal reports by diplomats are confidential by right, but do not necessarily merit a high degree of protection in all cases. The media's role as critic and watchdog also extends to foreign policy, with the result that those in charge in the media may publish a diplomatic report if they consider its content to be in the public interest.

4. In the case of Mr Jagmetti, the interest to the public of his strategy paper should be acknowledged, as should the fact that its publication was legitimate on account of the importance of the public debate on the assets of Holocaust victims, the prominent position occupied by the Swiss ambassador in Washington and the content of the document.

5. In this case the *Sonntags-Zeitung*, in irresponsible fashion, made Mr Jagmetti's views appear shocking and scandalous by printing the strategy paper in truncated form and failing to make the timing of the events sufficiently clear. The newspaper therefore acted in breach of the Declaration on the rights and responsibilities of journalists (point 3 of the Declaration of responsibilities). The *Tages-Anzeiger* and the *Nouveau Quotidien*, on the other hand, placed the affair in its proper context following the revelations by reproducing the document in its near-entirety."

E. The criminal proceedings against the applicant

1. Proceedings at cantonal level

25. Following publication of the articles, the ap-

plicant was made the subject of an investigation by the Zürich cantonal authorities. By a decision of 6 March 1998 the Federal Public Prosecutor's Office ordered the discontinuation of the investigation into a breach of official secrecy (*Verletzung des Amtsgeheimnisses*) within the meaning of Article 320 of the Swiss Criminal Code. It remitted the case in respect of the charge of publication of official deliberations within the meaning of Article 293 of the Criminal Code to the prosecuting authorities of the Canton of Zürich.

26. On 5 November 1998 the Zürich District Office (*Statthalteramt des Bezirkes Zürich*) fined the applicant 4,000 Swiss francs (CHF) (approximately 2,382 euros (EUR) at the current exchange rate) for contravening Article 293 § 1 of the Swiss Criminal Code (see paragraph 35 below) by publishing the articles entitled "Ambassador Jagmetti insults the Jews" and "The ambassador in bathrobe and climbing boots puts his foot in it".
27. On 22 January 1999, following an application by the applicant to have the decision set aside, the Zürich District Court (*Bezirksgericht*) convicted him of an offence under Article 293 § 1 of the Swiss Criminal Code, but reduced the amount of the fine to CHF 800 (approximately EUR 476 at current exchange rates).
28. The relevant passages of the District Court judgment read as follows (unofficial translation):

"5.2.2 According to the case-law of the Federal Court, the offence defined in Article 293 of the Criminal Code is based on a formal notion of secrecy whereby the confidential nature of a document, a set of talks or an investigation stems not from its content but from its being classified as such by the competent body. In accordance with this approach by the Federal Court, the strategy paper in question, which was marked '(classified) confidential' (Document 2/2), amounts to a secret in the formal sense, and as such attracts the protection of Article 293 of the Criminal Code.

When it comes to interpreting Article 293 of the Criminal Code, freedom of expression and freedom of the press (Article 10 of the European Convention on Human Rights and Article 55 of the Federal Constitution) should in principle be taken into consideration in the appellant's favour. With the revision of the Criminal Code of 10 October 1997, which made the publication of secrets of minor importance an extenuating circumstance (Article

293 § 3), the legislature added a substantive component to the notion of secrecy under Article 293. But even assuming that for these reasons – and contrary to the case-law of the Federal Court – the court were to base its decision on a purely substantive notion of secrecy, the outcome would not be favourable to the appellant.

The views expressed by Ambassador Jagmetti in the strategy paper were not in the public domain. This, moreover, is also apparent from the fact that the information conveyed and the way it was analysed provided the basis for 'sensationalist' articles by the appellant. Whether or not Ambassador Jagmetti might have been willing to divulge the content of the strategy paper in an interview is of little relevance here. However, there is every reason to doubt it, the more so given the limited number of persons to whom the document was sent. Furthermore, contrary to the appellant's claims, the content of the strategy paper was far from unremarkable. The document contained an assessment of the delicate foreign-policy situation in which Switzerland found itself in December 1997 on account of the unclaimed assets, in particular vis-à-vis the United States. It also proposed a variety of strategies aimed at helping the country get out of its predicament. Documents setting out often carefully worded evaluations and assessments are an essential part of the formation of opinions and decision-making at embassy level, a process during which strongly held and often diverging opinions are exchanged and discussed internally until agreement is reached on a particular position. The protection which Article 293 of the Criminal Code is intended to provide also applies to the formation of opinions in as free a manner as possible and without undue outside influence (BGE (Federal Court Reports) 107 IV 188). In that regard, the document in question was aimed at helping the head of the task force to form an opinion and hence at influencing the course of events and the country's handling of the issue of the unclaimed assets. By its very nature, the publication of internal documents of this kind, which are designed to help form opinions, can have devastating consequences for the negotiations to be conducted. Consequently, given its explosive content and the fact that it was unknown to the public, the document in question was also secret in the substantive sense. It is thus fair to say that the question whether the broad formal notion of secrecy adopted by the Federal Court takes precedence over Article 10 of the European Convention on Human Rights remains open...

6. To justify his actions, the appellant claims

to have been defending legitimate interests. According to the Federal Court, this extra-legal justification may be relied on 'if the act in question constitutes a necessary and reasonable means of achieving a legitimate aim, is the sole possible course of action and is manifestly of less importance than the interests which the perpetrator is seeking to defend' (BGE 120 IV 213). The appellant argues that the editors of the *Sonntags-Zeitung* assessed the situation before arriving at the conclusion that the public interest carried greater weight. They took the view that the public was entitled to be informed when leading diplomats used language which was in glaring contradiction with Switzerland's official position (Document 2/5, p. 2). The tone employed by the ambassador was so inappropriate, they argued, that publication was necessary (Document 2/7). Ambassador Jagmetti, according to the editors, was not the right person to be conducting the negotiations with Senator D'Amato and the Jewish organisations, as he lacked the finesse needed to deal with this important issue (Document 17, p. 13). By publishing the confidential strategy paper, therefore, the appellant was in part attempting, as it were, to sideline from the negotiations a leading diplomat whose style he disliked. It must be said that, even if it was genuine, the indignation expressed by the appellant with regard to the tone of the document seems somewhat naïve. While a section of the public may well have wished to be informed about internal documents of this kind, this has little to do with legitimate interests. Moreover, the appellant undoubtedly undermined the climate of discretion which is of vital importance in the sphere of diplomatic relations, thereby weakening Switzerland's position in the negotiations or at least compromising it substantially. In assessing the public interest relied on by the appellant in the light of the strict requirements laid down by the Federal Court with regard to the extra-legal justification of defence of legitimate interests, it is clear, firstly, that the means employed by the *Sonntags-Zeitung*, consisting in the impugned publication of secret official documents, were neither necessary nor reasonable and, secondly, that the interests which were damaged as a result were not 'manifestly' of less importance. In addition, the public debate on unclaimed assets which the appellant wished to see could perfectly well have been conducted without infringing Article 293 of the Criminal Code. The defence of legitimate interests cannot therefore be relied on as justification...

8. Under Article 293 § 3 of the Criminal Code, the publication of secrets of minor importance

amounts to an extenuating circumstance. As indicated above, however, the secret divulged in the present case was not of minor importance. The publishing of a strategy paper which was vital to the formation of opinions within the Federal Department of Foreign Affairs and the Federal Council, while it may not have actually weakened Switzerland's position vis-à-vis the outside world and in particular in the negotiations, at least temporarily compromised it. It was important to preserve the confidentiality of the document not just because it was classified as 'confidential'. The implications of the subject under discussion for Swiss foreign policy also called for greater discretion in dealing with the strategy paper. There are therefore no extenuating circumstances under Article 293 § 3 of the Criminal Code in relation to the facts constituting the offence.

...

The offence committed cannot now be regarded as minor, as the secrets which the appellant made public are not of secondary importance. In publishing the strategy paper, the appellant unthinkingly compromised Switzerland's tactical stance in the negotiations. Nevertheless, the offence is not a very serious one, as the appellant did not divulge an actual State secret whose publication could have undermined the country's very foundations. Nor should too much be made of the fault committed by the appellant, in so far as he committed his actions – with the backing of the newspaper's editor and its legal department – in a legitimate attempt, among other things, to start an open debate on all aspects of the unclaimed assets issue. A fine of CHF 800 is therefore appropriate..."

29. The applicant lodged an appeal on grounds of nullity (*Nichtigkeitsbeschwerde*), which was dismissed by the Court of Appeal (*Obergericht*) of the Canton of Zürich on 25 May 2000.

2. Proceedings at federal level

30. The applicant lodged an appeal on grounds of nullity and a public-law appeal (*staatsrechtliche Beschwerde*) with the Federal Court (*Bundesgericht*). He argued that a journalist could be convicted of an offence under Article 293 of the Swiss Criminal Code only in exceptional circumstances, namely if the secret published was of unusual importance and publishing it undermined the country's very foundations. He referred to the public interest in being made aware of the ambassador's remarks and the role of journalists as watchdogs in a democratic society.

31. The Federal Court dismissed the applicant's appeals in two judgments dated 5 December 2000 (served on 9 January 2001) in which it upheld the decisions of the lower courts.
32. In examining the appeal on grounds of nullity, the Federal Court first outlined some considerations regarding Article 293 of the Criminal Code (unofficial translation):

"2(a) According to the case-law and most commentators, Article 293 of the Criminal Code is aimed at protecting secrets in the formal sense. The sole determining factor is whether the documents, investigations or deliberations are secret by virtue either of the law or of a decision taken by the authority concerned. Whether they have been classified as 'secret' or simply 'confidential' is of little relevance; it is sufficient for it to be clear that the classification was designed to prevent their publication ... This formal notion of secrecy differs from the substantive notion, to which most of the Articles of the Criminal Code on the disclosure of secret information relate, for instance Article 267 (diplomatic treason) or Article 320 (breach of official secrecy). In the substantive sense, a fact is secret if it is accessible to only a limited number of persons, if the authority in question wishes to keep it secret and if that wish is justified by interests which merit protection...

Many commentators have argued in favour of the wholesale repeal of Article 293, saying that steps should at least be taken to ensure that publication of a secret in the substantive sense is punishable only if the secret is of major importance...

2(b) As part of the revision of the criminal and procedural provisions relating to the media, the Federal Council proposed repealing Article 293 of the Criminal Code without replacing it with another provision. In its communication (BBl (Federal Gazette) 1996 IV 525 et seq.), the Federal Council argued in particular that it was unfair to punish the journalist who had published the confidential information, while the official or representative of the authority concerned who had originally made publication possible generally escaped punishment because his or her identity could not be established ... According to the Federal Council, Article 293 of the Criminal Code, which protected secrets in the formal sense ..., placed excessive restrictions on the freedom of action of the media. In its view, the 'second user' of a disclosed secret (by someone working in the media, for instance) was less serious in terms of criminal potential and unlawfulness than the initial disclosure of the secret by its holder. In addition, the journalist was by no means

always aware that the information he had received was obtained as the result of betrayal of a secret. The actions of the 'second user' might be assessed differently in cases where the information disclosed was a genuine State or military secret. However, independently of Article 293 of the Criminal Code, the legislation in force in any case made provision, in relation to diplomatic treason (Article 267 of the Criminal Code) and breach of military secrecy (Article 329 of the Criminal Code), for two layers of protection in such cases, one against disclosure by the holder of the secret and the other against disclosure by the 'second user'. According to the Federal Council, the proposed repeal of Article 293 of the Criminal Code would not therefore undermine the protection of secrecy under criminal law in important spheres. The objection that Article 293 also protected individual interests was at best indirectly relevant, as individuals' private and personal lives were protected first and foremost by Articles 179-179f of the Criminal Code and the provisions of the Civil Code concerning the protection of personality rights...

In the federal authorities, those in favour of the wholesale repeal of Article 293 of the Criminal Code have also argued that the provision in question is rarely applied and is not effective. They contend that it is unfair, in particular, because it penalises only the journalist, who is the 'second user', whereas the identity of the initial perpetrator of the offence, namely the official or representative of the authority concerned, remains unknown ... and he or she cannot therefore be called to account for a breach of official secrecy, for instance. Even if Article 293 were simply repealed, they argue, the disclosure by a journalist of genuinely important secrets would still be punishable, for instance under Article 267 of the Criminal Code (diplomatic treason) or Article 329 (breach of military secrecy). Opponents of the repeal of Article 293 have argued ... that the provision is more necessary than ever, as the disclosure of secret or confidential information can have serious consequences..."

33. The Federal Court then turned to the circumstances of the present case:

"8. The 'publication of secret official deliberations' (offence referred to in Article 293 of the Criminal Code) must still be considered to be based on a formal notion of secrecy, in line with the case-law of the Federal Court. The addition of a third paragraph to Article 293 has done nothing to change that. However, in view of the fact that it is now open to the criminal courts not to impose any penalty, they must determine in advance whether the

classification as 'secret' can be justified in the light of the purpose and content of the disclosed documents. That is the case here.

The extracts from the confidential document published by the appellant were, moreover, also secret in the substantive sense. The appellant rightly refrains from arguing that the extracts in question were of minor importance within the meaning of Article 293 § 3 of the Criminal Code. In requesting that the application of Article 293 be confined to cases in which the secrets disclosed are of major importance and their disclosure threatens the very foundations of the State, the appellant is seeking a decision which goes well beyond any interpretation of Article 293 (in line with the Constitution and the case-law of the European Court of Human Rights), which the Federal Court is obliged to apply pursuant to Article 191 of the new Federal Constitution. The same is true of the argument that persons working in the media can be convicted of publishing secret official deliberations under Article 293 of the Criminal Code only if the interest of the State in preserving the confidentiality of the disclosed information outweighs the public interest in receiving the information. This comparison of the interests at stake has no bearing on the essential elements of the offence, although it may possibly have a bearing on the extra-legal justification of protection of legitimate interests. In any event, the circumstances of the present case are not such as to allow the protection of legitimate interests to be relied on as justification for publishing secret official deliberations.

9. This conclusion renders a comparison of the interests at stake in the present case redundant. It is therefore not necessary to respond to the appellant's criticism of the way in which the cantonal authorities balanced those interests.

For the sake of completeness, however, it should nevertheless be pointed out that, for the reasons set forth by the federal authorities, the interest in maintaining the confidentiality of the strategy paper in question carried greater weight than the public interest in being apprised of the extracts published in the newspaper. In order to avoid repetition, the court would refer here to the considerations set forth in the impugned judgment and in the first-instance judgment. It was in the interests not only of the ambassador and the Federal Council, but also of the country, to preserve the confidential nature of the strategy paper. The publication of isolated extracts was liable to interfere with the formation of opinions and the decision-making process within the State

bodies in Switzerland, and above all to further complicate the already difficult negotiations being conducted at international level; this was not in the country's interest. On the other hand the passing interest in the extracts published out of context in the newspaper which the eye-catching headline aroused among sensation-seeking members of the public is relatively insignificant in legal terms. This is all the more true since the 'tone' criticised by the appellant, used in an internal document written in a specific context (and the content of which was, according to the article, an unremarkable assessment of the situation), did not in any event permit the reader to draw clear and indisputable conclusions as to the 'mentality' of the ambassador, still less as to his ability to perform the task assigned to him..."

34. In its judgment following the applicant's public-law appeal, the Federal Court found as follows (unofficial translation):

"3. In his public-law appeal, the appellant requests in particular that the principle of equality in the breach of the law (*Gleichbehandlung im Unrecht*) be applied to him and raises, among other things, a complaint concerning a violation of the principle of lawfulness...

(b) There is no need to explore in detail here the reasons why the prosecuting authorities decided not to prosecute the other journalists mentioned by the appellant for publication of secret official deliberations on account of the articles which they wrote, or to consider whether those reasons were sufficient. Even if the latter question were to be answered in the negative, it would not benefit the appellant in any way.

It is clear from the explanations on this point set forth in the impugned judgment (pp. 5 et seq., considerations point IV) and in the first-instance judgment (p. 3, considerations point 4) that the exceptional circumstances in which the Federal Court's case-law recognises the right to equality in the breach of the law do not apply. The approach taken by the prosecuting authorities in this case does not in itself constitute a 'consistent' (possibly unlawful) practice, either in the sense that, in the absence of specific substantive grounds, journalists are only very exceptionally prosecuted for publication of secret official deliberations, not systematically, or in the sense that, where extracts from the same confidential document are published by several journalists in different articles, the journalist who, for whatever reason – whether on the basis of the way the article was written or of the extracts selected – appears to be the most culpable, is consistently

singled out for prosecution. Moreover, there is nothing to suggest that either (possibly unlawful) practice will be adopted in the future...”

II. RELEVANT DOMESTIC, INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE

A. Swiss law and practice

35. Article 293 of the Swiss Criminal Code, entitled “Publication of secret official deliberations”, reads as follows (unofficial translation):

“1. Anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of any authority which are secret by law or by virtue of a decision taken by such an authority acting within its powers shall be punished with imprisonment or a fine.

2. Complicity in such acts shall be punishable.

3. The court may decide not to impose any penalty if the secret concerned is of minor importance.”

36. In a judgment of 27 November 1981 (BGE 107 IV 185), the Federal Court specified that the notion of secrecy on which Article 293 of the Criminal Code was based was a purely formal one.

37. The Swiss legislature recently adopted the Federal Administrative Transparency Act of 17 December 2004, which entered into force on 1 July 2006 (Compendium of Federal Law 152.3). The relevant provisions of the Act, which is aimed at improving access to official documents, read as follows (unofficial translation):

“Part 1: General provisions

Section 1 – Purpose and object

The present Act is aimed at fostering transparency as to the tasks, organisation and activities of the authorities. To that end, it shall contribute to informing the public by providing access to official documents.

...

Part 2: Right of access to official documents

Section 6 – Principle of transparency

1. Any person shall have the right to consult official documents and obtain information as

to their content from the authorities.

2. The person concerned may consult the official documents *in situ* or request a copy of them, without prejudice to the copyright legislation.

3. If the official documents have already been published by the Confederation in paper or electronic form, the conditions set out in paragraphs 1 and 2 shall be deemed to have been fulfilled.

Section 7 – Exceptions

1. The right of access shall be restricted, deferred or refused where access to an official document:

(a) is liable to interfere significantly with the process of free formation of opinions and intentions within an authority governed by the present Act, another legislative or administrative body or a judicial authority;

(b) interferes with the implementation of specific measures taken by an authority in accordance with its objectives;

(c) is liable to jeopardise the country's internal or external security;

(d) is liable to jeopardise Swiss interests in the sphere of foreign policy and international relations;

...

2. The right of access shall be restricted, deferred or refused if access to an official document might interfere with the private sphere of a third party, unless the public interest in transparency is judged on an exceptional basis to carry greater weight.”

38. The Order of 10 December 1990 on the classification and processing of civil authority information (Compendium of Federal Law 172.015), in force at the material time, defines the different levels of classification (unofficial translation):

“Part 1: General provisions

Section 1 – Object

The present Order lays down the provisions on maintaining secrecy applicable to civil authority information (hereinafter ‘information’) which, in the higher interests of the State, must not be passed on temporarily to other persons or be disclosed; it does so by means of instructions on the manner in which such information is to be classified and processed.

...

Part 2: Classification

Section 5 – Categories of classification

The body which issues the information (hereinafter 'the issuing body') shall classify it on the basis of the level of protection it requires. There shall be only two categories of classification: 'secret' and 'confidential'.

Section 6 – 'Secret' information

The following information is to be classified as 'secret':

(a) information which, if it became known to unauthorised persons, could seriously damage Switzerland's external relations or jeopardise the implementation of measures designed to protect the country's internal and external security and aimed, for instance, at maintaining Government activity during an emergency or ensuring vital supplies;

(b) information to which only a very small number of persons have access.

Section 7 – 'Confidential' information

1. Information within the meaning of section 6 which is of less significance and to which, normally speaking, a greater number of people have access, shall be classified as 'confidential'.

2. A 'confidential' classification shall also be given to information which, if it became known to unauthorised persons, might enable them to:

(a) interfere with the activities of Government;

(b) frustrate the implementation of important measures by the State;

(c) betray manufacturing secrets or important commercial secrets;

(d) frustrate the course of criminal proceedings;

(e) undermine the security of major infrastructure.

Section 8 – Persons authorised to classify information

Heads of department, the Federal Chancellor, secretaries general, office directors and their deputies shall be responsible for classifying information and amending or removing classification. They may delegate their powers in certain cases."

This Order was subsequently replaced by the

Order of 4 July 2007 on the protection of federal information (Compendium of Federal Law 510.411), which entered into force on 1 August 2007.

B. International law and practice

39. On 19 December 2006 the four special representatives on freedom of expression (Mr Ambeyi Ligabo, United Nations Special Rapporteur on Freedom of Opinion and Expression, Mr Miklos Haraszti, OSCE Representative on Freedom of the Media, Mr Ignacio J. Alvarez, OAS (Organization of American States) Special Rapporteur on Freedom of Expression and Ms Faith Pansy Tlakula, ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression) adopted a joint declaration. The following is an extract from the declaration:

"Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold."

40. On 19 April 2007 the Parliamentary Assembly of the Council of Europe adopted a resolution on espionage and divulging State secrets. The paragraphs of relevance to the present case read as follows:

"Fair trial issues in criminal cases concerning espionage or divulging state secrets (Resolution 1551 (2007))

1. The Parliamentary Assembly finds that the state's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information, international scientific co-operation and the work of lawyers and other defenders of human rights.

2. It recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority.

...

5. The Assembly notes that legislation on official secrecy in many Council of Europe member states is rather vague or otherwise overly broad in that it could be construed in such a way as to cover a wide range of legitimate activities of journalists, scientists, lawyers or other human rights defenders.

6. ... For its part, the European Court of Human Rights found 'disproportionate' an injunction against the publication in the United Kingdom of newspaper articles reporting on the contents of a book (*Spycatcher*) that allegedly contained secret information, as the book was readily available abroad.

...

9. It calls on the judicial authorities of all countries concerned and on the European Court of Human Rights to find an appropriate balance between the state interest in preserving official secrecy on the one hand, and freedom of expression and of the free flow of information on scientific matters, and society's interest in exposing abuses of power on the other hand.

10. The Assembly notes that criminal trials for breaches of state secrecy are particularly sensitive and prone to abuse for political purposes. It therefore considers the following principles as vital for all those concerned in order to ensure fairness in such trials:

10.1. information that is already in the public domain cannot be considered as a state secret, and divulging such information cannot be punished as espionage, even if the person concerned collects, sums up, analyses or comments on such information. The same applies to participation in international scientific co-operation, and to the exposure of corruption, human rights violations, environmental destruction or other abuses of public authority (whistle-blowing);

10.2. legislation on official secrecy, including lists of secret items serving as a basis for criminal prosecution must be clear and, above all, public. Secret decrees establishing criminal liability cannot be considered compatible with the Council of Europe's legal standards and should be abolished in all member states;

..."

41. As regards the classification of Council of Europe documents, Committee of Ministers Resolution Res(2001)6 of 12 June 2001 on access to Council of Europe documents articulates a clear principle: that of publishing information, with classification only in exceptional cases. Accordingly, it defines four categories of classification: (1) documents not subject to any particular classification, which are public; (2) documents classified as "restricted"; (3) documents classified as "confidential" and (4) documents classified as "secret". No definition exists which would enable documents to be classified according to their content. The principle of trans-

parency promoted by Resolution Res(2001)6 has ultimately resulted in publication becoming the norm. It seems that, since its adoption, no Committee of Ministers document has been classified as "secret".

42. The United Nations Human Rights Committee, in concluding observations adopted in 2001, criticised the implementation of the Official Secrets Act by the United Kingdom authorities and its impact on the activities of journalists (Concluding Observations, doc. CCPR/CO/73/UK of 6 December 2001):

"...

21. The Committee is concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public concern, and to prevent journalists from publishing such matters.

The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information."

43. In the case of *Claude Reyes and others v. Chile* before the Inter-American Court of Human Rights (19 September 2006, Series C no. 151), the Inter-American Commission on Human Rights submitted as follows:

"58. ... The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests. ..."

The Inter-American Court of Human Rights found as follows:

"84. ... In several resolutions, the OAS General Assembly has considered that access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information.

..."

86. In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions,

and so that they can question, investigate and consider whether public functions are being performed adequately. ...

87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. ...”

C. Comparative law and practice

44. Mr Christos Pourgourides, rapporteur on Resolution 1551 (2007) of 19 April 2007 (see paragraph 40 above), carried out a comparative study of legislation concerning State secrets in the member States of the Council of Europe. In his report he stresses that the disclosure of certain types of classified information appears to be punishable in all countries, but with a wide variety of approaches being adopted. The report also makes reference to the methods of classification used. Below are some extracts from the report:

“57. Generally speaking, one can identify three basic approaches: the first consists in a short and general definition of the notion of official or state secret (or equivalent), presumably to be filled in on a case-by-case basis. The second involves lengthy and more detailed lists of specific types of classified information. The third approach combines the other two by defining general areas in which information may be classified as secret, and then relying upon subsequent administrative or ministerial decrees to fill in more specifically which types of information are in fact to be considered as secret.

...

59. There are, of course, many other differences among the states' legislation that I need not dwell on. Some states (Austria and Germany, for example) distinguish between 'official secrets' and 'state secrets', whose violation is sanctioned more heavily. Most states also distinguish different degrees of secrecy (classified or restricted, secret, top secret, etc.). There are also differences in the harshness of penalties foreseen, which may be limited to fines in less serious cases. Some statutes distinguish between duties of civil servants and those of ordinary citizens. Some expressly penalise disclosure through negligence, others require criminal intent. For our specific purpose, these differences are immaterial.

...

68. To sum up, each of these legislative approaches allows for reasonable responses to

the difficult task of specifying in advance the types of information that the State has a legitimate interest in protecting, while nonetheless respecting the freedom of information and the need for legal security. But any administrative or ministerial decrees giving content to more generally worded statutes must at the very least be publicly accessible. Also, in the absence of a vigilant and truly independent judiciary, and of independent media that are ready to expose any abuses of power, all legislative schemes reviewed are liable to abuse.”

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

45. The applicant alleged that his conviction for publication of “secret official deliberations” had infringed his right to freedom of expression within the meaning of Article 10 of the Convention. Article 10 provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

D. Whether there was interference

46. The Chamber considered, and it was not disputed, that the applicant's conviction amounted to “interference” with the exercise of his freedom of expression.
47. The Court sees no reason to depart from the Chamber's findings on this point.

E. Whether the interference was justified

48. Such interference will be in breach of Article

10 unless it fulfils the requirements of paragraph 2 of that Article. It therefore remains to be determined whether the interference was “prescribed by law”, pursued one or more of the legitimate aims referred to in paragraph 2 and was “necessary in a democratic society” in order to achieve them.

1. *“Prescribed by law”*

49. The Chamber considered that the applicant’s conviction had been based on Article 293 of the Criminal Code (see paragraph 35 above).
50. The parties did not challenge that conclusion. The Court, for its part, sees no reason to adopt a different stance.

2. *Legitimate aims*

(a) **The Chamber judgment**

51. The Chamber simply noted that the parties agreed that the impugned measure had been designed to prevent the “disclosure of information received in confidence”. Accordingly, it did not consider it necessary to examine whether the fine imposed on the applicant pursued any of the other aims referred to in Article 10 § 2.

(b) **The parties’ submissions**

52. The applicant accepted that preventing the “disclosure of information received in confidence” was one of the grounds which justified interference with the rights guaranteed by Article 10. However, he did not share the respondent Government’s view that publication of the paper had jeopardised “national security” and “public safety”. In his view, the disclosure of the report had not been liable to undermine the country’s fundamental and vital interests. In addition, the applicant argued that Article 293 of the Swiss Criminal Code did not encompass the protection of the rights of others and hence, in the instant case, the reputation of the ambassador who had written the report in question. He added that the relevant authorities had not instituted any defamation proceedings against him, although they could have done so.
53. The Government contended that the criminal sanction imposed on the applicant had been aimed not only at “preventing the disclosure of information received in confidence”, but also at protecting “national security” and “public safety”, given that the remarks by the report’s author had been made against a highly sensitive political background. They shared the view

of the Press Council that publication of the report had also been apt to damage the reputation and credibility of the report’s author in the eyes of his negotiating partners (“protection of the reputation or rights of others”).

(c) **The Court’s assessment**

54. The Court is not satisfied that the penalty imposed on the applicant was aimed at protecting “national security” and “public safety”. In any event it must be pointed out that the domestic authorities did not institute criminal proceedings against the applicant or third parties for offences or crimes consisting in activities which posed a threat to those interests. It is true that criminal proceedings based on Article 293 of the Criminal Code may involve issues relating to “national security” and “public safety”. However, the Court points out that the Zürich District Court, in its judgment of 22 January 1999, accepted that there had been extenuating circumstances, taking the view that the disclosure of the confidential paper had not undermined the country’s very foundations. Moreover, these concepts need to be applied with restraint and to be interpreted restrictively and should be brought into play only where it has been shown to be necessary to suppress release of the information for the purposes of protecting national security and public safety (see, along the same lines, the observations of the United Nations Human Rights Committee, paragraph 42 above).
55. As to the “protection of the reputation or rights of others”, it should be noted that no criminal proceedings were instituted against the applicant for offences against honour, notably for insult or defamation.
56. On the other hand, the Court shares the Government’s view that the applicant’s conviction pursued the aim of preventing the “disclosure of information received in confidence” within the meaning of Article 10 § 2.
57. The Court considers it appropriate to deal here with a question of interpretation which, although not raised by the parties to the present case, is apt to give rise to confusion.
58. Whereas the French wording of Article 10 § 2 of the Convention talks of measures necessary “pour empêcher la divulgation d’informations confidentielles”, the English text refers to measures necessary “for preventing the disclosure of information received in confidence”. The latter wording might suggest that the provision re-

lates only to the person who has dealings in confidence with the author of a secret document and that, accordingly, it does not encompass third parties, including persons working in the media.

59. The Court does not subscribe to such an interpretation, which it considers unduly restrictive. Given the existence of two texts which, although equally authentic, are not in complete harmony, it deems it appropriate to refer to Article 33 of the 1969 Vienna Convention on the Law of Treaties, the fourth paragraph of which reflects international customary law in relation to the interpretation of treaties authenticated in two or more languages (see the *LaGrand* case, International Court of Justice, 27 June 2001, I.C.J. Reports 2001, § 101).
60. Under paragraph 3 of Article 33, “the terms of the treaty are presumed to have the same meaning in each authentic text”. Paragraph 4 states that when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted (see, in this regard, *Sunday Times v. the United Kingdom* (no. 1), judgment of 26 April 1979, Series A no. 30, p. 30, § 48, and *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 31, § 42).
61. The Court accepts that clauses which allow interference with Convention rights must be interpreted restrictively. Nevertheless, in the light of paragraph 3 of Article 33 of the Vienna Convention, and in the absence of any indication to the contrary in the drafting history of Article 10, the Court considers it appropriate to adopt an interpretation of the phrase “preventing the disclosure of information received in confidence” which encompasses confidential information disclosed either by a person subject to a duty of confidence or by a third party and, in particular, as in the present case, by a journalist.
62. In view of the foregoing, the Court considers that the Government were entitled to invoke the legitimate aim of preventing the “disclosure of information received in confidence”.
3. “Necessary in a democratic society”

(a) The Chamber judgment

63. In the light of the Court’s case-law and taking

into account among other considerations the interest of any democratic society in guaranteeing freedom of the press, the limited margin of appreciation left to States when information of public interest was at stake, the media coverage of the issue of unclaimed assets, the relatively low level of classification (“confidential”) and the fact that disclosure of the document in question was not, even in the estimation of the Swiss courts, likely to undermine the foundations of the State, the Chamber found that the applicant’s conviction had not been reasonably proportionate to the legitimate aim pursued (see paragraphs 44 to 59 of the Chamber judgment).

(b) The parties’ submissions

i *The applicant*

64. The applicant argued that the purely formal notion of secrecy on which Article 293 of the Criminal Code was based and which had been confirmed by the Federal Court had adverse consequences for freedom of expression. According to that provision, the publishing by an official of any document, regardless of its content, which had been declared secret or confidential had to be punished, without it being possible to review the compatibility of the penalty imposed with Article 10 of the Convention. In the applicant’s view, such a definition of secrecy was clearly at odds with the requirements of the Convention.
65. The applicant further maintained that the Swiss courts had punished the wrong person, since he had been penalised, as a journalist, for disclosing a report which he had obtained as the result of a leak by a Government agent who enjoyed immunity from prosecution in the present case.
66. In addition, the applicant considered that Article 293 of the Criminal Code had always been applied selectively by the relevant authorities with the aim of preventing the disclosure of information concerning culpable conduct on the part of State officials or agents or problems in public administration. The provision in question had become an anachronism with the entry into force on 1 July 2006 of the Federal Administrative Transparency Act (see paragraph 37 above).
67. In the applicant’s submission, Article 293 of the Criminal Code should be repealed, given that disclosure of the most sensitive information could be prosecuted on the basis of Article 276

of the Criminal Code (provocation and incitement to breach of military duty) or Article 86 (espionage and treason on account of a breach of military secrecy) and Article 106 (breach of military secrecy) of the Military Criminal Code. Finally, journalists could also be convicted under Articles 24 and 320 of the Criminal Code of instigating a breach of official secrecy.

68. The applicant did not question the principle that the activities of the diplomatic corps merited protection. However, he considered it dangerous to confer absolute immunity on the members of the diplomatic corps in relation to all types of information. He referred to the proceedings based on Article 293 of the Criminal Code currently being brought against journalists in Switzerland accused of having disclosed information from the Swiss secret services concerning the existence of secret CIA detention centres in Europe.
69. In the applicant's opinion, only State secrets considered to be of particular importance could take precedence over freedom of expression within the meaning of Article 10. That certainly did not apply in the present case. He doubted whether the content of the paper had been liable to reveal a State secret whose disclosure might compromise "national security" or "public safety" in Switzerland. The views set forth in the two articles had been of too general a nature to weaken the position of the Swiss delegation in its talks with Jewish organisations.
70. The applicant further submitted that disclosure of the report had sparked a useful debate as to whether Mr Jagmetti was the right person to be conducting the negotiations with representatives of the Jewish organisations. Moreover, the publication of the report had been the reason for the ambassador's resignation the following day. Publication had clearly contributed to the adoption of a more sensitive approach by the Swiss authorities towards the delicate issue of unclaimed assets. At the same time, it had demonstrated that the Swiss authorities had no clear and coherent position at that stage as to Switzerland's responsibility in the matter and the precise strategy to be adopted in respect of the claims which had arisen.
71. The applicant was of the opinion that, in view of the importance and topical nature of the negotiations on the issue of unclaimed assets, the public had an interest in receiving more information about how those dealing with the issue in the Department of Foreign Affairs intended to conduct the negotiations with a view to an agreement on the subject of complaints against Swiss banks and financial institutions. In that connection, he considered the attitude and views of Mr Jagmetti who, he argued, had occupied a key role in relation to the unclaimed assets, to be particularly revealing.
72. As far as journalists' ethical responsibilities were concerned, the applicant did not deny that the articles could have been presented in a more balanced manner. At the same time, he made the point that he had not had much time to write the articles and had to comply with certain requirements concerning their length. He had therefore decided to concentrate on the way in which the ambassador had expressed himself rather than on the content of the report. This was, moreover, perfectly in line with the commentary by the newspaper's editor published in the same newspaper.
73. While the articles may have appeared shocking in places, the aim had been precisely to highlight the language used by Mr Jagmetti in his report, which, in the applicant's view, was unfitting for a senior representative of the Swiss Confederation and scarcely compatible with official Swiss foreign policy.
74. In addition, the applicant considered it essential to highlight the nature and functions of the Press Council, which was a private-law body created by four associations of journalists, the aim of which was to supervise the conduct of persons working in the media in the light of the ethical standards it had devised. The Press Council had no powers of investigation or prosecution and, consequently, any negative findings it made were in no way binding on the criminal courts.
75. The applicant also noted that, while the offence for which the fine had been imposed was merely a "minor offence", it was nonetheless punishable by imprisonment. Although the fine he had been ordered to pay might appear to be small, it damaged his reputation as a journalist and might prevent him in the future from performing the vital role of watchdog played by the press in a democratic society.
- ii *The Government*
76. In the Government's submission, the decisive factors in assessing the respondent State's margin of appreciation were the political context, the fact that the document in question

- had been written by an official who had assumed that it would remain confidential, the form in which it had been published, the reasons given by the applicant for the latter and the nature and severity of the penalty imposed.
77. It also had to be borne in mind that the domestic courts had subjected this delicate and sensitive case to close scrutiny and that the Federal Court, after holding a hearing, had delivered two judgments, including the judgment concerning the appeal on grounds of nullity which had been published in the Federal Court Reports (BGE 126 IV 236 to 255). When it came to assessing the extent of the authorities' margin of appreciation, the fact that the matter had been examined in depth at the domestic level should also be taken into account. Such examination was vital to the operation of the principle of subsidiarity, a fact which should prompt the Court to show restraint.
78. The Government argued that the crucial factor determining the margin of appreciation of the domestic authorities was not the nature and importance of the position held by the author of the document containing confidential information, but whether the person concerned had knowingly laid himself open to close scrutiny of his every word and deed, as was the case with politicians. In the instant case it was clear that Ambassador Jagmetti had quite reasonably assumed that his report would remain confidential.
79. The Government further pointed out that the confidentiality of all diplomatic correspondence was enshrined in Articles 24 to 27 of the Vienna Convention on Diplomatic Relations of 18 April 1961 as an absolute principle of international customary law. Although the Treaty did not provide for any criminal penalties to be imposed for a breach of its articles, the principle of *pacta sunt servanda* and the rules on States' international liability for unlawful acts meant that the States party to the 1961 Vienna Convention were obliged to honour the undertakings entered into under that instrument.
80. In the Government's view, the applicant had covered only the "deal" option in his two articles. It was vital to ensure that negotiations of that nature, like any negotiations concerning a friendly settlement, could be prepared in a climate of strict confidentiality. In addition, the applicant's articles had been published only five weeks after the Jagmetti report was written, at a time when the talks between the different parties had already begun.
81. The ambassador's remarks had been made against a highly sensitive political background. Their disclosure had jeopardised Switzerland's position and had threatened, in particular, to compromise the negotiations in which it was engaged at the time on the delicate issue of unclaimed assets.
82. Publication of the Jagmetti report had taken place at a particularly delicate moment. The applicant had, in biased and incomplete fashion, disclosed one of the options for defending the national interest being proposed in confidence to the Federal Council and the task force. At the time of its publication, the document was already more than a month old and in the meantime talks had begun on setting up a fund for Holocaust victims. Publication of the document had therefore been liable to cause serious damage to the country's interests.
83. In the Government's view, the chief intention of the applicant – who had himself described the content of the strategy paper as "unremarkable" – had not been to contribute to a debate of public interest, but to create a sensation centred first and foremost on Ambassador Jagmetti personally. Hence, the domestic courts had not accepted the existence of reasons, not prescribed by law, which might have justified disclosure in breach of Article 293 of the Criminal Code on the grounds of "protecting legitimate interests".
84. The Government pointed out that the editors of the *Sonntags-Zeitung* had themselves acknowledged that it would have been preferable to publish the text of the document in full, but had claimed that it had not been possible for technical reasons, an argument which the Press Council had considered "spurious". In the Government's view, the Chamber had not explained with sufficient clarity why the principle of publication in full, the importance and value of which were firmly established in the Court's case-law, had not been applied in the instant case.
85. In addition, the effect produced by publishing only certain extracts from the paper in isolation from their context had been heightened by the tone and presentation of the applicant's articles. The Press Council had stated that "the newspaper unnecessarily made the affair appear shocking and, by its use of the headline 'Ambassador Jagmetti insults the Jews', misled the reader and made it appear that the remarks

had been made the previous day". The applicant's duties and responsibilities as a journalist meant that he should have made clear that the document was already five weeks old.

86. The Government also considered it revealing that it had been the Press Council, a private, independent body set up by the press, which had criticised the applicant for a lack of professionalism and for acting in breach of the "Declaration on the rights and responsibilities of journalists". Moreover, other newspapers had distanced themselves from the articles written by the applicant, both in formal terms, by publishing the strategy paper in its near-entirety, and in terms of substance, by criticising vehemently the publication of a confidential document.
87. With regard to the nature and severity of the penalty imposed, the Government pointed to the Chamber's finding that, although the offence had been a minor one and the fine had been small (CHF 800), what mattered was not the mildness of the penalty but the fact that the applicant had been convicted at all. In the Government's view, these two elements were difficult to reconcile.

(c) The submissions of the third-party interveners

i *The French Government*

88. The French Government shared the Swiss Government's view and expressed surprise that the case-law developed by the Court in relation to politicians, which was justified by the willingness of the latter to lay themselves open to press criticism, should be applied to an official writing a confidential report. They considered that ambassadors did not inevitably and knowingly lay themselves open to close scrutiny of their every word and deed by both journalists and the population at large, still less so in the context of a confidential report.
89. They shared the view of the Chamber's minority that there was no country in which diplomatic reports were not confidential. They further argued that ambassadors abroad should be able to communicate with their governments and express themselves freely and without constraints without having to use with their own authorities the "diplomatic language" which was essential in relations between countries.
90. Moreover, if the approach taken by the Chamber judgment were followed, and diplomats were to run the risk of finding the memoranda

they wrote to their governments printed in the newspapers, they would most likely limit their communications either in substance or in form; this would inevitably distort the information received by States through these channels and hence detract from the quality and relevance of their foreign policies. Consequently, in the French Government's view, disclosures of this kind undoubtedly undermined the authority of diplomats posted abroad and, as a result, affected relations between States.

91. The French Government were not convinced by the Chamber's argument that the question whether the matter was of public interest should be assessed in the context of the "media coverage of the issue concerned" (see paragraph 49 of the Chamber judgment). In their view, this reasoning was flawed on two counts. Firstly, that would mean that the press itself, through its coverage of an issue, would determine the limits of its own freedom of expression; secondly, there were very few reports from ambassadors to their governments which did not deal with subjects of public interest.
92. In the view of the French Government, the Chamber had made a clear finding in the instant case that the requirements of journalistic ethics had not been complied with, as observed by the Press Council, but had not drawn the appropriate conclusions.
93. The French Government contended that the reasons given for the Chamber's decision had rendered nugatory the examination of the proportionality of the interference. This was all the more open to criticism since the aim pursued by States in seeking to protect the confidentiality of certain documents, and in particular diplomatic papers, was to safeguard not individual private interests, but the wider interests of the State and the harmony of international relations.
- ii *The Slovakian Government*
94. In the view of the Slovakian Government, Article 10 § 2 also covered information classified merely as "confidential", and hence of a lesser degree of confidentiality according to the Court's case-law.
95. The Slovakian Government were of the opinion that no legal system allowed journalists access to diplomatic papers. Hence, refusing to grant a request for access could not amount to a violation of Article 10.

96. They further argued that diplomatic correspondence enabled diplomatic services to exchange information on developments occurring in international relations or domestically which had implications for the country's foreign policy.
97. They did not share the Chamber's view that publication of a confidential document should be allowed if it did not jeopardise "national security" or "public safety" or undermine the country's very foundations.
98. The Slovakian Government took the view that the applicant had published only extracts from the paper in which the ambassador had expressed himself in non-neutral terms, thus making the articles shocking and sensational.
99. In the Slovakian Government's view, the applicant had clearly been aware that he had obtained a copy of the confidential document purely as a result of a breach of official secrecy by a third party.
100. They considered that the breach of journalistic rules found by the Chamber needed to be examined more closely by the Grand Chamber. Furthermore, the Chamber judgment, which had given inadequate consideration to the breach of those rules, pushed the boundaries of freedom of expression too far and was liable to have considerable negative repercussions in the future.

(d) The Court's assessment

i Principles developed by the Court

101. The main issue to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have been summed up as follows (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, pp. 2329 et seq., § 46, and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II):

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no

'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts"

102. The Court further reiterates that all persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities" the scope of which depends on their situation and the technical means they use (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49 *in fine*). Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see, for example, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III, and *Monnat v. Switzer-*

land, no. 73604/01, § 66, ECHR 2006-...).

103. Hence, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Monnat*, cited above, § 67; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI).

104. These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance. (As regards the principle, well established in the Court's case-law, whereby the Convention must be interpreted in the light of present-day conditions, see, for example, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, p. 15, § 31; *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14 et seq., § 26; *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).

105. Where freedom of the “press” is at stake, the authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists (see, by way of example, *Editions Plon v. France*, no. 58148/00, § 44, third subparagraph, ECHR 2004-IV).

106. Furthermore, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, for example, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, Reports 1996-V, p. 1957, § 58). The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see, for example, *Bladet Tromsø and Stensaas*, cited above, § 64, and *Jersild v. Denmark*, judgment

of 23 September 1994, Series A no. 298, p. 25, § 35).

107. However, while it appears that all the member States of the Council of Europe have adopted rules aimed at preserving the confidential or secret nature of certain sensitive items of information and at prosecuting acts which run counter to that aim, the rules vary considerably not just in terms of how secrecy is defined and how the sensitive areas to which the rules relate are managed, but also in terms of the practical arrangements and conditions for prosecuting persons who disclose information illegally (see the comparative study by Mr Christos Pourgourides, paragraph 44 above). States can therefore claim a certain margin of appreciation in this sphere.

ii *Application of those principles to the present case*

(a) The issue at stake in the present case: dissemination of confidential information

108. In the present case the domestic courts ordered the applicant to pay a fine of CHF 800 for having made public “secret official deliberations” within the meaning of Article 293 of the Criminal Code. In the view of the Swiss courts, the applicant had committed an offence by virtue of having published in a weekly newspaper a confidential report written by Switzerland's ambassador to the United States. The report had dealt with the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks.

109. Hence, the issue under consideration is the dissemination of confidential information, a sphere in which the Court and the Commission have already had occasion to rule, albeit in circumstances often different to those in the instant case (see, in particular, the following cases, listed in chronological order: *Z. v. Switzerland*, no. 10343/83, Commission decision of 6 October 1983, DR 35, pp. 229-234; *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177; *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216; *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A; *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252; *Vereniging Weekblad Bluf! v. the Netherlands*, judgment of 9 February 1995,

- Series A no. 306-A; *Fressoz and Roire*, cited above; *Editions Plon*, cited above; *Tourancheau and July v. France*, no. 53886/00, 24 November 2005; *Dammann v. Switzerland*, no. 77551/01, 25 April 2006; and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, 9 November 2006).
110. The Court confirms at the outset the applicability of the above-mentioned principles to the present case. Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as “public watchdog” and the ability of the press to provide accurate and reliable information may be adversely affected (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports 1996-II*, p. 500, § 39).
111. This is confirmed in particular by the principle adopted within the Council of Europe whereby publication of documents is the rule and classification the exception (see paragraph 41 above and Resolution 1551 (2007) of the Parliamentary Assembly of the Council of Europe on fair trial issues in criminal cases concerning espionage or divulging state secrets, paragraph 40 above). Similarly, the Inter-American Commission on Human Rights has taken the view that the disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests (see the submissions to the Inter-American Court of Human Rights in the case of *Claude Reyes and others v. Chile*, 19 September 2006, paragraph 43 above).
112. In order to ascertain whether the impugned measure was none the less necessary in the present case, a number of different aspects must be examined: the nature of the interests at stake (β), the review of the measure by the domestic courts (γ), the conduct of the applicant (δ) and whether or not the fine imposed was proportionate (ϵ).
113. The present case differs from other similar cases in particular by virtue of the fact that the content of the paper in question had been completely unknown to the public (see, in particular, *Fressoz and Roire*, cited above, § 53; *Observer and Guardian*, cited above, p. 34, § 69; *Weber*, cited above, pp. 22 et seq., § 49; *Vereniging Weekblad Bluf!*, cited above, pp. 15 et seq., § 43 et seq.; *Open Door and Dublin Well Woman*, cited above, p. 31, § 76; and *Editions Plon*, cited above, § 53).
114. In this context the Court shares the opinion of the Swiss and French Governments that the margin of appreciation of the domestic authorities in this case should not be determined by the nature and importance of the position held by the author of the document, in this instance a senior civil servant, given that the ambassador had assumed that the content of his report would remain confidential.
115. In addition, it should be noted that in the instant case, unlike other similar cases, the public's interest in being informed of the ambassador's views had to be weighed not against a private interest – since the report did not relate to the ambassador as a private individual – but against another public interest (see, conversely, *Fressoz and Roire*, cited above, § 53, on the subject of the declared income of a company's managing director and hence involving fiscal confidentiality). Finding a satisfactory solution to the issue of unclaimed funds, in which considerable sums of money were at stake, was not only in the interests of the Government and the Swiss banks but, since it related to compensation due to Holocaust victims, also affected the interests of survivors of the Second World War and their families and descendants. In addition to the substantial financial interests involved, therefore, the matter also had a significant moral dimension which meant that it was of interest even to the wider international community.
116. Accordingly, in assessing in the instant case whether the measure taken by the Swiss authorities was necessary, it must be borne in mind that the interests being weighed against each other were both public in nature: the interest of readers in being informed on a topical issue and the interest of the authorities in ensuring a positive and satisfactory outcome to the diplomatic negotiations being conducted.

(β) The interests at stake

- *The nature of the interests*

- *The public interest in publication of the articles*

117. In the Court's view, the manner of reporting in question should not be considered solely by reference to the disputed articles in the *Sonntags-Zeitung*, but in the wider context of the media coverage of the issue (see, *mutatis mutandis*, Bladet Tromsø and Stensaas, cited above, § 63).
118. In this regard the Court shares the view of the Chamber that the information contained in the Swiss ambassador's paper concerned matters of public interest (see paragraph 49 of the Chamber judgment). The articles were published in the context of a public debate about a matter which had been widely reported in the Swiss media and had deeply divided public opinion in Switzerland, namely the compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts. The discussions on the assets of Holocaust victims and Switzerland's role in the Second World War had, in late 1996 and early 1997, been very heated and had an international dimension (see, *mutatis mutandis*, Bladet Tromsø and Stensaas, cited above, § § 63 and 73).
119. The recent *Monnat* judgment (cited above), moreover, demonstrates the importance of the public debate and the deep divisions in Swiss public opinion on the question of the role actually played by Switzerland during the Second World War (*ibid.*, § 59). The Court notes that, in *Monnat*, the television documentary in question, which provoked such strong feeling and criticism among the Swiss public, was broadcast on 6 and 11 March 1997, that is, less than two months after the articles in the present case had been published, on 26 January 1997 (*ibid.*, § 6). It should be pointed out that the Court found the admission of viewers' complaints by the Federal Court to be in breach of Article 10 of the Convention (*ibid.*, § 69).
120. In short, there can be no doubting the public interest in the issue of unclaimed funds, which was the subject of impassioned debate in Switzerland, especially around the time when the applicant's articles were published.
121. It is also important, in the Court's view, to examine whether the articles in question were capable of contributing to the public debate on this issue.
122. Like the Press Council, the Chamber took the view that publication of the document in question had revealed, among other things, that the persons dealing with the matter had not yet formed a very clear idea as to Switzerland's responsibility and what steps the Government should take. The Chamber acknowledged that the public had a legitimate interest in receiving information about the officials dealing with such a sensitive matter and their negotiating style and strategy (see paragraph 49 of the Chamber judgment), such information affording the public one of the means of discovering and forming an opinion of the ideas and attitudes of political leaders (see, *mutatis mutandis*, in relation to politicians, *Ibrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, § 68 *in fine*, 10 October 2000, and *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42).
123. The Grand Chamber shares this view. In his report, the ambassador analysed the situation with regard to unclaimed assets and proposed some practical solutions. As the report covered a number of aspects, the fact that the applicant chose to concentrate almost exclusively on the personality of the ambassador and his individual style does not mean that his articles were of no relevance in the context of the public debate. In other words, the applicant could argue with some degree of legitimacy that it was important to inform the public of the bellicose language used by Ambassador Jagmetti, a major player in the negotiations, in order to contribute to the debate on the question of unclaimed funds.
124. In the Court's view, the impugned articles were capable of contributing to the public debate on the issue of unclaimed assets.
- *The interests the domestic authorities sought to protect*
 - *Confidentiality*
125. The report in question was written by a high-ranking diplomat. In that connection, the Chamber explicitly acknowledged the interest in protecting diplomatic activity against outside interference.
126. The Court agrees with the Government and the third-party interveners that it is vital to diplomatic services and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information (see also paragraph 5 of the Press Council opinion, paragraph 24 above). Admittedly, the disclosure at issue is not covered by the provisions on the inviolability of archives and documents contained in the Vienna Convention on Diplomatic Relations (Articles 24 et seq.), referred to

- by the Government (see paragraph 79 above), which are designed to protect the archives and documents of the accredited State against interference from the receiving State or persons or entities under its jurisdiction. Nevertheless, the principles derived from those provisions demonstrate the importance of confidentiality in this sphere.
127. The Court also attaches some importance to the Government's argument, based on the Press Council opinion, that the publishing of a report written by an ambassador and classified as "confidential" or "secret" might not only have an adverse and paralysing effect on a country's foreign policy, but might also make the official concerned almost automatically *persona non grata* in the host country (see paragraph 5 of the Press Council opinion, paragraph 24 above). The fact that Ambassador Jagmetti resigned following publication of his report attests to this.
128. At the same time the Court would reiterate the principle whereby the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, for example, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33). This principle must also be adhered to when it comes to assessing interference with a right. Consequently, in order to appear legitimate, the arguments relied on by the opposing party must also address in a practical and effective manner the grounds set forth in the second paragraph of Article 10. As exceptions to the exercise of freedom of expression, these must be subjected to close and careful scrutiny by the Court. In other words, while the confidentiality of diplomatic reports is justified in principle, it cannot be protected at any price. Furthermore, like the Press Council, the Court takes the view that the media's role as critic and watchdog also applies to the sphere of foreign policy (see paragraph 5 of the Press Council opinion, paragraph 24 above). Accordingly, preventing all public debate on matters relating to foreign affairs by invoking the need to protect diplomatic correspondence is unacceptable.
129. Consequently, in weighing the interests at stake against each other, the content of the diplomatic report in question and the potential threat posed by its publication are of even greater importance than its nature and form.
- *Repercussions in the circumstances of the case*
130. The Court notes that the Government did not succeed in demonstrating that the articles in question actually prevented the Swiss Government and Swiss banks from finding a solution to the problem of unclaimed assets which was acceptable to the opposing party. Nevertheless, that fact in itself cannot be a determining factor in the present case. What is important is to ascertain whether the disclosure of the report and/or the impugned articles were, at the time of publication, capable of causing "considerable damage" to the country's interests (see, *mutatis mutandis*, *Hadjianastassiou*, cited above, p. 19, § 45, *in fine*, for a case concerning military interests and national security in the strict sense).
131. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, for example, *Observer and Guardian*, cited above, p. 30, § 60; *Sunday Times v. the United Kingdom* (no. 2), judgment of 26 November 1991, Series A no. 217, pp. 29 et seq., § 51; and *Association Ekin v. France*, no. 39288/98 39288/98, § 56, ECHR 2001-VIII). Consequently, a journalist cannot in principle be required to defer publishing information on a subject of general interest without compelling reasons relating to the public interest or protection of the rights of others (see, for example, *Editions Plon*, cited above, § 53, with further references). The Court must determine whether this was the case here.
132. In that connection the Court is of the opinion that the disclosure of the extracts in question from the ambassador's report at that point in time could have had negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged on two counts. Here, a distinction must be made between the content of the ambassador's remarks and the way in which they were presented.
133. Firstly, with regard to the content of the report, it should be observed that at the time the applicant's articles were published in the *Sonn- und tags-Zeitung* the Swiss Government had been engaged for several weeks in difficult negotiations aimed at finding a solution to the sensitive issue of unclaimed assets. The Court shares the view of the Swiss courts that the content of the document written by the ambassador was of some importance since it amounted to an assessment of the delicate situation which Switzerland would have to deal with at the end of 1997. The document proposed various strat-

egies aimed at helping the respondent State find a way out of its predicament. It was thus intended to help the head of the task force to form his opinion and hence to influence the country's handling of the issue of unclaimed assets. As the Press Council rightly pointed out, reporting on what the ambassador thought and on what he based his opinions was very relevant (see paragraph 6 of the Press Council opinion, paragraph 24 above).

134. As to the formal aspect of the report, the language used by its author is clearly a consideration. While this may appear to be of secondary importance, the Court recalls its case-law, according to which even factors which appear relatively unimportant may have serious consequences and cause "considerable damage" to a country's interests (see, *mutatis mutandis*, *Hadjianastassiou*, cited above, p. 19, § 45).

135. In the present case the vocabulary used – which was considered bellicose by, among others, the Press Council – was clearly liable to provoke a negative reaction from the other parties to the negotiations, namely the World Jewish Congress and its American allies, and, in consequence, to compromise the successful outcome of negotiations which were regarded as difficult and which related to a particularly sensitive subject. Suffice it to note, by way of example, that the ambassador expressed the view in his report that Switzerland's partners in the negotiations were "not to be trusted" but that it was just possible that "an actual deal might be struck" with them. What is more, he described them as "adversaries".

136. In view of the foregoing, the Court is of the opinion that the disclosure – albeit partial – of the content of the ambassador's report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations in general and of having negative repercussions on the negotiations being conducted by Switzerland in particular. Hence, given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party in the present case.

(γ) The review of the measure by the domestic courts

137. It is not for the Court to take the place of the Parties to the Convention in defining their national interests, a sphere which traditionally forms part of the inner core of State sov-

ereignty. However, considerations concerning the fairness of proceedings may need to be taken into account in examining a case of interference with the exercise of Article 10 rights (see, *mutatis mutandis*, *Steel and Morris*, cited above, § 95). Consequently, the Court must determine whether the purely formal notion of secrecy underlying Article 293 of the Criminal Code is compatible with the requirements of the Convention. In other words it must examine whether, in the instant case, this purely formal notion was binding upon the courts to the extent that they were prevented from taking into consideration the substantive content of the secret document in weighing up the interests at stake, as an inability to take that into consideration would act as a bar to their reviewing whether the interference with the rights protected by Article 10 of the Convention had been justified.

138. In its judgment of 5 December 2000 on the applicant's appeal on grounds of nullity, the Federal Court reaffirmed the formal definition of the notion of secrecy. At the same time that judgement makes clear that, since the introduction of paragraph 3 of Article 293 of the Criminal Code in 1997, the court hearing a criminal case must determine in advance whether the "secret" classification appears justified in the light of the purpose and content of the disclosed documents; the cantonal authorities complied with that requirement in the instant case (see, in particular, paragraph 8 of the Federal Court judgment, paragraph 33 above). In that regard, the Federal Court explicitly acknowledged that Article 293 of the Criminal Code allowed the court to weigh up the interests at stake even if this did not have a bearing on the essential elements of the offence, and also to accept a possible extra-legal justification based on the protection of legitimate interests. In the instant case however, the Federal Court found that no such justification existed, with the result that it was not required to answer the question whether the interest in maintaining the confidentiality of the strategy paper took precedence over the public interest in being informed of the extracts published in the newspapers. Nevertheless, it considered that the substantive conclusions drawn by the cantonal authorities in that regard had been coherent and well-founded (see, in particular, paragraph 9 of the Federal Court judgment, paragraph 33 above).

139. In conclusion, given that the Federal Court verified whether the "confidential" classification of

the ambassador's report had been justified and weighed up the interests at stake, it cannot be said that the formal notion of secrecy on which Article 293 of the Criminal Code is based prevented the Federal Court, as the court of final instance, from determining in the instant case whether the interference at issue was compatible with Article 10.

(δ) The applicant's conduct

140. As far as the ethics of journalism are concerned, a distinction must be made between two aspects in the instant case: the manner in which the applicant obtained the report in question and the form of the impugned articles.

- *The manner in which the applicant obtained the report*

141. The Court considers that the manner in which a person obtains information considered to be confidential or secret may be of some relevance for the balancing of interests to be carried out in the context of Article 10 § 2. In that regard, the applicant submitted that the Swiss authorities had prosecuted and convicted the wrong person, since he had never been accused of having obtained the document in question by means of trickery or threats (see, *mutatis mutandis*, *Dammann*, cited above, § 55 *in fine*) and the officials responsible for the leak were never identified or punished.

142. It should be noted in that regard that the applicant was apparently not the person responsible for leaking the document. In any event, no proceedings were instituted on that basis by the Swiss authorities.

143. Furthermore, it is primarily up to States to organise their services and train staff in such a way as to ensure that no confidential or secret information is disclosed (see *Dammann*, cited above, § 55). In that regard, the authorities could have opened an investigation with a view to prosecuting those responsible for the leak (see, *mutatis mutandis*, *Craxi v. Italy* (no. 2), no. 25337/94, § 75, 17 July 2003).

144. Nevertheless, the fact that the applicant did not act illegally in that respect is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities. In any event, as a journalist, he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Criminal Code (see, *mutatis mutandis*, *Fressoz and Roire*, cited above, § 52).

- *The form of the articles*

145. In the present case, the question whether the form of the articles published by the applicant was in accordance with journalistic ethics carries greater weight. In this regard the opinion of the Press Council, a specialised and independent body, is of particular importance.

146. The Court reiterates at the outset that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Consequently, it is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists (see, for example, *Jersild*, cited above, p. 23, § 31, and *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, p. 236, § 48).

147. Nevertheless, like the Press Council, the Court observes a number of shortcomings in the form of the published articles. Firstly, the content of the articles was clearly reductive and truncated. The Court has already observed that the applicant was entitled to concentrate in the articles on the ambassador's personality (see paragraphs 122-124 above); however, it cannot overlook the fact that the articles quoted at times isolated extracts from the report in question, taken out of context, and that they focused on only one of the strategies outlined by the ambassador, namely that of a "deal".

It would have been possible to accompany the articles in the *Sonntags-Zeitung* with the full text of the report, as the *Tages-Anzeiger* and the *Nouveau Quotidien* largely did the following day, and thus to allow readers to form their own opinion (see, *mutatis mutandis*, *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 35, ECHR 2000-X). The Court is not persuaded by the arguments advanced by the editors of the *Sonntags-Zeitung* that, on 25 January 1997, it would have been virtually impossible to add another page to the newspaper and that plans to publish the full text on the Internet were abandoned owing to technical problems.

148. Secondly, the vocabulary used by the applicant tends to suggest that the ambassador's remarks were anti-Semitic. Admittedly, freedom of the press covers possible recourse to a degree of exaggeration, or even provocation (see, for example, *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38). The fact remains that the applicant,

in capricious fashion, started a rumour which related directly to one of the very phenomena at the root of the issue of unclaimed assets, namely the atrocities committed against the Jewish community during the Second World War. The Court reiterates the need to deal firmly with allegations and/or insinuations of that nature (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, judgment of 23 September 1998, Reports 1998-VII, p. 2886, § 53, and *Garaudy v. France*, (dec.), no. 65831/01, ECHR 2003-IX). Moreover, the rumour in question most likely contributed to the ambassador's resignation.

149. Thirdly, the way in which the articles were edited seems hardly fitting for a subject as important and serious as that of the unclaimed funds. The sensationalist style of the headings and sub-headings is particularly striking ("Ambassador Jagmetti insults the Jews – Secret document: Our adversaries are not to be trusted" and "The ambassador in bathrobe and climbing boots puts his foot in it – Swiss Ambassador Carlo Jagmetti's diplomatic blunders"; for the German titles, see paragraphs 18 and 19 above). In the Court's view, it is of little relevance whether the headings were chosen by the applicant or the newspaper's editors. The picture on page 7 of the *Sonntags-Zeitung* of 26 January 1997 accompanying the second article, which showed the ambassador in a bathrobe (see paragraph 19 above), seems to confirm the trivial nature of the applicant's articles, in clear contrast to the seriousness of the subject matter. Moreover, the headings, sub-headings and picture in question have no obvious link to the subject matter but have the effect of reinforcing the reader's impression of someone ill-fitted to hold diplomatic office.
150. Fourthly, the articles written by the applicant were also inaccurate and likely to mislead the reader by virtue of the fact that they did not make the timing of the events sufficiently clear. In particular, they created the impression that the document had been written on 25 January 1997, whereas in fact it had been written over four weeks earlier, on 19 December 1996 (see also the criticism made by the Press Council in paragraph 7 of its opinion, paragraph 24 above).
151. In view of the above considerations, and having regard also to the fact that one of the articles was placed on the front page of a Swiss Sunday newspaper with a large circulation, the Court shares the opinion of the Government

and the Press Council that the applicant's chief intention was not to inform the public on a topic of general interest but to make Ambassador Jagmetti's report the subject of needless scandal. It is therefore easy to understand why the Press Council, in its conclusions, criticised the newspaper clearly and firmly for the form of the articles as being in clear breach of the "Declaration on the rights and responsibilities of journalists" (see paragraph 7 of the Press Council opinion and point 5 of its findings, paragraph 24 above).

152. Accordingly, the Court considers that the truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate protected by Article 10 of the Convention.
- (ε) Whether the penalty imposed was proportionate
153. The Court reiterates that the nature and severity of the penalty imposed are further factors to be taken into account when assessing the proportionality of interference (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 64, second sub-paragraph, ECHR 1999-IV, and *Chauvy and Others v. France*, no. 64915/01, § 78, ECHR 2004-VI).
154. Furthermore, the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog (see, *mutatis mutandis*, *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, p. 26, § 58; *Lingens*, cited above, p. 27, § 44; and *Monnat*, cited above, § 70). In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed (see, for example, *Jersild*, cited above, p. 25, § 35, first sub-paragraph; *Lopes Gomes da Silva*, cited above, § 36; and *Dammann*, cited above, § 57).
155. On the other hand, a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information (see para-

- graph 44 above).
156. In the instant case it should be observed that the penalty imposed on the applicant could hardly be said to have prevented him from expressing his views, coming as it did after the articles had been published (see, by converse implication, *Observer and Guardian*, cited above, p. 30, § 60).
157. In addition, the amount of the fine (CHF 800, or approximately EUR 476 at current exchange rates) was relatively small. Moreover, it was imposed for an offence coming under the heading of "minor offences" within the meaning of Article 101 of the Criminal Code as in force at the relevant time, which constituted the lowest category of acts punishable under the Swiss Criminal Code. More severe sanctions, even going as far as a custodial sentence, apply to the same offence both under Article 293 of the Criminal Code and in the laws of other Council of Europe member States (see paragraph 59 of the comparative study by Mr Christos Pourgourides, paragraph 44 above).
158. The Zürich District Court, in its judgment of 22 January 1999, also accepted the existence of extenuating circumstances and took the view that the disclosure of the confidential paper had not undermined the very foundations of the State.
159. It is true that no action was taken to prosecute the journalists who, the day after the applicant's articles appeared, published the report in part and even in full, and therefore, on the face of it, revealed much more information considered to be confidential. However, that fact in itself does not make the sanction imposed on the applicant discriminatory or disproportionate. Firstly, the applicant was the first to disclose the information in question. Secondly, the principle of discretionary prosecution leaves States considerable room for manoeuvre in deciding whether or not to institute proceedings against someone thought to have committed an offence. In a case such as the present one they have the right, in particular, to take account of considerations of professional ethics.
160. Lastly, as regards the possible deterrent effect of the fine, the Court takes the view that, while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case.
161. In view of all the above factors, the Court does not consider the fine imposed in the present

case to have been disproportionate to the aim pursued.

iii *Conclusion*

162. Having regard to the foregoing, the Court is of the view that, in weighing the interests at stake in the present case against each other in the light of all the relevant evidence, the domestic authorities did not overstep their margin of appreciation. Accordingly, the applicant's conviction can be said to have been proportionate to the legitimate aim pursued. It follows that there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds by twelve votes to five that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 December 2007.

Vincent Berger, *Jurisconsult*

Jean-Paul Costa, *President*

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

- (a) concurring opinion of Mrs Ziemele;
- (b) dissenting opinion of Mr Zagrebelsky, joined by Mr Lorenzen, Mrs Fura Sandström, Mrs Jaeger and Mr Popović.

CONCURRING OPINION OF JUDGE ZIEMELE

I voted with the majority in favour of finding that there has been no violation of Article 10 in the circumstances of this case. However, I do not share the reasoning of the majority on one specific point.

Beginning in paragraph 125 of the judgment, the Court looks in great detail at the interests which the domestic authorities sought to protect in this case. The first interest is the protection of the confidentiality of information within diplomatic services so as to ensure the smooth functioning of international relations. The Court takes the opportunity to articulate a very important principle as regards the role that Article 10 plays in international relations and

foreign-policy decisions of States Parties, namely, that “preventing all public debate on matters relating to foreign affairs by invoking the need to protect diplomatic correspondence is unacceptable” (see paragraph 128). Certain well-known foreign-policy decisions of the last few years, for example, which led to complex international events and developments, demonstrate the importance of debate and transparency in this field.

Subsequently, the majority of the Court addresses the question of the repercussions that the published articles concerning Ambassador Jagmetti and his confidential report had on the negotiations between Switzerland and the World Jewish Congress and the other interested parties on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts (see paragraphs 130-136). The majority of the Court first notes that the Government did not show that the published articles had actually prevented Switzerland and the banks in question from finding a solution to the problem (see paragraph 130). Nevertheless, the majority decides to assess whether, at the moment of their publication, the articles were such as to cause damage to the interests of the State. It comes to the conclusion that “... the disclosure – albeit partial – of the content of the ambassador’s report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations in general and of having negative repercussions on the negotiations being conducted by Switzerland in particular. Hence, given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party in the present case” (see paragraph 136).

I disagree that the Court of Human Rights should single out the interests of the respondent party in these negotiations. The negotiations involved several parties but, above all, they related to a particularly difficult and delicate general interest and had implications extending beyond the Swiss public. The judgment points out elsewhere that “[t]he discussions on the assets of Holocaust victims and Switzerland’s role in the Second World War had, in late 1996 and early 1997, been very heated and had an international dimension” (see paragraph 118). Indeed, discussions about the State’s responsibilities under international law came up in this context.

The Court should instead have considered whether the partial disclosure of the report at that time was likely to contribute to the resolution of a long-standing, important international issue or, on the contrary and to the detriment of all parties, was

likely to make matters even more difficult.

The case under consideration shows that, in today’s globalised world, national audiences may not be the only public interests to be served by the media and others.

DISSENTING OPINION OF JUDGE ZAGREBELSKY JOINED BY JUDGES LORENZEN, FURA- SANDSTRÖM, JAEGER AND POPOVIĆ

(Translation)

I regret that I am unable to subscribe to the reasoning and conclusion adopted by the majority in the present case.

Until they reach paragraph 147 of the judgment readers could easily believe that the Court is heading towards finding a violation of Article 10 of the Convention. It is only from that point on that the majority reveals the real reason for its negative assessment of the articles published by the applicant. But this seems to me to be a dangerous and unjustified departure from the Court’s well-established case-law concerning the nature and vital importance of freedom of expression in democratic societies.

My reasons for saying so are as follows. In paragraphs 54 to 62 the Court quite rightly excludes the possibility that, in the present case, the interference with the applicant’s exercise of his freedom of expression under Article 10 of the Convention could be justified by any aim other than preventing the disclosure of confidential information. The Court finds the other aims mentioned by the Government, namely protection of national security, public safety and the reputation or rights of others, to be without relevance in the case. The only remaining justification therefore is protection of secret information.

In that connection it should be noted that the protection of confidential information, unlike any other aim mentioned in Article 10 § 2, is functional in nature. If information which falls within the sphere of individual privacy is disregarded, it does not represent a value in itself (I am more inclined to say that the opposite is true, in a democratic society, at least as far as information regarding public authority is

concerned). On the contrary, it is taken into consideration only because it serves to protect those values and interests which do merit protection at the expense of freedom of expression. It seems to me therefore that – for the purposes of Article 10 – the legitimacy of classifying a document or information as “confidential” cannot be assessed, nor can the value of such classification be “weighed” against the fundamental freedom of expression, without identifying and “weighing up” the underlying value or interest for the protection of which the information must remain confidential.

But the majority, after stating that “the confidentiality of diplomatic reports is justified in principle, [but] cannot be protected at any price” (see paragraph 128), and that “the Government did not succeed in demonstrating that the articles in question actually prevented the Swiss Government and Swiss banks from finding a solution to the problem of unclaimed assets which was acceptable to the opposing party” (see paragraph 130), ultimately takes into consideration merely the “confidentiality” of the document, publication of which quite obviously undermined “the climate of discretion necessary to the successful conduct of diplomatic relations in general” (see paragraph 136). What follows, in the same paragraph, which states that publication was capable of “having negative repercussions on the negotiations being conducted by Switzerland” and that “given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party”, is merely a hypothesis, if not a *petitio principii*. In sum, this reasoning renders meaningless the principle whereby any interference with the right of free expression must be properly justified.

However, even if one follows the majority's reasoning, it seems clear to me that any damage sustained must have been very minor when judged against everything the Court has said in numerous judgments about the importance of freedom of expression, particularly where it is a question of unmasking and criticising the conduct of the public authorities and those through whom public authority is mediated. It is worth pointing out in this regard that the issue at stake was the publication of a few passages from a letter which the Swiss ambassador in Washington had sent to more than twenty individuals and offices; moreover, no proceedings were instituted against the other newspapers which published the document virtually in full (and obviously knew about it). The criticism of the applicant for having published only a few extracts from the document relating specifically to the way in which the ambassador expressed himself be-

comes, paradoxically, a factor which counts against him, and the majority goes so far as to suggest that it would have been wiser to publish the document in full (see paragraph 147 of the judgment). In my view, therefore, this interest in discretion could not on its own justify restricting the exercise of journalistic freedom in a public-interest context (see paragraphs 113 to 124 of the judgment).

I can see no reason to depart from the Court's case-law to the effect that the criterion for assessing whether interference is necessary in a democratic society must be whether it corresponds to a “pressing social need”, that “the authorities have only a limited margin of appreciation” in this sphere (see paragraph 105) and that “the most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken ... by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern” (paragraph 106) (see, among other authorities, the following judgments: *Handyside v. the United Kingdom*, 7 December 1976, § 48; *Sunday Times v. the United Kingdom*, 26 April 1979, § 59; *Lingens v. Austria*, 8 July 1986, § § 39-41; *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59; *Hertel v. Switzerland*, 25 August 1998, § 46; and *Steel and Morris v. the United Kingdom*, 15 February 2005, § 87).

In its judgment of 7 June 2007 in the case of *Du-puis and Others v. France* (application no. 1914/02), where the applicants were journalists convicted of breaching the secrecy of a criminal investigation, the Court stated as follows: “Where the press is concerned, as in the present case, the national power of appreciation conflicts with a democratic society's interest in securing and maintaining freedom of the press. Considerable weight should likewise be attached to that interest when it is a matter of determining, as required by the second paragraph of Article 10, whether the restriction was proportionate to the legitimate aim pursued”. It is regrettable in my opinion that the Grand Chamber, instead of developing and applying these principles, should be tending in the opposite direction, particularly at a time when a series of episodes in the democratic world has shown that, even in the sphere of foreign policy, democratic scrutiny is possible only after confidential documents have been leaked and made public.

However, the judgment does not accept the necessity in a democratic society of the interference in question solely on the basis of the authorities' interest in discretion. On the contrary, in paragraph 147 of the judgment, the majority addresses what appears to me to be the real reason for its criticism

of the journalist, one which, in its view, justifies his conviction, namely the “form of the articles”.

The judgment reiterates that Article 10 protects the substance of the ideas and information expressed and the form in which they are conveyed. “Consequently, it is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists” (see paragraph 146 of the judgment). Having said that, the majority seems to me to contradict itself by stating in the following paragraph: “Nevertheless, like the Press Council, the Court observes a number of shortcomings in the form of the published articles”. The judgment does not give any reason for this surprising “nevertheless”, which introduces an element of censure regarding the form chosen by the journalist and leads the Court to endorse the wholly different position of a private body concerned with journalistic ethics. Moreover, the majority does not ultimately attach any weight to the purpose of the applicant’s articles, which, as it itself acknowledges in paragraph 123, clearly related to the ambassador’s controversial handling of several episodes, and in particular of the issue of unclaimed assets lodged by Holocaust victims in Swiss bank accounts. This issue obviously provided the backdrop to the articles; however, the latter clearly targeted the personality, as well as the character and attitudes of an ambassador who was an important player in the negotiations. And in my opinion, the judgment falls into a trap on account of the fact that, at the domestic level, criminal proceedings for disclosure of a confidential document were brought in place of defamation proceedings, which were not instituted at any point (see paragraph 152 of the judgment).

This case, however, relates solely to a criminal prosecution for publication of official deliberations within the meaning of Article 293 of the Criminal Code.

Let me now turn to my conclusions. In my opinion the authorities’ interest in discretion referred to in paragraph 136 of the judgment is not sufficient in this case to outweigh the journalist’s freedom. The examination and criticism of the form of the articles seem to me unduly harsh in view of the fact that the journalist focused his remarks on the ambassador (who did not complain as a result). In any event, it is my opinion that the majority’s criticism concerning the form of the applicant’s articles is not relevant from the Court’s perspective.

As to the penalty imposed and its potentially adverse effect on the exercise of journalistic freedom,

I subscribe to the conclusions of the Chamber in this case and those of the *Dupuis* judgment, cited above.

The Court has consistently held that freedom must be construed broadly and that any restrictions must, by contrast, be applied restrictively. In the light of this guiding principle, it seems clear to me that the Court should have found a violation of the right to freedom of expression.

ECHR

ECJ

SECOND SECTION

**CASE OF SEGERSTEDT-
WIBERG AND OTHERS v
SWEDEN**

(Application no. 62332/00)

JUDGMENT

STRASBOURG

6 June 2006

FINAL

06/09/2006

NATIONAL SECURITY, PUBLIC INTEREST, STORAGE OF INFORMATION, PRIVATE LIFE, DEMOCRACY, BALANCE, PREVENTION OF CRIME, ORDER

IN THE CASE OF SEGERSTEDT-WIBERG AND OTHERS V. SWEDEN,

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

Jean-Paul Costa, *President*,
András Baka,
Ireneu Cabral Barreto,
Antonella Mularoni,
Elisabet Fura-Sandström,
Danutė Jočienė,
Dragoljub Popović, *judges*,
and **Sally Dollé**, *Section Registrar*,

Having deliberated in private on 20 September 2005 and 16 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 62332/00) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 7 October 2000 by five Swedish nationals: (1) Ms Ingrid Segerstedt-Wiberg (born in 1911), (2) Mr Per Nygren (born in 1948), (3) Mr Staffan Ehnebom (born in 1952), (4) Mr Bengt Frejd (born in 1948) and (5) Mr Herman Schmid (born in 1939) ("the applicants").
2. The applicants were represented by Mr D. Töllborg, Professor of Law, practising as a lawyer in Västra Frölunda. The Swedish Government ("the Government") were represented by their Agent, Mr C.H. Ehrenkrona, of the Ministry of Foreign Affairs.
3. The applicants alleged, in particular, that the storage in the Security Police files of certain information that had been released to them constituted unjustified interference with their right to respect for private life under Article 8 of the Convention. Under this Article, they further

complained of the refusal to advise them of the full extent to which information concerning them was kept on the Security Police register. The applicants also relied on Articles 10 and 11. Lastly, they complained under Article 13 that no effective remedy existed under Swedish law in respect of the above violations.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).
6. By a decision of 20 September 2005, the Chamber declared the application partly admissible.
7. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The present application was brought by five applicants, all of whom are Swedish nationals: (1) Ms Ingrid Segerstedt-Wiberg (born in 1911), (2) Mr Per Nygren (born in 1948), (3) Mr Staffan Ehnebom (born in 1952), (4) Mr Bengt Frejd (born in 1948) and (5) Mr Herman Schmid (born in 1939). The first applicant lives in Gothenburg, the second applicant lives in Kungsbacka and the third and fourth applicants live in Västra Frölunda, Sweden. The fifth applicant lives in Copenhagen, Denmark.
- A. The first applicant, Ms Ingrid Segerstedt-Wiberg**
9. The first applicant is the daughter of a well-known publisher and anti-Nazi activist, Mr Torgny Segerstedt. From 1958 to 1970 she was a Liberal member of parliament. During that period she was a member of the Standing Committee on the Constitution (*konstitutionsutskottet*). She has also been Chairperson of the United Nations Association of Sweden. She is a prominent figure in Swedish political and

cultural life.

10. On 22 April 1998, relying on section 9A of the Police Register Act (*lag om polisregister m.m.*, 1965:94), the first applicant made a request to the Minister of Justice for access to her Security Police records. She said that she had become aware of certain material held by the foreign service of the United States of America from which it appeared that since the Second World War she and others had been under continuous surveillance, in particular because of her work for the United Nations Association of Western Sweden. That information had originated from Sweden and had apparently been communicated by the United States to other countries in order to cause her damage and harm her work for the protection of refugees. She also referred to the spreading of rumours that she was “unreliable” in respect of the Soviet Union. Those rumours had started during the 1956 parliamentary elections, but had not prevented her, a couple of years later, being returned to Parliament or sitting on its Standing Committee on the Constitution.

By a decision of 17 June 1998, the Ministry of Justice refused her request. It pointed out that absolute secrecy applied not only to the content of the police register but also to whether or not a person was mentioned in it. The government considered that the reasons relied on by the first applicant, with reference to section 9A of the Police Register Act, could not constitute special grounds for derogation from the rule of absolute secrecy.

Appended to the refusal was a letter signed by the Minister of Justice, pointing out that neither the first applicant’s previous access to material indicating that she had been the subject of secret surveillance nor the age of any such information (40 to 50 years old) could constitute a special reason for a derogation under section 9A of the Act. The Minister further stated:

“As you may be aware, some time ago the government submitted a proposal to Parliament as to the manner in which the Security Police register should be made more accessible to the public. It may be of interest to you to know that a few weeks ago Parliament passed the bill, which means that absolute secrecy will be abolished. The bill provides that the Security Police must make an assessment of the need for secrecy on a case-by-case basis, which opens up new possibilities for individuals to see records that are today covered by absolute secrecy. It is first of all historical material that

will be made accessible.”

11. On 28 April 1999, following an amendment on 1 April 1999 to Chapter 5, section 1(2), of the Secrecy Act 1980 (*sekretesslagen*, 1980:100), the first applicant submitted a new request to the Security Police to inform her whether or not her name was on the Security Police register.

On 17 September 1999 the Security Police decided to grant the first applicant authorisation to view “seventeen pages from the Security Police records, with the exception of information about Security Police staff and information concerning the Security Police’s internal [classifications]”. Beyond that, her request was rejected, pursuant to Chapter 5, section 1(2), of the Secrecy Act 1980, on the ground that further “information could not be disclosed without jeopardising the purpose of measures taken or anticipated or without harming future operations”.

On 4 October 1999 the first applicant went to the headquarters of the Security Police in Stockholm to view the records in question. They concerned three letter bombs which had been sent in 1990 to Sveriges Radio (the national radio corporation of Sweden), to her and to another well-known writer (Hagge Geigert) because of their stand against Nazism and xenophobia and in favour of the humanitarian treatment of refugees in conformity with international treaties ratified by Sweden. The Security Police had gathered a number of police reports, photographs and newspaper cuttings, and had reached the conclusion that there was nothing to confirm the suspicion that there was an organisation behind the letter bombs. That was all the information the first applicant was allowed to view.

12. On 8 October 1999 the first applicant instituted proceedings before the Administrative Court of Appeal (*kammarrätten*) in Stockholm, requesting authorisation to view the entire file on her and other entries concerning her that had been made in the register. In a judgment of 11 February 2000, the court rejected her request. Its reasoning included the following:

“The Administrative Court of Appeal considers that, beyond what emerges from the documents already released, it is not clear that information about whether or not [the first applicant] is on file in the Security Police records regarding such activities as are referred to in Chapter 5, section 1(2), could be disclosed

without jeopardising the purpose of measures taken or anticipated or without harming future operations.”

13. On 28 February 2000 the first applicant appealed to the Supreme Administrative Court (*Regeringsrätten*). She submitted that the rejection of her request had left her with the impression of being accused of involvement in criminal activities. In order to counter these accusations, she requested permission to see all files concerning her.

On 10 May 2000 the Supreme Administrative Court refused the first applicant leave to appeal.

14. During the proceedings before the Strasbourg Court, the Government provided the following additional information.

The first applicant was put on file for the first time in 1940. The Security Police were interested in her because of the circles in which she moved and which, during the war in Europe, were legitimately targeted by the security services. In accordance with the legislation in force at the relevant time, additional entries were made in her file until 1976, in part on independent grounds and in part to supplement records entered previously.

Between 1940 and 1976, information and documents regarding the first applicant had been collected in the filing system that existed at the time. While those documents were microfilmed, no documents concerning her had been microfilmed since 1976. The documents contained in the file were probably weeded some time before 1999. However, while back-up copies on microfiche had been retained, they were not accessible in practice, unless marked as having already been “deactivated”.

A new filing system was introduced in 1980-82. As the first applicant came under a bomb threat in 1990, a new file on her was opened under the new system. It included a reference to the previous file under the old system and the microfilm number required to retrieve the microfiche. The Security Police’s register was also updated with the new information regarding the first applicant. The 1990 file had also been weeded. It was not destroyed but transferred to the National Archives.

The first applicant was again put on file by the Security Police in 2001, because of a new incident that could have been interpreted as a threat against her.

On 13 December 2002 the Security Police decided of their own accord to release all stored information that had been kept about the applicant until 1976, representing fifty-one pages. No copies of these documents or particulars of their specific content were submitted to the Court.

B. The second applicant, Mr Per Nygren

15. The second applicant is an established journalist at *Göteborgs-Posten*, one of the largest daily newspapers in Sweden. He is the author of a number of articles published by that paper on Nazism and on the Security Police that attracted wide public attention.
16. On 27 April 1998 the Security Police rejected a request by the applicant for access to their quarterly reports on communist and Nazi activities for the years 1969 to 1998, and for information on which authorities had received those reports.
17. By a letter of 7 June 1999 addressed to the Security Police, the second applicant stated that, having received one of the quarterly reports from the police in Karlskrona, he had become aware that the Security Police had been interested in him; he therefore wished “to read [his] file and all other documents at [their] disposal where [his] name might occur”. In addition, the second applicant made a similar request in respect of his recently deceased father, in accordance with the latter’s wishes.

In a decision of 11 November 1999, the Security Police allowed the applicant’s request in part by replying that his father did not appear in any files or entries in the register and rejected the remainder of his request. It stated:

“As from 1 April 1999 the treatment of personal data by the Security Police of the kind referred to in your request is governed in the first place by the Police Data Act (1998:622).

According to Chapter 5, section 1(2), of the Secrecy Act (1980:100), secrecy applies to information relating to undercover activities under section 3 of the Police Data Act or that otherwise falls within the Security Police’s remit in preventing or revealing crimes committed against the security of the Realm or in preventing terrorism, if it is not clear that the information may be imparted without jeopardising the purpose of the decision or measures planned or without harm to future activities. The implied starting-point is that secrecy applies as the main rule irrespective of whether the information, for example, appears in a file

or emanates from a preliminary investigation or undercover activities.

In the preparatory work for the relevant provision of the Secrecy Act (*prop.* 1997/98:97, p. 68), it is stated that even information about whether a person is mentioned in a secret intelligence register should be classified in accordance with Chapter 5, section 1, of the Secrecy Act. It is further stated that in view of the nature of undercover activities only in special circumstances can there be a question of disclosing information. If there are no such circumstances, the government assume in accordance with the preparatory work that even the information that a person is not registered is classified as secret under the Act.

In the present case the Security Police consider that ... the fact that your father was born in 1920 and has recently passed away satisfies the kind of conditions in which information can be disclosed that a person is not registered.

In so far as your request concerns yourself, it is rejected for the reasons given in the preparatory work and the relevant provisions of the Secrecy Act."

According to the applicant, the above reasons given for the rejection of the request made for access to his own records were identical to those given in all other rejection cases.

18. In their pleadings to the Court, the Government stated that at the time of the Security Police's decision on 11 November 1999 it had not been possible to find the file owing to the fact that the second applicant had not been the subject of a personal record in connection with the report in issue.
19. On 25 November 1999 the second applicant appealed to the Administrative Court of Appeal in Stockholm, requesting authorisation to view his file and all other entries made on him by the Security Police. He relied on certain written evidence to the effect that he had been mentioned in the records of the Security Police, notably on the cover page and page 7 of a secret report dating back to the third quarter of 1967 and emanating from Section (*byrå*) A of the Security Police, that had been released by the Karlskrona police shortly beforehand. The report was entitled "Presentation on communist and Nazi activities in Sweden from July to September 1967". Page 7 contained the following statement:

"On 18-20 September a meeting was held

within the DUV [*Demokratisk Ungdoms Världsfederation* – World Federation of Democratic Youth] in Warsaw. A youngster, probably [identifiable as] Mr Per Rune Nygren from Örebro, participated as a representative for the VUF [*Världsongdomsfestivalen* – World Youth Festival]."

The second applicant requested, in particular, access to the quarterly reports for the years 1969-98 and information regarding the authorities to which those reports had been communicated. He stressed that since he had never been convicted, charged or notified of any suspicion of crime and had never taken part in any illegal, subversive or terrorist activity, refusing him full access to the files could not be justified. The wishes of the Security Police to maintain secrecy about their work should have been balanced against his interest in clarifying the extent of the violation that he had suffered, not only through their collection of information about him but also through their disclosure of such information.

20. In accordance with standard procedure, the appeal was brought to the attention of the Security Police, who then decided, on 20 December 1999, to release the same two pages of the 1967 report referred to above, while maintaining their refusal regarding the remainder of the second applicant's initial request. The reasons given were largely the same as in the first decision, with the following addition:

"In the Security Police archives there are a number of documents which contain information both about different subject matter and individuals. The fact that such documents exist in the Security Police's archives does not mean that all information in the documents is registered and therefore searchable. Information which is not registered can only be retrieved if details have been submitted about the document in which the information is contained. Since you provided us with such details, it was possible for us to find the document you asked for in your request."

After receipt of the above decision, the second applicant had a telephone conversation with Ms Therese Mattsson, an officer of the Security Police (who had signed the decision of 27 April 1998). According to the applicant, she explained that, when dealing with requests such as his, only documents that were searchable by computer would be verified, which was the reason why the initial request had been rejected in its entirety and access had been granted to the two pages of the 1967 report.

21. In his appeal to the Administrative Court of Appeal, the applicant pointed out that from the above telephone conversation it emerged, firstly, that since 1969 several hundred thousand personal files in the Security Police's register had been destroyed. Secondly, information about persons whose files had been erased could still be found in the Security Police's archives but could not be searched under names or personal identity numbers. Thirdly, the so-called destruction lists, comprising several hundred thousand names, was all that remained of the erased files. The second applicant complained that the Security Police had failed to search those lists (assuming that the files no longer existed).

On 14 February 2000 the Administrative Court of Appeal dismissed the appeal in its entirety, giving essentially the same reasons as the Security Police, with the following further considerations:

"In connection with the introduction of [section 3 of the Police Data Act], the government stated that even the information that a person is not registered by the Security Police is such that it should be possible to keep it secret under the said provision (*prop.* 1997/98:97, p. 68). According to the government bill, the reason is the following. A person who is engaged in criminal activity may have a strong interest in knowing whether the police have information about him or her. In such a case it could be highly prejudicial to the investigation for the person concerned to be informed whether or not he or she is of interest to the police. It is therefore important for a decision on a request for information from the register not to have to give information on whether the person appears in the register or not. The nature of secret intelligence is such that there can only be disclosure of information in special cases.

The Administrative Court of Appeal finds that it is not clear that information, beyond that which emerges from the disclosed documents, about whether [the second applicant] has been the subject of any secret police activity falling under Chapter 5, section 1(2), of the Secrecy Act can be disclosed without jeopardising the purpose of measures taken or anticipated or without harming future operations."

22. On 25 July 2000 the Supreme Administrative Court refused the second applicant leave to

appeal.

C. The third applicant, Mr Staffan Ehnebon

23. The third applicant has been a member of the KPML(r) (*Kommu-nistiska Partiet Marxist-Leninisterna* – Marxist-Leninist (revolutionaries) Party, established in 1970) since 1978. He is an engineer, and since 1976 has been employed by the Ericsson Group.
24. On 10 April 1999, after the absolute secrecy requirement applying to information held in the records of the Security Police had been lifted on 1 April 1999, the third applicant submitted a request to the Security Police to see all files that might exist on him. By a decision dated 17 November 1999, the Security Police granted him access to thirty pages, two of which could only be read on the Security Police's premises and could not be copied by technical means. Copies of the twenty-eight remaining pages were sent to his home. Twenty-five of these consisted of the decision by the Parliamentary Ombudsperson concerning the above-mentioned matter and the three remaining pages were copies of press articles, two dealing with the applicant and a third, not mentioning him, consisting of a notice from the paper *Proletären* about a forthcoming 1993 KPML(r) party congress. Thus, all of the said twenty-five pages contained publicly available, not classified, material. The two pages which the third applicant was permitted to see on the Security Police's premises consisted of two security checks concerning him dating from 1980. These were copies of forms used by the FMV (the *Försvarets Materialverk*, an authority responsible for procuring equipment for the Swedish Army, and with whom the Ericsson Group worked) to request a personnel check (now known as a register check) concerning the third applicant. The registered information contained the following text in full:

"In September 1979 it was revealed that [the third applicant] was/is a member of the Frölunda cell of the KPML(r) in Gothenburg. At this time he was in contact with leading members of the KPML(r) regarding a party meeting in the Frölunda town square."

25. The third applicant submitted that the above information about his membership of the KPML(r) was the real reason for the FMV's demand that he be removed from his post, although every authority involved would deny this. He pointed out that the KPML(r) was a registered and lawful political party that took

part in elections.

26. On 24 November 1999 the third applicant appealed against the decision of the Security Police to the Administrative Court of Appeal, maintaining his request to see all the material that the Security Police might have on him. He disputed, *inter alia*, that the material released to him revealed that he constituted a security risk. In a judgment of 14 February 2000, the Administrative Court of Appeal rejected his request, giving the same type of reasons as in the cases of the first and second applicants.
27. On 13 April 2000 the Supreme Administrative Court refused the third applicant leave to appeal.

D. The fourth applicant, Mr Bengt Frejd

28. The fourth applicant has been a member of the KPML(r) since 1972, and the Chairman of *Proletären FF*, a sports club which has about 900 members, since 1974. He is renowned within sporting circles in Sweden and has actively worked with children and young people in sport, both nationally and internationally, to foster international solidarity and facilitate social integration through sport.
29. On 23 January 1999 the fourth applicant requested access to information about him contained in the Security Police register, which he suspected had been entered because of his political opinions. On 4 February 1999 the Security Police rejected his request under the rules on absolute secrecy.
30. The fourth applicant renewed his request after the abolition of the rule on 1 April 1999. On 8 February 2000 the Security Police granted the fourth applicant permission to see parts of his file.

This comprised, firstly, fifty-seven pages of paper cuttings and various information concerning him and other athletes and sports leaders, their participation in conferences, meetings and tournaments, and about sport and the promotion of social integration through sport, particularly involving international exchanges and solidarity in cooperation with the African National Congress in South Africa. There was information about a much publicised sports project in 1995, where representatives of several sports such as basketball, football and handball had left Sweden for South Africa with the aim of helping young people in black townships. A number of people from within the

Swedish sports movement whom the fourth applicant had met, many of whom had no connection with any political organisations, had been mentioned in his file. These included, for example, a prominent sports leader, Mr Stefan Albrechtson, who had himself been subjected to Security Police surveillance.

The file further included a number of items dealing with sports organisations and events, such as an appeal (in the file from as late as 1993) from all the sports clubs in Gothenburg demanding lower fees for the use of sports fields, a document with the names of some one hundred people, including that of the fourth applicant, and in some instances their telephone numbers. A list of the participants at a spring meeting of the Gothenburg Handball League could also be found.

In addition to the above material, on 28 February 1999 the fourth applicant was granted access to two pages from his file, provided that they were read on the Security Police's premises and not reproduced by technical means. The pages contained the following information:

"1 January 1973. F. is a member of the KPML(r) and has been working actively for six months. He is responsible for propaganda in the Högsbo-Järnbrott group of the KPML(r), 4 March 1975. According to an article in *Goteborgs Tidningen* of 4 March 1975, F. is the Chairman of *Proletären FF*, 9 June 1977. According to an article in *Stadsdelsnytt/Väster*, F. is one of the leaders of the youth section of *Proletären FF*, 6 September 1979. F. is number 19 on the KPML(r) ballot for the municipal elections in the fourth constituency of Gothenburg. Not elected."

31. On 1 March 2000 the fourth applicant appealed to the Administrative Court of Appeal against the decision of the Security Police, requesting to see his file in its entirety and all other records that might have been entered concerning him. He disputed the Security Police's right to store the information that had already been released to him, and stressed that none of it justified considering him a security risk.

On 12 May 2000 the Administrative Court of Appeal rejected the fourth applicant's appeal, basically on the same grounds as those stated in the judgments pertaining to the first, second and third applicants.

32. On 29 August 2000 the Supreme Administrative Court refused the fourth applicant leave to

appeal.

E. The fifth applicant, Mr Herman Schmid

33. The fifth applicant was a member of the European Parliament from 1999 to 2004, belonging to the GUE/NGL Group and sitting for the Swedish Left Party (*Vänsterpartiet*).
34. On 9 December 1997 the fifth applicant filed a request with the Ministry of Defence to have access to the data files and all entries about him that may have been made in the Security Police registers. On 20 January 1998 the Ministry of Defence informed him that the request had been transmitted to the Defence Authority (*Försvarsmakten*) for decision. On the same date the fifth applicant was informed of another government decision to lift secrecy regarding certain information contained in an attachment B to a report entitled "The Military Intelligence Service, Part 2" (*Den militära underättelsetjänsten. Del 2*). In this research document, which had previously been released to two journalists, it was stated:

"One document ... contains the information that among the teachers listed in the Malmö ABF [*Arbetarnas Bildningsförbund – Workers' Association of Education*] study programme for the autumn of 1968 are sociologists Schmid and Karin Adamek. It was stated that both of them had previously been reported in different contexts."

On 19 March 1998 the National Police Authority sent a duplicate letter to the fifth applicant and an unknown number of others, announcing that their requests for access to registered information had been rejected.

35. On 29 October 1999 the Security Police took a new decision, granting the fifth applicant access to "eight pages from the Security Police archives with the exception of information regarding Security Police staff and ... internal classifications", on the condition that the documents be consulted on the Security Police's premises and not copied by technical means. As far as all other information was concerned, the initial rejection of his request remained, with the following standard reasoning:

"All information about whether or not you are reported in other security cases filed by the Security Police is subject to secrecy according to Chapter 5, section 1(2), of the Secrecy Act. Thus, such information cannot be released without jeopardising the purpose of actions taken or planned, or without detriment to fu-

ture activity."

On the above-mentioned date the fifth applicant went to the police headquarters in Malmö in order to have access to the eight pages in question. While under surveillance, he read out loud the text on each page and tape-recorded himself, for later transcription. According to a transcript provided by the applicant, the entries bore various dates between 18 January 1963 and 21 October 1975.

The above-mentioned entries concerned mostly political matters such as participation in a campaign for nuclear disarmament and general peace-movement activities, including public demonstrations and activities related to membership of the Social Democratic Student Association. According to one entry dated 12 May 1969, the fifth applicant had extreme left-wing leanings and had stated that during demonstrations one should proceed with guerrilla tactics in small groups and if necessary use violence in order to stage the demonstration and achieve its goals. There were also some notes about job applications he had made for university posts and a report he had given to the Norwegian police with his comments in connection with the murder of a Moroccan citizen, Mr Bouchiki, in Lillehammer on 21 July 1973. Finally, the documents contained entries on the opening of a boarding school for adults (*folkhögskola*) in 1984 in which the fifth applicant had played a major role.

The fifth applicant, for his part, challenged the allegation that he had advocated violence, saying that it was totally against his principles and emphasising that since 1960 he had been active in the peace movement in Skåne and was a well-known pacifist who had been imprisoned three times on account of his conscientious objection to military service.

36. On 29 November 1999 the applicant appealed to the Administrative Court of Appeal against the Security Police's refusal to give him access to all the information about him registered in their archives. He disputed their right to store the information to which he had had access. The appeal was dismissed by a judgment of 15 May 2000 on the same grounds as those given to the other applicants in the present case.
37. On 27 June 2000 the Supreme Administrative Court refused the fifth applicant leave to ap-

peal.

F. Particulars of the KPML(r) party programme

38. Clause 1 of the KPML(r) party programme states that the party is a revolutionary workers' party whose goal is the complete transformation of existing society. Clause 4 affirms that the power of the bourgeoisie in society is protected by the State and rests ultimately on its organs of violence, such as the police, armed forces, courts and jails, supplemented to some extent by private security companies. Clause 22 provides that the socialist transformation of society has to take place contrary to the laws and regulations of bourgeois society, and that for a transitional period a revolutionary dictatorship of the working class will be established. Clause 23 states that the forms of the socialist revolution are determined by the prevailing concrete conditions but that the bourgeoisie will use any means available to prevent the establishment of real people's power, and the revolutionary forces must therefore prepare themselves for an armed struggle. According to Clause 28, socialist democracy does not make any distinction between economic and political power, or between judicial and executive power, but subjects all social functions to the influence of the working people.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. Domestic provisions of relevance to the present case are found in a number of instruments. Certain constitutional provisions regarding freedom of opinion, expression and association found in the Instrument of Government (*regeringsformen*) provide the starting-point. This is also the case with regard to the principle of free access to official documents enshrined in the Freedom of the Press Ordinance (*tryckfrihetsförordningen*) and the restrictions on that freedom imposed by the Secrecy Act (*sekretesslagen*, 1980:100). The Security Police's handling of personal information is regulated by the Police Data Act (*polisdatalagen*, 1998:622, which came into force on 1 April 1999), the Police Data Ordinance (*polisdataförordningen*, 1999:81, which also came into force on 1 April 1999), the Personal Data Act (*personuppgiftslagen*, 1998:204) and the Personal Data Ordinance (*personuppgifts-*

förordningen, 1998:1191).

A. Constitutional guarantees

40. Chapter 2, section 1(1), of the Instrument of Government ("the Constitution") guarantees the freedom to form opinions, the right to express them and the right to join others in the expression of such opinions. The freedoms and rights referred to in Chapter 2, section 1(1), may be restricted by law to the extent provided for in sections 13 to 16. Restrictions may only be imposed to achieve a purpose which is acceptable in a democratic society. A restriction may never exceed what is necessary having regard to its purpose, nor may it be so onerous as to constitute a threat to the free expression of opinion, which is one of the foundations of democracy. No restriction may be imposed solely on grounds of political, religious, cultural or other such opinions (Chapter 2, section 12).
41. According to Chapter 2, section 13, freedom of expression may be restricted, for instance, "having regard to the security of the Realm". However, the second paragraph of the latter provision states that "[i]n judging what restraints may be imposed by virtue of the preceding paragraph, particular regard shall be had to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters". The term "security of the Realm" covers both external and internal security.
42. With regard to freedom of association, fewer limitations are provided for. It follows from Chapter 2, section 14, that it may be restricted "only in respect of organisations whose activities are of a military or quasi-military nature, or which involve the persecution of a population group of a particular race, skin colour or ethnic origin".
43. Chapter 2, section 3, provides that no entry regarding a citizen in a public register may be based, without his or her consent, exclusively on that person's political opinion. The prohibition is absolute.
44. Under Chapter 2, section 2, of the Freedom of the Press Ordinance, everyone is entitled to have access to official documents unless, within defined areas, such access is limited by law.
- #### B. Security intelligence
45. The Security Police form part of the National Police Board (*Rikspolisstyrelsen*). The Security

Police are engaged in four major fields of activity. Three of them – the upholding of the Constitution, counter-espionage and counter-terrorism – fall under the common heading of security intelligence. The fourth area concerns security protection.

1. *Legal basis for registration*

46. The legal basis for the register kept by the Security Police before 1999 has been described in *Leander v. Sweden* (26 March 1987, § § 19-22, Series A no. 116). For the period thereafter the matter is governed by the 1999 Police Data Act and Police Data Ordinance. The Police Data Act is a *lex specialis* in relation to the 1998 Personal Data Act. The Security Police's own rules of procedure (*arbetsordning*), which are not public in their entirety, contain more detailed rules on the registration and use of personal information.
47. Section 5 of the Police Data Act (under the heading "Processing of sensitive personal data") provides:

"Personal information may not be processed merely on the ground of what is known about the person's race or ethnic origin, political opinions, religious or philosophical conviction, membership of a trade union, health or sexual orientation.

If personal information is processed on another ground, the information may be completed with such particulars as are mentioned in the first paragraph if it is strictly necessary for the purposes of the processing."

48. Section 32 reads:

"The Security Police shall keep a register [*SÄPO-registret*] for the purposes of:

1. facilitating investigations undertaken in order to prevent and uncover crimes against national security;
2. facilitating investigations undertaken in order to combat terrorist offences under section 2 of the Act; or
3. providing a basis for security checks under the Security Protection Act [*säkerhetsskyddslagen*, 1996:627]. The Security Police are responsible [*personuppgiftsansvarig*] for the processing of personal data in the register."

49. Section 33 of the Act provides:

"The Security Police's register may contain personal information only if:

1. The person concerned by the information is suspected of having engaged in or of intending to engage in criminal activity that entails a threat to national security or a terrorist offence;

2. The person concerned has undergone a security check under the Security Protection Act; or

3. Considering the purpose for which the register is kept, there are other special reasons therefor.

The register shall indicate the grounds for data entry. The government may lay down further regulations on the type of data that may be entered (Act 2003:157)."

The scope of the expression "special reasons" in sub-paragraph 3 of section 33 of the Police Data Act is commented on in the preparatory work in respect of that legislation (Government Bill 1997/98:97, pp. 153-54 and pp. 177-78), where the following points are made in particular. In order to enable the Security Police to perform the tasks assigned to them by the relevant legislation, it could in certain cases be deemed necessary to register persons also for reasons other than those laid down in sub-paragraphs 1 and 2 of section 33: for instance, persons who are connected with other persons registered under sub-paragraphs 1 and 2 of section 33; persons who could be the targets of threats; and persons who could be the object of recruitment attempts by foreign intelligence services. In order for the Security Police to be able to prevent and uncover crimes against national security, it was necessary to survey and identify potential threats and recruitment attempts. It should also be possible for the Security Police to identify links between persons who move to Sweden after participating in oppositional activities in their home countries. Moreover, it should be possible for the Security Police to register information about persons who have been smuggled into Sweden on assignment from foreign non-democratic regimes with the task of collecting information concerning fellow countrymen. There was a need to update information concerning such informers continuously. Also, information concerning contacts with foreign missions in Sweden was relevant in this context.

The Government stated that the fact that an individual's name had been included in the register did not necessarily mean that he or she was suspected of an offence or other incriminating activities. Other than the examples

already mentioned above from the preparatory work, the Government gave the following illustrations:

he or she is in contact with someone suspected of a crime;

- he or she is in contact with personnel from a foreign mission;
- he or she has attracted the attention of a foreign intelligence service or is used by such a service;
- he or she is active in a circle that has attracted the attention of a foreign intelligence service;
- he or she is used by an organisation whose activities are the subject of an investigation regarding threats to security;
- he or she is the referee of a foreign citizen seeking a visa;
- he or she has contacted the Security Police and provided information;
- he or she is contacted by the Security Police.

The Government stated that information in respect of the person in question may be needed in order to determine the interests of an entity (State, organisational or individual) constituting a threat to Swedish security, and the extent and development of that threat.

50. Section 34 of the Police Data Act provides:

“The Security Police register may only contain:

- information for identification;
- information on the grounds for registration; and
- references to the files where information concerning the registered person can be found.”

51. Under section 3 of the Personal Data Act, the treatment of personal information includes every operation or series of operations carried out with respect to personal information, whether automatic or manual. Examples of such treatment are the gathering, entry, collation, storage, processing, use, release and destruction of personal information. Personal information is defined by the same provision as all kinds of information that relate directly or indirectly to a physical, living person. The Personal Data Act applies to the processing of

personal information that is wholly or partially automated. It also applies to all other processing of personal data if the information is or is intended to be part of a structured collection of personal information that can be accessed by means of a search or compilation according to certain criteria (section 5).

2. Registration and filing

52. Documents that contain information are collected in files. Depending on its content, a document may, when necessary, either be placed in a file on a certain individual – a personal file (*personakt*) – or in a so-called thematic file (*sakakt*). It may also be added to both kinds of files.
53. A thematic registration is done, and a thematic file opened, whenever there is a need to collect and compile documents systematically. The documents may concern a matter or a subject that the Security Police have a duty to supervise or cover, or on which the Security Police need to have access to relevant information for any other reason. A thematic file may be started in order to collect documents that concern the relations between States and organisations. It may also be started in order to collect a certain type of document, for instance a series of reports. It should be observed that thematic registration as such does not mean that names are entered into the Security Police’s register, even though names may be found in the documents of a thematic file. Thus, a search for a person who has been mentioned in a thematic file cannot be done unless, for independent reasons, that person has also been registered in a personal file. Moreover, the name of a person who has been registered personally may occur in a thematic file but may still not show up in a search for the name in the latter file if, for instance, the name in the thematic file lacks relevance for the Security Police.

3. Correction and destruction of registered information

54. The Data Inspection Board (*Datainspektionen*) monitors compliance with the Personal Data Act (unlike the Records Board which supervises the Security Police’s compliance with the Police Data Act). The Data Inspection Board is empowered to deal with individual complaints and, if it finds that personal information is not processed in accordance with the Personal Data Act, it is required to call attention to the fact and request that the situation be corrected. If the situation remains unchanged, the

Board has the power to prohibit, on pain of a fine (*vite*), the person responsible for the register from continuing to process the information in any other way than by storing it (section 45 of the Personal Data Act).

55. The Data Inspection Board may request a county administrative court to order the erasure of personal information that has been processed in an unlawful manner (section 47 of the Act).

4. Removal of registered information

56. Registered information in respect of an individual suspected of committing or of being liable to commit criminal activities that threaten national security or a terrorist offence, shall as a rule be removed no later than ten years after the last entry of information concerning that person was made (section 35 of the Police Data Act). The same applies to information that has been included in the register for other special reasons connected with the purpose of the register. The information may be kept for a longer period if justified by particular reasons. More detailed rules concerning the removal of information are to be found in the regulations and decisions issued by the National Archives (*Riksarkivet*) and in the Security Police's own rules of procedure. All documents removed by the Security Police are transferred to the National Archives.

C. Access to official documents

57. The limitations on access in this particular field before 1 April 1999 have been described in detail in *Leander* (cited above, § § 41-43). With regard to access to information kept by the Security Police, absolute secrecy was thus the principal rule prior to 1 April 1999. The only exceptions made were for the benefit of researchers. From 1 July 1996 it was also possible to allow exemptions (*dispens*) if the government held the view that there were extraordinary reasons for an exemption to be made from the main rule of absolute secrecy.
58. The absolute secrecy of files kept exclusively by the Security Police was abolished by an amendment to Chapter 5, section 1(2), of the Secrecy Act, made at the same time as the Police Data Act came into force on 1 April 1999. According to the amended provision, information concerning the Security Police's intelligence activities referred to in section 3 of the Police Data Act, or that otherwise concerns the Security Police's activities for the prevention and investigation of crimes against national

security, or to prevent terrorism, was to be kept secret. However, if it was evident that the information could be revealed without detriment to the aim of measures that had already been decided upon or that were anticipated, or without harm to future activities, the information should be disclosed. When submitting the relevant bill to Parliament, the government stressed that the nature of the intelligence service was such that information could only be disclosed in special cases. They presumed that in other cases the fact that a person was not registered would also remain secret (Government Bill 1997/98:97, p. 68).

A fourth subsection was added to section 1 of Chapter 5 on 1 March 2003, under which a person may upon request be informed of whether or not he or she can be found in the Security Police's files as a consequence of registration in accordance with the Personnel Security Check Ordinance that was in force until 1 July 1996 or corresponding older regulations. However, the government was still of the view that there were in principle no reasons for the Security Police to reveal whether or not there was any information concerning an individual in their files and registers:

"The Government acknowledge that it may appear unsatisfactory not to be given a clear answer from the Security Police as to whether an individual is registered in their files or not. There are, however, valid reasons for the Security Police not to disclose in certain cases whether a person appears in Security Police records. This point of view was also taken in the preparatory work on the Police Data Act (Government Bill 1997/98:97, p. 68), where it was stated that a person linked to criminal activities may have a strong interest in knowing whether the police have any information regarding him or her. In such a case, it could be very damaging for an investigation if it were revealed to the person in question either that he or she was of interest to the police or that he or she was not. It is therefore essential that the information whether a person appears [in the files] or not may be kept secret." (Government Bill 2001/02:191, pp. 90-91)

59. The Security Police apply the Secrecy Act directly. There are thus no internal regulations that deal with the issue of access to official documents since that would be in breach of the Secrecy Act. Under Chapter 5, section 1(2), of the Secrecy Act, there is a presumption of secrecy, meaning that whenever it is uncertain whether the disclosure of information in an of-

ficial document is harmful or not, such information shall not be disclosed.

60. A request for access to official documents kept by the Security Police gives rise to a search to ascertain whether or not the person in question appears in the files. If there is no information, the person who has made the request is not informed thereof and the request is rejected. A few exceptions have been made from this practice in cases where the person concerned has died and the request has been made by his or her children (as in the second applicant's case). However, if information is found, the Security Police make an assessment of whether or not all or part of it can be disclosed. It is not indicated whether the disclosed information is all that exists in the files.
61. The Government have stated that it was standard practice for the Administrative Court of Appeal to go to the Security Police and take part of their files – if any – in every case that had been brought to it. The three judges examined all the documents and made an assessment of every document that had not been released to the appellant. If the appellant did not appear in the register and files of the Security Police, the court obtained part of a computer print-out showing that the appellant did not appear in the documents kept by the Security Police.

D. Review bodies

1. *The Records Board*

62. The Records Board (*Registernämnden*) was established in 1996 and replaced the National Police Board (described in paragraphs 19 to 34 of the above-mentioned *Leander* judgment). It is entrusted with the task of determining whether information kept by the Security Police may be disclosed in security checks, to monitor the Security Police's registration and storage of information and their compliance with the Police Data Act, in particular section 5 (see section 1 of the Ordinance prescribing instructions for the Records Board – *förordningen med instruktion för Registernämnden*, 1996:730). In order to carry out its supervisory function, the Board is entitled to have access to information held by the Security Police (section 11). It presents an annual report to the government on its activities (section 6). The report is made public.

Under sections 2 and 13 of the Ordinance prescribing instructions for the Records Board, the Board consists of a maximum of eight members, including a chairperson and a vice-

chairperson, all appointed by the government for a fixed term. The chairperson and the vice-chairperson have to be or to have been permanent judges. The remaining members include parliamentarians. The Records Board's independence is guaranteed by, *inter alia*, Chapter 11, section 7, of the Constitution, from which it follows that neither Parliament nor the government nor any other public authority may interfere with the manner in which the Board deals with a particular case.

2. *The Data Inspection Board*

63. Under section 1 of the Ordinance prescribing instructions for the Data Inspection Board (1998:1192), the Board's main task is to protect individuals from violations of their personal integrity through the processing of personal data. The Board is competent to receive complaints from individuals. Its independence is guaranteed, *inter alia*, by Chapter 11, section 7, of the Constitution.
64. In order to carry out its monitoring function, the Data Inspection Board is entitled to have access to the personal data that is being processed, to receive relevant additional information and documentation pertaining to the processing of personal data and to the safety measures in respect of the processing and, moreover, to have access to the premises where the processing takes place (section 43 of the Personal Data Act).

The Board's powers in relation to the correction and erasure of registered data are summarised in paragraphs 55 and 56 above.

65. A personal data representative (*personuppgiftsombud*) has been appointed within the Security Police with the function of ensuring independently that the personal data controller processes personal data in a lawful and correct manner and in accordance with good practice, and of pointing out any shortcomings. If the representative has reason to suspect that the controller has contravened the provisions on the processing of personal data, and if the situation is not rectified as soon as is practicable after being pointed out, the representative shall notify the Data Inspection Board (section 38(1) and (2) of the Personal Data Act).

3. *Other review bodies*

66. The Security Police, the Records Board and the Data Inspection Board and their activities come under the supervision of the Parliamentary

Ombudspersons and the Chancellor of Justice. Their functions and powers are described in *Le-ander* (cited above, § 36-39).

67. Unlike the Parliamentary Ombudspersons, the Chancellor of Justice may award compensation in response to a claim from an individual that a public authority has taken a wrongful decision or omitted to take a decision. This power of the Chancellor of Justice is laid down in the Ordinance concerning the administration of claims for damages against the State (*förordningen om handläggning av skadeståndsanspråk mot staten*, 1995:1301). The Chancellor may examine claims under several provisions of the Tort Liability Act (*skadeståndslagen*, 1972:207), notably Chapter 3, section 2, pursuant to which the State shall be liable to pay compensation for financial loss caused by a wrongful act or omission in connection with the exercise of public authority. Compensation for non-pecuniary damage may be awarded in connection with the infliction of personal injury or the commission of certain crimes, such as defamation (Chapter 5, section 1, and Chapter 1, section 3).

A decision by the Chancellor of Justice to reject a claim for damages in full or in part may not be appealed against. The individual may, however, institute civil proceedings against the State before a district court, with the possibility of appealing to a higher court. In the alternative, such proceedings may be instituted immediately without any previous decision by the Chancellor. Before the courts, the State is represented by the Chancellor.

68. Under section 48 of the Personal Data Act, a person responsible for a register shall pay compensation to a data subject for any damage or injury to personal integrity caused by the processing of personal data in breach of the Act.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The relevant parts of Article 8 of the Convention read as follows:

“1. Everyone has the right to respect for his private ... life ...

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 ... [or] for the prevention of disorder or crime ...”

A. Storage of the information that had been released to the applicants

70. Under Article 8 of the Convention, the applicants complained that the storage in the Security Police files of the information that had been released to them constituted unjustified interference with their right to respect for private life.

1. Applicability of Article 8

71. The Government questioned whether the information released to the applicants could be said to fall within the scope of the notion of private life for the purposes of Article 8 § 1. They stressed that the information that had been released to the first applicant did not concern her own activities but the activities of other persons, namely those responsible for the letter bombs that had been sent to her and others. The information kept on the other applicants that was subsequently released to them appeared to a large extent to have emanated from open sources, such as observations made in connection with their public activities (the second applicant's participation in a meeting abroad and the fifth applicant's participation in a demonstration in Stockholm). In addition, the bulk of the information was already in the public domain since it consisted of newspaper articles (the third, fourth and fifth applicants), radio programmes (the fifth applicant) or of decisions by public authorities (decision by the Parliamentary Ombudspersons with regard to the third applicant). None of them had alleged that the released information was false or incorrect.

72. The Court, having regard to the scope of the notion of “private life” as interpreted in its case-law (see, in particular, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II, and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000-V), finds that the information about the applicants that was stored on the Security Police register and was released to them clearly constituted data pertaining to their “private life”. Indeed, this embraces even those parts of the information that were public, since the information had been systematically collected and stored in files held by the authorities. Accordingly, Article 8 § 1 of the Convention is applicable to the impugned storage of the in-

formation in question.

2. Compliance with Article 8

(a) Whether there was interference

73. The Court further considers, and this has not been disputed, that it follows from its established case-law that the storage of the information in issue amounted to interference with the applicants' right to respect for private life as secured by Article 8 § 1 of the Convention (see *Leander*, cited above, § 48; *Kopp v. Switzerland*, 25 March 1998, § 53, *Reports of Judgments and Decisions* 1998-II; *Amann*, cited above, § 69 and 80; and *Rotaru*, cited above, § 46).

(b) Justification for the interference

- i *Whether the interference was in accordance with the law*
74. The applicants did not deny that the contested storage of information had a legal basis in domestic law. However, they maintained that the relevant law lacked the requisite quality flowing from the autonomous meaning of the expression "in accordance with the law". In particular, they submitted that the terms of the relevant national provisions were not formulated with sufficient precision to enable them to foresee – even with the assistance of legal advice – the consequences of their own conduct. The ground of "special reasons" in subparagraph 3 of section 33 of the Police Data Act was excessively broad and could be applied to almost anybody. This had been amply illustrated by the instances of gathering and storage of information that had been released to them.
75. The Government submitted that not only did the impugned interference have a basis in domestic law but the law was also sufficiently accessible and foreseeable to meet the quality requirement under the Court's case-law.
76. The Court reiterates its settled case-law, according to which the expression "in accordance with the law" not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *Rotaru*, cited above, § 52). The law must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded

by paragraph 1 of Article 8. Especially where, as here, a power of the executive is exercised in secret, the risks of arbitrariness are evident. Since the implementation in practice of measures of secret surveillance is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Malone v. the United Kingdom*, 2 August 1984, § § 67-68, Series A no. 82, reiterated in *Amann*, cited above, § 56, and in *Rotaru*, cited above, § 55).

77. In this regard, the Court notes from the outset that the legal basis in Swedish law of the collection and storage of information on the secret police register, and the quality of that law prior to the amendments which came into force on 1 April 1999, were the subject of the Court's scrutiny in the above-cited *Leander* judgment (§ § 19-22). It concluded that such measures had a legal basis in national law and that the law in question was sufficiently accessible and foreseeable to satisfy the quality requirements flowing from the autonomous interpretation of the expression "in accordance with the law" (*ibid.*, § § 52-57). In the present instance, the parties have centred their pleadings on the situation after 1 April 1999. The Court will therefore not deal of its own motion with the period before that date and will limit its examination to the subsequent period.
78. In the first place, the Court is satisfied that the storage of the information in issue had a legal basis in sections 5, 32 and 33 of the 1998 Police Data Act.
79. Secondly, as to the question regarding the quality of the law, the Court notes that, as is made clear by the terms of section 33 of the Police Data Act, "[t]he Security Police's register may contain personal information *only*" (emphasis added) on any of the grounds set out in sub-paragraphs 1, 2 or 3. The Court considers that an issue may arise, but only in relation to the apparent broadness of the ground in subparagraph 3 of section 33: "Considering the purpose for which the register is kept, there are other special reasons therefor" (see paragraph 49 above). The Government stated that a per-

son may be registered without his or her being incriminated in any way. Here the preparatory work gives some specific and clear examples: in particular, a person who is connected with another person who has been registered, a person who may be the target of a threat and a person who may be the object of recruitment by a foreign intelligence service (ibid.). The Government have also given examples of wider categories, for instance “a person in contact with someone suspected of a crime” (ibid.). It is clear that the Security Police enjoys a certain discretion in assessing who and what information should be registered and also if there are “special reasons” other than those mentioned in sub-paragraphs 1 and 2 of section 33 (a person suspected of a crime threatening national security or a terrorist offence, or undergoing a security check).

However, the discretion afforded to the Security Police in determining what constitutes “special reasons” under sub-paragraph 3 of section 33 is not unfettered. Under the Swedish Constitution, no entry regarding a citizen may be made in a public register exclusively on the basis of that person’s political opinion without his or her consent. A general prohibition of registration on the basis of political opinion is further set out in section 5 of the Police Data Act. The purpose of the register must be borne in mind where registration is made for “special reasons” under sub-paragraph 3 of section 33. Under section 32 of the Police Data Act, the purpose of storing information on the Security Police register must be to facilitate investigations undertaken to prevent and uncover crimes against national security or to combat terrorism. Further limitations follow from section 34 governing the manner of recording data in the Security Police register.

Against this background, the Court finds that the scope of the discretion conferred on the competent authorities and the manner of its exercise was indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

80. Accordingly, the interference with the respective applicants’ private lives was “in accordance with the law”, within the meaning of Article 8.
 - ii *Aim and necessity of the interference*
81. The applicants stressed the absence of any concrete actions recorded by the Security Po-

lice that substantiated the alleged risk that any of them might be connected with terrorism, espionage or any other relevant crime.

82. The Government maintained that the interference pursued one or more legitimate aims: the prevention of crime, in so far as the first applicant’s own safety was concerned by the bomb threats, and the interests of national security with regard to all the applicants. In each case the interference was moreover “necessary” for the achievement of the legitimate aim or aims pursued.
83. The Government submitted that they were at a loss to understand the reason why the first applicant should claim at all that the Security Police’s registration and filing of information concerning threats against her were not in her best interests but, on the contrary, entailed a violation of her rights under the Convention. The information that had been released to the other four applicants was highly varied in nature. Most of it appeared to have been found in the public domain, such as the media. The Government were unaware of the origins of each and every piece of information, and therefore could not comment on that particular aspect. They noted, however, that from today’s perspective the information seemed either fairly old or quite harmless and that the interference was proportionate to the legitimate aim pursued, namely the protection of national security.
84. As to the second applicant, given the Cold War context at the time, it could not be deemed unreasonable for the Security Police to have kept themselves informed about a meeting in 1967 of left-wing sympathisers in Poland in which he may have taken part. He had not been the subject of personal data registration and the information about him had been carefully phrased (with the use of the word “probably”).
85. The third and fourth applicants had since the 1970s been members of the KPML(r), a political party which advocated the use of violence in order to bring about a change in the existing social order. One of the Security Police’s duties was to uphold the Constitution, namely, by preventing and uncovering threats against the nation’s internal security. It was evident that persons who were members of political parties like the KPML(r) would attract the attention of the Security Police.
86. The case of the fifth applicant should also be seen against the background of the Cold War, and he too seemed to have advocated vio-

lence as a means of bringing about changes in society. According to one of the entries in the records released to him, he was said to have stated that violence could be resorted to in order to stage demonstrations and to achieve their goals.

iii *The Court's assessment*

87. The Court accepts that the storage of the information in question pursued legitimate aims, namely the prevention of disorder or crime, in the case of the first applicant, and the protection of national security, in that of the remainder of the applicants.
88. While the Court recognises that intelligence services may legitimately exist in a democratic society, it reiterates that powers of secret surveillance of citizens are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions (see *Klass and Others v. Germany*, 6 September 1978, § 42, Series A no. 28, and *Rotaru*, cited above, § 47). Such interference must be supported by relevant and sufficient reasons and must be proportionate to the legitimate aim or aims pursued. In this connection, the Court considers that the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security and combating terrorism must be balanced against the seriousness of the interference with the respective applicants' right to respect for private life. Here again the Court will limit its examination to the period from 1999 onwards.
89. In so far as the first applicant is concerned, the Court finds no reason to doubt that the reasons for keeping on record the information relating to bomb threats in 1990 against her and certain other personalities were relevant and sufficient as regards the aim of preventing disorder or crime. The measure was at least in part motivated by the interest in protecting her security; there can be no question of any disproportionate interference with her right to respect for private life thus being entailed. The Court has received no particulars about the precise contents of the documents released to the applicant on 13 December 2002 and will not therefore examine that matter.
90. However, as to the information released to the second applicant (namely, his participation in a

political meeting in Warsaw in 1967), the Court, bearing in mind the nature and age of the information, does not find that its continued storage is supported by reasons which are relevant and sufficient as regards the protection of national security.

Similarly, the storage of the information released to the fifth applicant could for the most part hardly be deemed to correspond to any actual relevant national security interests for the respondent State. The continued storage of the information to the effect that he, in 1969, had allegedly advocated violent resistance to police control during demonstrations was supported by reasons that, although relevant, could not be deemed sufficient thirty years later.

Therefore, the Court finds that the continued storage of the information released to the second and fifth applicants entailed a disproportionate interference with their right to respect for private life.

91. The information released to the third and fourth applicants raises more complex issues in that it related to their membership of the KPML(r), a political party which, the Government stressed, advocated the use of violence and breaches of the law in order to bring about a change in the existing social order. In support of their argument, the Government submitted a copy of the KPML(r) party programme, as adopted on 2-4 January 1993, and referred in particular to its Clauses 4, 22, 23 and 28 (see paragraph 38 above).

The Court observes that the relevant clauses of the KPML(r) party programme rather boldly advocate establishing the domination of one social class over another by disregarding existing laws and regulations. However, the programme contains no statements amounting to an immediate and unequivocal call for the use of violence as a means of achieving political ends. Clause 23, for instance, which contains the most explicit statements on the matter, is more nuanced in this respect and does not propose violence as either a primary or an inevitable means in all circumstances. Nonetheless, it affirms the principle of armed opposition.

However, the Court reiterates that "the constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions; the contents of the programme must be compared with the actions of the party's leaders

and the positions they defend" (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 101, ECHR 2003-II; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 46, Reports 1998-I; *Socialist Party and Others v. Turkey*, 25 May 1998, § 50, Reports 1998-III; and *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 45, ECHR 1999-VIII). This approach, which the Court has adopted in assessing the necessity under Article 11 § 2 of the Convention of the dissolution of a political party, is also pertinent for assessing the necessity in the interests of national security under Article 8 § 2 of collecting and storing information on a secret police register about the leaders and members of a political party.

In this case, the KPML(r) party programme was the only evidence relied on by the Government. Beyond that, they did not point to any specific circumstance indicating that the impugned programme clauses were reflected in actions or statements by the party's leaders or members and constituted an actual or even potential threat to national security when the information was released in 1999, almost thirty years after the party had come into existence. Therefore, the reasons for the continued storage of the information about the third and fourth applicants, although relevant, may not be considered sufficient for the purposes of the necessity test to be applied under Article 8 § 2 of the Convention. Thus, the continued storage of the information released to the respective applicants in 1999 amounted to a disproportionate interference with their right to respect for private life.

92. In sum, the Court concludes that the continued storage of the information that had been released was necessary with respect to the first applicant, but not for any of the remaining applicants. Accordingly, the Court finds that there has been no violation of Article 8 of the Convention with regard to the first applicant, but that there has been a violation of this provision with regard to each of the other applicants.

B. The refusals to advise the applicants of the full extent to which information was kept about them on the Security Police register

1. The parties' submissions

(a) The applicants

93. The applicants further submitted that the respective refusals to grant full access to all information kept about them on the Security Police register amounted to unjustified interference with their right to respect for private life under Article 8 of the Convention.
94. In the applicants' view, the interference was not "in accordance with the law" as the relevant national law failed to fulfil the requirements as to quality under the Convention. It had not been foreseeable what kind of information might be stored or what considerations governed the decisions by the Security Police or the courts on each applicant's request for access to information kept on file about them.
95. Nor was the interference "necessary in a democratic society". The applicants pointed to the absence of any specific information recorded by the Security Police that could substantiate any assumption of a risk that the applicants might be connected with terrorism, espionage or other relevant criminal activities. Moreover, the lack of access to declassified data kept mainly for purely historical or political reasons could not be viewed as strictly necessary.

In this connection, the applicants argued that the relevant law did not offer adequate safeguards against abuse. They stressed that the Records Board, a body established in 1996, had failed to review their files following their request for access. The Board had no power to order the destruction of files or the suppression or rectification of information therein. Nor was it empowered to award compensation. The Data Inspection Board had never carried out a substantial review of the files kept by the Security Police. The Parliamentary Ombudsperson could not grant the applicants access to their files and was not empowered to correct false or irrelevant information therein. The Chancellor of Justice was the government's representative and was therefore not independent.

(b) The Government

96. The Government acknowledged that, at some point in time, the Swedish Security Police had kept some information about the applicants but, referring to their above-mentioned arguments, questioned whether the applicants had shown that there was at least a reasonable likelihood that the Security Police retained personal information about them and that there had consequently been interference with their private life.

97. However, were the Court to conclude that there was interference with the applicants' rights under Article 8 § 1 in this context, the Government submitted that it was justified under Article 8 § 2: it was "in accordance with the law", pursued a legitimate aim and was "necessary in a democratic society" in order to achieve that aim.

98. As to the issue of necessity, the Government argued that under Swedish law there were adequate safeguards against abuse.

(i) The discretion afforded to the Security Police was subject to limitations set out in the more general Personal Data Act, which dealt with the processing of personal information wherever it took place, and the more specific Police Data Act, which in positive terms obliged the Security Police to keep a register, specified its aims and laid down the conditions under which personal information could be included in it.

(ii) Both the Constitution and the Police Data Act expressly provided that certain sensitive information could only be registered in exceptional circumstances, that is to say when it was "strictly necessary". Under no circumstances could a person be registered by the Security Police simply because of his or her political views or affiliations.

(iii) The Data Inspection Board was an important safeguard, considering its mandate with respect to the overall treatment of personal information. It was empowered to take various measures to protect personal integrity, such as prohibiting all processing of personal data (other than merely storing it) pending the rectification of illegalities. It could also institute judicial proceedings in order to have registered information erased.

(iv) The Records Board, another important safeguard, had two functions. It monitored the Security Police's filing and storage of information and their compliance with the Police Data Act. It also determined whether information held by the Security Police could be disclosed in security checks.

(v) The Parliamentary Ombudspersons supervised the application of laws and other regulations not only by the Security Police themselves but also by the bodies monitoring them (the Data Inspection Board

and the Records Board). The Ombudspersons were empowered to carry out inspections and other investigations, institute criminal proceedings against public officials and report officials for disciplinary action. It was to be recalled that the third applicant's trade union had in fact lodged a complaint with the Parliamentary Ombudspersons, arguing that there had been a breach of the Personnel Security Check Ordinance in connection with the security check carried out with regard to the third applicant, and that the Ombudspersons had voiced some criticism about the manner in which the matter had been handled.

(vi) The Chancellor of Justice had a role similar to that of the Parliamentary Ombudspersons, was competent to report public servants for disciplinary action, to institute criminal proceedings against them and to award compensation.

In addition, damages could be claimed under the Tort Liability Act in direct judicial proceedings. The Personal Data Act moreover contained a separate ground for damages that was of relevance in the context of the present case.

The Government argued that, in view of the absence of any evidence or indication that the system was not functioning as required by domestic law, the framework of safeguards achieved a compromise between the requirements of protecting a democratic society and the rights of the individual which was compatible with the provisions of the Convention.

2. *The Court's assessment*

99. The Court, bearing in mind its assessment in paragraphs 72 and 73 above, finds it established that the impugned refusal to advise the applicants of the full extent to which information was being kept about them on the Security Police register amounted to interference with their right to respect for private life.

100. The refusal had a legal basis in domestic law, namely Chapter 5, section 1(2), of the Secrecy Act. As to the quality of the law, the Court refers to its findings in paragraphs 79 and 80 above, as well as paragraphs 57 to 61, describing the conditions of a person's access to information about him or her on the Security Police register. The Court finds no reason to doubt that the interference was "in accordance with the law" within the meaning of Article 8 § 2.

101. Moreover, the refusal pursued one or more legitimate aims – reference is made to paragraph 87 above.

102. The Court notes that, according to the Convention case-law, a refusal of full access to a national secret police register is necessary where the State may legitimately fear that the provision of such information may jeopardise the efficacy of a secret surveillance system designed to protect national security and to combat terrorism (see *Klass and Others*, cited above, § 58, and *Leander*, cited above, § 66). In this case the national administrative and judicial authorities involved all held that full access would jeopardise the purpose of the system. The Court does not find any ground on which it could arrive at a different conclusion.

103. Moreover, having regard to the Convention case-law (see *Klass and Others*, cited above, § 50; *Leander*, cited above, § 60; *Esbester v. the United Kingdom*, no. 18601/91, Commission decision of 2 April 1993, unreported; and *Christie v. the United Kingdom*, no. 21482/93, Commission decision of 27 June 1994, Decisions and Reports 78-A) and referring to its findings regarding the quality of the law (see paragraphs 79 and 80 above) and the various guarantees that existed under national law (see paragraphs 52 to 68), the Court finds it established that the applicable safeguards met the requirements of Article 8 § 2.

104. In the light of the foregoing, the Court finds that the respondent State, having regard to the wide margin of appreciation available to it, was entitled to consider that the interests of national security and the fight against terrorism prevailed over the interests of the applicants in being advised of the full extent to which information was kept about them on the Security Police register.

Accordingly, the Court finds that there has been no violation of Article 8 of the Convention under this head.

II. ALLEGED VIOLATIONS OF ARTICLES 10 AND 11 OF THE CONVENTION

105. The applicants complained that, in so far as the storage of secret information was used as a means of surveillance of political dissidents, as was particularly noticeable with regard to the first and fourth applicants, it entailed a

violation of their rights under Article 10 of the Convention. The relevant parts of that Article provide:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security ... [or] for the prevention of disorder or crime ...”

They further complained that, for each of them, membership of a political party had been a central factor in the decision to file secret information on them. This state of affairs constituted an unjustified interference with their rights under Article 11, the relevant parts of which provide:

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

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or ... for the prevention of disorder or crime ...”

106. The Government argued that no separate issues arose under either Article 10 or Article 11 in the circumstances of the present case in so far as the first, second, fourth and fifth applicants were concerned. They had not been the subject of personnel security checks. The information on them held by the Security Police was apparently never consulted by third parties. In fact, it seemed only to have been released to the applicants themselves following their own requests for access. Furthermore, their suspicions that the Security Police were holding information on them – suspicions that were confirmed when information was indeed released to them – appeared not to have had any impact on their opportunities to exercise their rights under either Article 10 or Article 11. They had at all times been free to hold and express their political or other opinions. It was not supported by the facts of the present case that their opportunities to enjoy freedom of association had in any way been impaired. There-

fore, the Government maintained that there had been no interference with their rights under Articles 10 and 11 and requested the Court to declare their complaints under these provisions inadmissible as being manifestly ill-founded.

107. The Court, for its part, considers that the applicants' complaints under Articles 10 and 11, as submitted, relate essentially to the adverse effects on their political freedoms caused by the storage of information on them in the Security Police register. However, the applicants have not adduced specific information enabling it to assess how such registration in the concrete circumstances could have hindered the exercise of their rights under Articles 10 and 11. Nevertheless, the Court considers that the storage of personal data related to political opinion, affiliations and activities that is deemed unjustified for the purposes of Article 8 § 2 *ipso facto* constitutes an unjustified interference with the rights protected by Articles 10 and 11. Having regard to its findings above under Article 8 of the Convention with regard to the storage of information, the Court finds that there has been no violation of these provisions with regard to the first applicant, but that there have been violations of Articles 10 and 11 of the Convention with regard to the other applicants.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. The applicants further complained that no effective remedy existed under Swedish law with respect to the above violations, contrary to Article 13 of the Convention, which provides:

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

A. The parties' submissions

1. The applicants

109. Apart from arguing that the relevant Swedish law on data registration was vague and that the safeguards against improper data entry were inadequate, the applicants submitted, in particular, that Swedish law did not provide for a judicial remedy enabling aggrieved parties to have the files destroyed.

110. The applicants further alleged that the standardised reasoning the national courts gave when rejecting their request for full access to their respective files had been arbitrary and even stigmatising.

The first applicant claimed that the Administrative Court of Appeal did not look into the Security Police's files on her before adopting its judgment.

111. The applicants maintained that during its thirty years of existence the Data Inspection Board had never performed a substantial review of the files of the Security Police. While the Records Board had been a success, it had not been involved in any of the instances in issue under the Convention. The Parliamentary Ombudsperson was not empowered to decide on whether the applicants should be granted a right of access to their files or to correct irrelevant or false information on them. The Chancellor of Justice was not independent of the executive.

2. The Government

112. The Government disputed that the applicants had an arguable claim for the purposes of Article 13 and contended that this provision was therefore not applicable. In any event, the requirements of this provision had been complied with.

113. In so far as the applicants could be deemed to have arguable claims when it came to the correction and erasure of information held by the Security Police, the Government referred to the available remedies. The applicants could have complained – but had failed to do so – to the Data Inspection Board in order to seek appropriate measures.

114. The Government further disputed the first applicant's contention that the administrative courts had failed to look into the Security Police's files. It was evident from the case file of the Administrative Court of Appeal that the court had visited the premises of the Security Police on 3 February 2000 in order to obtain some of the documents.

115. In so far as the applicants had also complained of a lack of opportunity to seek compensation for any grievances resulting from the storage of information on them by the Security Police, they had had the opportunity to (1) lodge complaints with the Chancellor of Justice, (2) institute judicial proceedings under the Tort Li-

ability Act, or (3) claim – also within the framework of judicial proceedings – damages under the Personal Data Act. None of the applicants appeared to have made use of any of those remedies.

B. The Court's assessment

116. The Court sees no reason to doubt that the applicants' complaints under Article 8 of the Convention about the storage of information and refusal to advise them of the full extent to which information on them was being kept may, in accordance with its consistent case-law (see, for example, *Rotaru*, cited above, § 67), be regarded as "arguable" grievances attracting the application of Article 13. They were therefore entitled to an effective domestic remedy within the meaning of this provision.

117. Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. It therefore requires the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligation under this provision. The remedy must be "effective" in practice as well as in law (*ibid.*, § 67).

The "authority" referred to in Article 13 may not necessarily in all instances be a judicial authority in the strict sense. Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy is effective. Furthermore, where secret surveillance is concerned, objective supervisory machinery may be sufficient as long as the measures remain secret. It is only once the measures have been divulged that legal remedies must become available to the individual (*ibid.*, § 69).

118. Turning to the present case, the Court observes that the Parliamentary Ombudsperson and the Chancellor of Justice have competence to receive individual complaints and have a duty to investigate them in order to ensure that the relevant laws have been properly applied. By tradition, their opinions command great respect in Swedish society and are usually followed. However, in the above-cited *Leander* judgment (§ 82), the Court found that the main weakness in the control afforded by these of-

ficials is that, apart from their competence to institute criminal proceedings and disciplinary proceedings, they lack the power to render a legally binding decision. In addition, they exercise general supervision and do not have specific responsibility for inquiries into secret surveillance or into the entry and storage of information on the Security Police register. As it transpires from the aforementioned judgment, the Court found neither remedy, when considered on its own, to be effective within the meaning of Article 13 of the Convention (*ibid.*, § 84).

119. In the meantime, a number of steps have been taken to improve the remedies, notably enabling the Chancellor of Justice to award compensation, with the possibility of judicial appeal against the dismissal of a compensation claim, and the establishment of the Records Board, replacing the former National Police Board. The Government further referred to the Data Inspection Board.

Moreover, it should be noted that, with the abolition of the absolute secrecy rule under former Chapter 5, section 1(2), of the Secrecy Act (when it is deemed evident that information could be revealed without harming the purposes of the register), a decision by the Security Police whether to advise a person of information kept about him or her on their register may form the subject of an appeal to the county administrative court and the Supreme Administrative Court. In practice, the former will go and consult the Security Police register and appraise for itself the contents of files before determining an appeal against a refusal by the Security Police to provide such information. For the reasons set out below, it is not necessary here to resolve the disagreement between the first applicant and the Government as to the scope of the Administrative Court of Appeal's review in her case.

In the circumstances, the Court finds no cause for criticising the similarities in the reasoning of the Administrative Court of Appeal in the applicants' cases.

120. However, the Court notes that the Records Board, the body specifically empowered to monitor on a day-to-day basis the Security Police's entry and storage of information and compliance with the Police Data Act, has no competence to order the destruction of files or the erasure or rectification of information kept in the files.

It appears that wider powers in this respect are vested in the Data Inspection Board, which may examine complaints by individuals. Where it finds that data is being processed unlawfully, it can order the processor, on pain of a fine, to stop processing the information other than for storage. The Board is not itself empowered to order the erasure of unlawfully stored information, but can make an application for such a measure to the county administrative court. However, no information has been furnished to shed light on the effectiveness of the Data Inspection Board in practice. It has therefore not been shown that this remedy is effective.

121. What is more, in so far as the applicants complained about the compatibility with Articles 8, 10 and 11 of the storage on the register of the information that had been released to them, they had no direct access to any legal remedy as regards the erasure of the information in question. In the view of the Court, these shortcomings are not consistent with the requirements of effectiveness in Article 13 (see *Rotaru*, cited above, § 71, and *Klass and Others*, cited above, § 71) and are not offset by any possibilities for the applicants to seek compensation (see paragraphs 67 and 68 above).
122. In the light of the above, the Court does not find that the applicable remedies, whether considered on their own or in the aggregate, can be said to satisfy the requirements of Article 13 of the Convention.

Accordingly, the Court concludes that there has been a violation of this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

124. The applicants each sought 400,000 Swedish kronor (SEK) (approximately 42,970 euros (EUR)), exclusive of value-added tax (VAT), in compensation for non-pecuniary damage, arguing that they should be awarded the same level of compensation as was offered to Mr

Leander following the revelations as to what information had been kept about him on the secret police register and subsequent to the delivery of the Court’s judgment in his case.

125. The Government stressed that the offer to Mr Leander had been made on an *ex gratia* basis under a special agreement reached on 25 November 1997 between him and them. In their view, the grant of compensation to Mr Leander could not serve as a model for any award to be made in this case. The Government submitted that the applicants had not substantiated their claim and had not shown any causal link between the alleged violation of the Convention and any non-pecuniary damage. In any event, the injury which may have been sustained by the applicants was not of such a serious nature as to justify a pecuniary award in this case. In the Government’s view, the finding of a violation would in itself constitute sufficient just satisfaction.
126. The Court agrees with the Government that the settlement they reached with Mr Leander cannot serve as a model for an award in the present case. However, the Court considers that each of the applicants must have suffered anxiety and distress as a result of the violation or violations of the Convention found in his or her case that cannot be compensated solely by the Court’s findings. Accordingly, having regard to the nature of the violations and the particular circumstances pertaining to each applicant, the Court awards under this head EUR 3,000 to the first applicant, EUR 7,000 each to the second and fifth applicants and EUR 5,000 each to the third and fourth applicants.

B. Costs and expenses

127. The applicants sought, firstly, the reimbursement of their legal costs and expenses, in an amount totalling SEK 289,000 (approximately EUR 31,000), in respect of their lawyer’s work on the case (115 hours and 35 minutes, at SEK 2,500 per hour).

Secondly, the applicants’ lawyer sought certain sums in reimbursement of the cost of his work in connection with a “first session” with the third applicant and a number of other persons.

128. The Government maintained that costs and expenses relating to other cases were not relevant and should not be taken into account in any award to be made in this case. As to the amount claimed with respect to the present case, the Government did not question the

number of hours indicated but considered the hourly rate charged to be excessive. SEK 1,286 (inclusive of VAT) was the hourly rate currently applied under the Swedish legal aid system. In view of the special character of the case, the Government could accept a higher rate, not exceeding SEK 1,800. Accordingly, should the Court find a violation, they would be prepared to pay a total of SEK 208,000 in respect of legal costs (approximately EUR 22,000).

129. The Court will consider the above claims in the light of the criteria laid down in its case-law, namely whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and are reasonable as to quantum.

Accordingly, the Court dismisses the applicants' second costs claim. As to the first claim, the Court is not convinced that the hourly rate and the number of hours were justified. Deciding on an equitable basis, it awards the applicants, jointly, EUR 20,000 under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention in respect of the second, third, fourth and fifth applicants, but not of the first applicant;
2. Holds that there has been a violation of Articles 10 and 11 of the Convention in respect of the second, third, fourth and fifth applicants, but not of the first applicant;
3. Holds that there has been a violation of Article 13 of the Convention in respect of each of the applicants;
4. Holds
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) in respect of non-pecuniary damage, EUR 3,000 (three thousand euros) to the first applicant; EUR 7,000 (seven thousand euros) each to the second and fifth applicants; and EUR 5,000 (five thousand euros) each to the third and fourth applicants;
 - (ii) EUR 20,000 (twenty thousand euros) to the applicants jointly in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 6 June 2006, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Sally Dollé, *Registrar*

Jean-Paul Costa, *President*

ECHR

ECJ

FIRST SECTION

CASE OF PASKO v RUSSIA

(Application no. 69519/01)

JUDGMENT

STRASBOURG
22 October 2009

FINAL
10/05/2010

FREEDOM OF EXPRESSION, SECRET INFORMATION,
CLASSIFIED, DECLASSIFIED, DISCLOSURE

IN THE CASE OF PASKO V. RUSSIA,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Giorgio Malinverni,

George Nicolaou, *judges*,

and **Søren Nielsen**, *Section Registrar*,

Having deliberated in private on 1 October 2009,

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

PROCEDURE

1. The case originated in an application (no. 69519/01 69519/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Grigoriy Mikhaylovich Pasko ("the applicant"), on 20 January 2001.
2. The applicant was represented by Mr F. Elgesem, a lawyer practising in Oslo. The Russian Government ("the Government") were initially represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.
3. The applicant complained, in particular, of his conviction on the basis of retrospective application of the relevant law and of a violation of his freedom of expression. He relied on Articles 7 and 10 of the Convention.
4. By a decision of 28 August 2008, the Court declared the application partly admissible.
5. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties

replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1962 and lives in Vladivostok.
 7. At the material time the applicant was a Navy officer and worked as a military journalist on the Russian Pacific Fleet's newspaper *Boyevaya Vakhta* ("Battle Watch"). The applicant's articles mainly focused on problems of environmental pollution and other issues related to the activity of the Russian Pacific Fleet.
 8. According to the applicant, he also worked, on a freelance basis, for a Japanese TV station, NHK, and a Japanese newspaper, *Asahi Simbun*, and supplied their representatives, in particular accredited correspondents Mr T.Dz. and Mr T.O. with openly available information and video footage. The Government submitted in this connection, with reference to witness statements from the editor and deputy editor of *Boyevaya Vakhta*, that the applicant had not been entrusted with any task of cooperating with Mr T.O., apart from assisting the latter in visiting Russian military units and apprising him of the professional activities of *Boyevaya Vakhta*. According to the Government, any further contacts with Mr T.O. were maintained by the applicant of his own volition, and he did not report to his superiors on such contacts. The applicant insisted that his superiors had been aware of and accepted his contacts with Japanese journalists.
- A. The applicant's arrest and pre-trial detention**
9. On 13 November 1997 customs officers at Vladivostok Airport searched the applicant, who was about to leave on an official trip to Japan, and seized a number of his papers, on the ground that they allegedly contained classified information. Thereafter the applicant was allowed to continue his trip.
 10. On 20 November 1997 the Federal Security Service (*Федеральная служба безопасности* – "the FSB") brought criminal proceedings against the applicant in connection with the above episode, and apprehended him on his return from Japan. The applicant was then es-

corted to pre-trial detention centre IZ 20/1 in Vladivostok, where he was detained until his first conviction on 20 July 1999.

11. During the night of 20 to 21 November 1997 the FSB searched the applicant's flat and seized his personal computer and a number of documents. The applicant's computer was returned to him some time later.
12. On 28 November 1997 the applicant was formally charged with treason through espionage. These charges were based on a preliminary expert opinion given by the Headquarters' 8th Department of the Pacific Fleet (*Восьмое управление штаба Тихоокеанского флота*), which concluded that some of the documents seized on 13 and 20 November 1997 contained State secrets.

B. The applicant's indictment

13. On 29 September 1998 a bill of indictment was served on the applicant. It stated that the applicant had committed treason, through espionage, by having collected, kept and transmitted ten items of information classified as secret to two Japanese nationals in the period between 1996 and 20 November 1997. The information in question included a draft article by the applicant on the decommissioning of Russian nuclear submarines, a copy of a report on the financial situation of the Pacific Fleet, a copy of several pages of a manual on searching for and rescuing space craft by the Navy, a report on decommissioning and keeping afloat of Russian nuclear submarines, a questionnaire on re-processing of liquid rocket fuel, a list of accidents on Russian nuclear submarines, a copy of several pages of a report on decommissioning of weapons and armaments, a map of the territory of military unit no. 40752, and handwritten notes made by the applicant at a meeting held at the headquarters of the Pacific Fleet on 11 September 1997. The indictment further stated that the applicant had orally divulged information concerning the time and place of the departure of a trainload of spent nuclear fuel.
14. The indictment was based on reports of 22 December 1997 and 14 March 1998 prepared by four expert groups appointed by the General Headquarters' 8th Department of the Ministry of Defence (*Восьмое управление Генштаба*

Министерства обороны).

C. First round of court proceedings

15. By a judgment of 20 July 1999 the Pacific Fleet Military Court reclassified the offence and convicted the applicant of abuse of power, having found it unproven that the applicant had actually transmitted State secrets to foreign nationals. The applicant was sentenced to three years' imprisonment. By virtue of an Amnesty Act of 18 June 1999 the applicant was discharged from serving this sentence and released in the courtroom.
16. The applicant, his lawyers and the prosecuting party appealed against the first-instance judgment.
17. On 21 November 2000 the Military Section of the Supreme Court of Russia (*Военная коллегия Верховного Суда РФ* – "the Supreme Court") quashed the judgment of 20 July 1999 on the grounds of the trial court's failure to establish the essential circumstances of the case and its inconsistent conclusions and wrongful application of the law. The case was remitted to the Pacific Fleet Military Court for a fresh examination.

D. Second round of court proceedings

1. Proceedings before the trial court

18. On an unspecified date, following the Pacific Fleet Military Court's request, the General Headquarters' 8th Department of the Ministry of Defence appointed seven experts and the Ministry of Nuclear Energy appointed an expert. The experts were asked whether the items of information listed in the indictment contained State secrets.
19. On 14 September 2001 the experts submitted their report, stating that three out of the ten items in question were of "restricted distribution", whilst the other seven contained State secrets. According to the applicant, in defining whether the disclosed information contained State secrets, the experts had applied the Ministry of Defence's unpublished Decree no. 055 of 10 August 1996, Presidential Decree no. 1203:95 of 30 November 1995 and section 5 of the State Secrets Act, enacted on 21 July 1993 and amended on 6 October 1997. In the applicant's submission, he had access to Decree no. 055, read it and signed a document to the effect that he had read it in the autumn of 1996.
20. On 25 December 2001 the Pacific Fleet Military

tary Court convicted the applicant of treason through espionage under Article 275 of the Russian Criminal Code.

21. As regards the *actus reus* of the offence, the court found that in 1996-1997 the applicant had established friendly relations with a Japanese journalist, Mr T.O., and provided him with information, at the latter's requests, in exchange for regular payments. In August-September 1997, in his telephone conversations with the applicant, Mr T.O. had repeatedly expressed his interest in the military exercises that were being conducted by the Pacific Fleet at that time, especially their particular features and any differences from previous exercises. The judgment further stated:

"On 10 September 1997, on an official invitation, [the applicant], as a representative of the *Boyevaya Vakhta* newspaper, attended a meeting of the Military Council of the Pacific Fleet, where he learned that an appraisal of the results of the military exercises of the Pacific Fleet was scheduled for 11 September 1997.

On 11 September 1997 [the applicant], with the intention of obtaining classified information on the said exercises and subsequently transferring it to [Mr T.O.], arrived at the headquarters of the Pacific Fleet. Although he was not included in the list of persons authorised to participate in the appraisal of the tactical training exercises, the applicant attended the meeting and collected information disclosing the actual names of highly critical and secured military formations and units, including military-intelligence units, that had taken part in the exercises and information disclosing the means and methods of protection of classified data by radio electronic warfare units that had participated in the exercises. Under section 5 paragraphs 1 (6) and 4 (5) of the State Secrets Act of the Russian Federation (no. 5485-1) of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997, paragraphs 13 and 77 of the List of Information classified as State Secrets approved by Decree no. 1203 of the President of the Russian Federation of 30 November 1995, [the impugned information] was classified as State secrets.

For the same purpose, namely for communicating it to [Mr T.O.], the applicant then unlawfully kept this information ... On 20 November 1997 the handwritten notes made by [the applicant] during [the meeting of 11 September 1997] were found and seized at his place of residence.

...

According to a report by a forensic expert, the handwritten text in those notes was made by [the applicant], which the latter has not denied in court."

22. The court based its findings on statements by a number of witnesses, five recordings of the applicant's telephone conversations with Mr T.O. made by the FSB in June-September 1997, and the expert report of 14 September 2001, insofar as it stated that the applicant's handwritten notes contained information classified as secret. In particular, the court noted with regard to the expert report of 14 September 2001:

"... The experts concluded that [the applicant's] notes contained, in summary fashion, information on the composition of the groups of the naval forces which had taken part in the exercises, [such information] disclosing the actual names of highly critical and secured military formations and units, including military intelligence units, which constituted a State secret under section 5, paragraph 1 (6) of the State Secrets Act of the Russian Federation (no. 5485-1) of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997 and paragraph 13 of the List of Information constituting State Secrets, approved by Decree no. 1203 of the President of the Russian Federation of 30 November 1995.

Also, the experts concluded that [the applicant's handwritten notes] in summary fashion ... disclosed information on the activities of radio electronic warfare units, and notably on means and methods of protection of classified data, which constituted a State secret under section 5, paragraph 4 (5) of the State Secrets Act of the Russian Federation, no. 5485-1 of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997 and paragraph 77 of the List of Information classified as State Secrets, approved by Decree no. 1203 of the President of the Russian Federation of 30 November 1995.

...

... The court finds that [the experts'] conclusions that [the applicant's] notes on the exercises contain information disclosing the actual names of highly critical and secured military formations and units of the Pacific Fleet, including military intelligence units and [information on] specific activities of radio electronic warfare units ... which constitutes State secrets, are consistent, well-reasoned and based on a correct application of the legislation ..."

23. The applicant confirmed that he had attended the meeting of 11 September 1997 and made summary notes of speeches and reports of its participants, but pleaded not guilty and argued that he had lawfully attended the said meeting, since he had the right to receive and impart information as a journalist. The applicant insisted that he had had no intention of transferring this information to Mr T.O. and had kept it in order to enrich his own knowledge on the latest developments in the Navy and to inform his subordinates thereof, and to report on the results of the military exercises in the *Boyevaya Vakhta* newspaper. The applicant stated that all his activities had fully complied with Russian legislation.
24. As regards the applicant's argument that he had the right to freedom of expression, and was therefore entitled to attend the meeting of 11 September 1997, the court noted that the right to information was not absolute and could be limited by law for the protection of national security. Under national law, military personnel's right to information was limited in the interests of military service and, in particular, such personnel had an obligation not to disclose state or military secrets. As a serving officer, the applicant was bound by the legal provisions regulating the way in which servicemen accessed, collected, kept, imparted and published information classified as secret, and the way they communicated with foreign nationals.
25. The court also rejected the applicant's argument that he had made the impugned notes with a view to their publication in *Boyevaya Vakhta*. In this respect the court noted that the applicant had been fully aware of the relevant regulations which prohibited publication of information disclosing the actual names of military formations and units, and there had therefore been no practical use for such information in the applicant's publications.
26. The court further examined the conclusions of the expert report of 14 September 2001 in respect of the other items of information imputed to the applicant, compared them with the other materials of the case and rejected them as unreliable. In particular, the court stated that some of the pieces of information imputed to the applicant, including the list of accidents on Russian nuclear submarines and the map of the territory of military unit no. 40752, could be found in public sources, such as a military reference book on submarines, or a Greenpeace report. In this respect the court noted that receiving, keeping and disseminating publicly accessible information was not punishable under the Russian legislation in force and that there was no practical need to classify information which could be found in public sources.
27. The court thus acquitted the applicant of all the other charges listed in the indictment, some of them having been waived by the prosecuting party.
28. In view of the fact that the applicant had a minor child, no criminal record and positive professional references and decorations, and given that his offence had caused no damage, since he had not transferred the impugned information, the court referred to the "special-circumstances" clause of Article 64 of the Russian Code of Criminal Procedure and sentenced the applicant to a term below the statutory minimum, namely, four years' imprisonment in a strict-security correctional colony, and deprivation of a military rank.

2. Appeal proceedings

29. In their appeal submissions the defence complained, *inter alia*, that the experts who had drafted the report of 14 September 2001 had relied on unpublished Decree no. 055 of the Ministry of Defence in asserting the classified nature of the impugned information. The defence argued that the use of Decree no. 055 by the experts had resulted in the incorrect application of the State Secrets Act by the first-instance court. They further argued that the State Secrets Act had been applied retrospectively, since there had been no list of information constituting State secrets at the time of the commission of the offence in question. The defence also contended that, in any event, the information contained in the applicant's notes had been accessible from public sources.
30. On 25 June 2002 the Supreme Court of Russia upheld the applicant's conviction on appeal, having excluded a reference to the unlawfulness of his presence at the meeting of 11 September 1997 and to the general unlawfulness of his off-duty contacts with foreign nationals.
31. The Supreme Court noted that the question whether the applicant's handwritten notes had contained State secrets had been thoroughly and objectively examined in the first-instance judgment. It confirmed that the trial court had based its judgment on the expert report of 14 September 2001, which had stated that

"information disclosing the actual names of highly critical and secured military formations and units and information on the presence among the participants in the military exercises of the military intelligence units and information on the means and methods of protection of classified data [constituted] State secrets under section 5, paragraphs 1 (6) and 4 (5) of the State Secrets Act of the Russian Federation (no. 5485-1) of 21 July 1993, as amended by Federal Law no. 131-FZ of 6 October 1997, paragraphs 13 and 77 of the List of Information classified as State Secrets, approved by Decree of the President of the Russian Federation no. 1203 of 30 November 1995, and paragraphs 129 and 240-1 of ... Decree of the Ministry of Defence no. 055". The appellate court further noted that, when assessing the expert report of 14 September 2001, the trial court had rejected a number of its conclusions in which the experts had groundlessly stated that some of the impugned items of information had contained State secrets. The Supreme Court thus concluded that the first-instance court had critically assessed the expert report of 14 September 2001 and had only relied on those conclusions which had been objectively confirmed during the trial.

32. The Supreme Court also upheld the first-instance finding that the applicant's intent to transfer the impugned information to Mr T.O. had been proved by the recordings of his telephone conversations with the latter. The court further rejected the applicant's argument that the information in his handwritten notes could have been found in public sources. In that connection it stated – with reference to the trial court's finding – that "no data concerning the actual names of highly critical and secured military units, ships and formations, and, in particular, military intelligence units, the means and methods of radio electronic warfare, as contained in [the applicant's] handwritten notes, [was] openly published".
33. The court also rejected the applicant's argument that Decree no. 055 had been unlawfully applied in his case, holding that this decree had been operative on the date that the applicant had committed his offence and was still in force.
34. Finally, as regards the applicant's argument that the law had been applied retrospectively in his case, the Supreme Court noted:

"According to the decision of the Constitu-

tional Court of Russia of 20 December 1995, ... the requirements of Article 29 § 4 of the Constitution of the Russian Federation are implemented in the State Secrets Act of the Russian Federation of 21 July 1993, which defines the notion of State secrets and lists the information classifiable as State secrets. Later, on 30 November 1995, the List of Information classified as State secrets was enacted by Decree no. 1203 of the President of the Russian Federation.

Since collecting and keeping secret information for its transfer to a foreign citizen, committed by [the applicant], [was] a continuing criminal offence which was brought to an end on 20 November 1997, the [first-instance] court rightly applied the aforementioned legal instrument as well as the State Secrets Act, as amended on 6 October 1997, in the examination of his case."

35. The applicant unsuccessfully applied for supervisory review of his conviction.
36. On 23 January 2003 the applicant was released on parole.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal liability for disclosure of State secrets

37. Article 275 (High Treason) of the Russian Criminal Code, in force as of 1 January 1997, provides that high treason, that is, espionage, disclosure of State secrets, or assistance otherwise provided to a foreign state, a foreign organisation, or their representatives, by way of hostile activities undermining the external security of the Russian Federation, committed by a Russian citizen, shall be punishable by twelve to twenty years' imprisonment and confiscation of property.

B. Laws and regulations concerning State secrets

1. *The Russian Constitution of 12 December 1993*
38. Article 29 § 4 of the Russian Constitution provides that everyone has the right to freely search, obtain, impart, generate and disseminate information by all lawful means and that a list of information constituting State secrets is to be defined by a federal statute.

2. *The Federal Law on State Secrets*

(a) **Period prior to 6 October 1997**

39. Federal Law on State Secrets no. 5485-1 (“the State Secrets Act”) was enacted on 21 July 1993 and entered into force on 21 September 1993. Section 5 provided:

“The following information may be classified as State secrets:

(1) information in the military field:

...

[information] about the location, actual names, organisational structure, armament, numerical strength of troops ...

...

(4) information in the field of intelligence, counter-intelligence and operational and search activities:

...

[information] about the means and methods of protection of classified data ...”

40. Section 9 set out the procedure for classifying information as State secrets. Authority to classify information was delegated to heads of State agencies. The law itself did not contain the list of such officials which was to be approved by the Russian President. The latter was also to approve the List of Information classified as State secrets, which was to be officially published. State agencies whose heads were competent to decide to classify information were to draw up extended lists of information that was to be classified as State secrets. The State Secrets Act did not specify whether such “extended lists” could be made public.
41. On 16 March, 26 and 27 October 1995 the State Duma, noting that the absence of the list of classified information “deprived the law-enforcement agencies of a legal basis for the performance of their duty to protect the security of the State, community and individuals”, repeatedly petitioned the Government to prepare for the President’s approval a draft decree containing the list of classified information.
42. On 30 November 1995 the President approved Decree no. 1203 on the List of Information classified as State Secrets. Paragraphs 13 and 77 of the list provided for the classification of “information disclosing the location, actual names, organisational structure, armament and numerical strength of troops, which is not

subject to open declaration in accordance with the international obligations of the Russian Federation” and “information disclosing measures which are planned and/or being carried out to protect information from unauthorised access, foreign technical intelligences services and leaks through technical channels”. They also designated the Ministry of the Interior, the Ministry of Defence and several other State agencies as bodies authorised to classify such information.

(b) **Period after 6 October 1997**

43. On 6 October 1997 Federal Law no. 131-FZ amending the 1993 State Secrets Act was enacted. The amendment was published and became operative on 9 October 1997. Section 5 of the State Secrets Act was amended to read:

“State secrets shall include: ...

(1) information in the military field:

...

[information] about the location, actual names, organisational structure, armament, numerical strength of troops ...

...

(4) information in the field of intelligence, counter-intelligence and operational and search activities:

...

[information] about the means and methods of protection of classified data ...”

3. *Case-law of the Russian courts*

44. On 20 December 1995 the Russian Constitutional Court examined the compatibility of the Criminal Code of the RSFSR, then in force, with the Russian Constitution, in so far as the former established criminal liability for State treason, and stated:

“... It follows that the State may classify as State secrets information in the field of defence and economic and other activities, disclosure of which is capable of undermining the national defence and security of the State. In this connection Article 29 § 4 of the Russian Constitution provides that the list of information constituting State secrets is to be enacted in the form of a federal statute. The State may also determine the means and methods for the protection of State secrets, including by way of establishing criminal liability for its disclosure and communication to a foreign State.

However, by virtue of the above Constitutional provision, criminal liability for disclosure of State secrets to a foreign State is justified only on condition that the list of information constituting State secrets is established in an officially published and publicly accessible federal statute. Pursuant to Article 15 § 3 of the Constitution, no law-enforcement decision, including conviction by a court, may be grounded on an unpublished legal instrument.

The requirement of Article 29 § 4 of the Russian Constitution is implemented in the State Secrets Act of 21 July 1993, which defines the notion of State secrets and lists the information classifiable as State secrets.

Accordingly, establishing criminal liability for disclosure of State or military secrets to a foreign State is not incompatible with Articles 15 § 3, 29 § 4 and 55 § 3 of the Russian Constitution."

45. On 29 December 1999 the St Petersburg City Court acquitted Mr Nikitin, a former naval officer, of charges under Articles 275 (High treason) and 283 § 1 (Divulging of information constituting State secrets) of the Russian Criminal Code (case no. 78-000-29 78-000-29). Mr Nikitin was accused, in particular, of having collected in August 1995, and having transferred in September 1995, information constituting State secrets. The court held as follows:

"... By virtue of the constitutional provisions, a list of information constituting State secrets was to be defined by a federal statute ...

There was no such statute at the time that Mr Nikitin committed the alleged offences; Decree no. 1203 of the President of the Russian Federation of 30 November 1995 was the only legal instrument which began regulating legal relations in the field of the protection of State secrets.

...

The State Secrets Act of the Russian Federation of 21 July 1993, which was subsequently subjected to considerable amendments, constitutes the federal statute mentioned in Article 29 § 4 of the Russian Constitution.

...

However, the Russian Constitution prescribes the definition of the list of information *constituting State secrets* by a *federal statute*. This requirement of the Constitution was only complied with in full when the State Secrets Act was amended in November 1997

to include in section 5 the list of information *constituting State secrets* instead of the list of information *which could be classified as State secrets*, which was mentioned in the [original version] of the Law.

By virtue of section 9 (4) of the Act, the list of information constituting State secrets must be approved by the President. ... By virtue of section 9 (4) of the Act in its version of 21 July 1993 and as amended on 6 October 1997 [the list] will be published and may be revised as and when needed.

...

An analysis of section 5 of the Act (irrespective of its different versions) indicates that [the Act] itself does not establish any degree of secrecy; in other words it does not classify any information, since it is in accordance with a *special* procedure provided for in section 9 of the Act that information can be classified as secret ...

This also means that, in its original version, section 5 of the Act cannot serve as the sole basis for charging [a person] with espionage or disclosure of State secrets. It must be supplemented with other legal instruments.

It is [in particular] Decree no. 1203 of the Russian President of 1995 which [was] used in the present case as [a legal instrument] in addition to section 5 [of the State Secrets Act] ...

The materials of the case reveal that Mr Nikitin ended his activity ... in September 1995.

The Presidential Decree of 30 November 1995 had not yet entered into force ...

Accordingly, section 5 of the Act (in the version that existed at the time when the defendant committed the acts imputed to him) cannot be used as a basis for bringing formal charges without supplementary legal instruments which would have formed a proper legal basis for an accusation ... such legal instruments can be applied on condition that they were officially published and entered into force prior to the commission of the acts imputed to Mr Nikitin.

... In view of the above, the court finds that any citizen of the Russian Federation... does not (did not) have any real possibility of determining whether information constitutes a State secret unless such information is included in the list of information constituting a State secret defined by a federal statute or approved by a decree of the Russian President ...

...

The new version of the State Secrets Act ... of 6 October 1997 brought the Act into compliance with the requirements of the Constitution, and consequently, only then did it become possible to apply section 5 of the State Secrets Act *independently*, that is, *without referring* to the List of Information classified as State Secrets enacted by decree of the Russian President on 30 November 1995.

Accordingly, in the period from 12 December 1993 until 30 November 1995 there was no statutory definition of information constituting State secrets, and therefore classifying any information as secret during the period under consideration ... was arbitrary and not based on law."

46. On 17 April 2000 the Supreme Court of Russia upheld Mr Nikitin's acquittal in the following terms:

"Having acquitted Mr Nikitin for the lack of constitutive elements of a criminal offence in his acts, the [first-instance] court proceeded from the premise that between 12 December 1993 and 30 November 1995 there had been no statutory definition of information constituting State secrets, with the result that the qualification of Mr Nikitin's acts by the investigating bodies had not been based on law.

...

By virtue of Article 29 § 4 of the Russian Constitution, which was enacted on 12 December 1993 and was in force during the period when Mr Nikitin committed the alleged offences, the list of information constituting State secrets was to be defined in a federal statute. Such a list was first defined in the federal law introducing changes and amendments to the State Secrets Act of the Russian Federation of 6 October 1997.

Taking into account that during the period when Mr Nikitin committed the alleged acts, there was no list of information constituting State secrets that met the requirements of the Constitution, the information that he had collected... and disclosed ... cannot be said to have contained State secrets ... As the *actus reus* of the offences under Articles 275 and 283 of the Criminal Code refers only to acts involving State secrets, the same acts involving other information cannot be held to be high treason and disclosure of State secrets ...

...

... The [State Secrets] Act [in its 1993 version] could not have been applied to Mr Nikitin as it did not contain the list of information con-

stituting State secrets, since section 5 of that Law referred only to information that could be classified as State secrets. However, Article 29 § 4 of the Constitution required that the said list be established in a federal statute. As section 5 of the State Secrets Act of 21 July 1993 and Article 29 § 4 of the Constitution refer to different subjects, the court cannot agree with the argument of [the prosecuting party] to the effect that the difference between these provisions is merely semantic ..."

47. On 25 July 2000 the Supreme Court of Russia quashed on appeal, and remitted for a fresh examination to a trial court, the sentence of Mr Moiseyev, a former employee of the Russian Ministry of Foreign Affairs, who had been charged with offences under Article 275 of the Russian Criminal Code. It found as follows:

"In finding [the applicant] guilty of the offence under Article 275 of the Criminal Code, the [first-instance] court noted that ... between early 1994 and 3 July 1998 [the applicant] had ... communicated information and documents containing State secrets to the South Korean intelligence service. The [first-instance] court only gave a general list of information and documents ..., without specifying which information and documents [the applicant] had communicated, and when. As the offences imputed to [the applicant] were continuous and spanned the period from 1992-1993 to July 1998, during which time the Russian laws evolved, the determination of these issues is of crucial importance for the case.

Pursuant to Article 29 § 4 of the Constitution ... the list of information constituting State secrets was to be defined in a federal statute. Such a list was first established in the federal law of 6 October 1997 introducing changes and amendments to the State Secrets Act of the Russian Federation. Hence, until that date there was no list of information constituting State secrets that met the requirements of the Constitution. As there is no indication in the judgment about the time when [the applicant] transmitted the information and documents, it is impossible to reach the correct conclusion as to which of the offences imputed to the applicant were committed during the period when the federal law containing the list of State secrets and compatible with the requirements of the Constitution was in force."

THE LAW

ALLEGED VIOLATION OF ARTICLES 7 AND 10 OF THE CONVENTION

48. The applicant complained under Article 7 of the Convention that the domestic courts had retrospectively applied and extensively construed the State Secrets Act in his case. He further complained under Article 10 of the Convention of a violation of his freedom of expression. The applicant claimed that he had been subjected to an overly broad and politically motivated criminal persecution as a reprisal for his critical publications. In particular, he had never transferred any information containing State secrets to Mr T.O., a Japanese journalist. Nevertheless, he had been convicted for his alleged intention to transfer his handwritten notes, which had been found to contain State secrets, to Mr T.O., the only basis for such a finding being the fact that he had previously legitimately communicated information to the Japanese journalist on several occasions. The applicant further complained that in so far as his handwritten notes had been found to have contained the actual names of military formations and units and the activities of radio electronic warfare units, this information had been publicly accessible from a number of public sources, including internet sites, and that he had been unable to foresee that this information had constituted State secrets, as this finding had been based on the unpublished – and therefore inaccessible – Decree no. 055 of the Ministry of Defence. The respective Convention provisions, in their relevant parts, provide:

Article 7

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed ...

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

Article 10

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart in-

formation and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

C. Submissions by the parties

1. The applicant

49. In so far as his complaints under Article 7 of the Convention were concerned, the applicant insisted that he had been convicted on the basis of retrospective application of the State Secrets Act. He argued, in particular, that between 11 September 1997, the date on which he had collected the information in question, and 9 October 1997, the date on which the amendment to the State Secrets Act incorporating the list of information classified as secret had become operative, there had been no such list defined in a federal statute, and therefore there had been no legal basis for his conviction for the alleged offence for that period. The applicant contended that Presidential Decree no. 1203 of 30 November 1995, approving the list of information classified as State secrets, could not be regarded as a proper legal basis for his conviction, given that Article 29 § 4 of the Constitution clearly stated that “a list of information constituting State secrets shall be defined by a federal statute”. He also insisted that in the absence of such a list he had been unable to foresee that his actions had been criminally liable.

50. In that respect, the applicant relied on the case-law of the Russian courts in the cases of *Nikitin v. Russia* (no. 50178/99, ECHR 2004-VIII) and *Moiseyev v. Russia* (no. 62936/00, 9 October 2008). In particular, he pointed out that the Supreme Court of Russia in its decision of 17 April 2000, given in the case of *Nikitin*, and in its decision of 25 July 2000, given in the case of *Moiseyev*, had consistently stated that the list of information constituting State secrets should be defined in a federal statute, and that such a list had first been established in the federal law of 6 October 1997 introducing chang-

es and amendments to the State Secrets Act of the Russian Federation.

51. The applicant further contended that the domestic courts had relied on unpublished Decree no. 055 of the Ministry of Defence, which, in his opinion, had led to an extensive interpretation and overly broad application of the State Secrets Act. Whilst he accepted that the trial court had not referred to Decree no. 055 directly, he considered that the court had relied on it indirectly by using the expert report of 14 September 2001. According to the applicant, the report in question had established the classified nature of his handwritten notes on the basis of the above-mentioned unpublished decree. In his view, this was confirmed by the formula “the activities of radio electronic warfare units during the exercises” used by the trial court in his conviction and taken word for word from Decree no. 055, rather than from section 5 of the State Secrets Act. In the applicant’s submission, the formula employed in the Act was narrower and covered only one type of the activities of radio electronic warfare units, namely information concerning “the means and methods of protection of classified data”. The applicant also pointed out that the use of Decree no. 055 in his case had been acknowledged by the appellate court, which had stated in its decision of 25 June 2002 that the expert report of 14 September 2001 had been based on the State Secrets Act, Presidential Decree no. 1203 and Ministerial Decree no. 055.
52. The applicant thus argued that, in any event, he could not have foreseen that the information which he had collected at the meeting of 11 September 1997 could have been of a classified nature, as none of the participants at the said meeting had informed the others about the secret nature of the information which had been distributed at the meeting. He also insisted that the information which he had collected and kept at home was of minor importance.
53. The applicant further maintained his complaint under Article 10 of the Convention. He insisted that the authorities had persecuted him for his journalistic activity and his publication of articles on serious environmental issues. He also contended that the impugned information could have been found in public sources, and in particular in reports by various environmental organisations, that it was of minor importance and that it could not therefore be regarded as a State secret.

2. *The Government*

54. The Government argued that in the applicant’s case the domestic courts had not applied the domestic law retrospectively, nor had they construed it extensively.
55. They submitted that the courts’ assessment of the applicant’s actions and, consequently, his conviction had been based on Article 275 of the Russian Criminal Code, the State Secrets Act as amended on 6 October 1997 and Decree no. 1203 of the Russian President of 30 November 1995, which approved the List of Information classified as State Secrets. They referred to the decision of 25 June 2002 in which the appellate court confirmed that the trial court had lawfully applied the said legal instruments in the applicant’s case, given that the offence imputed to the applicant had been of a continuous nature, had commenced on 11 September 1997, when the applicant collected the imputed notes, and had been halted on 20 November 1997, when the notes had been seized from the applicant. According to the Government, in a situation where there was a criminal offence of a continuing nature, it was legislation in force at the moment when such an offence was halted that was applicable. The Government contended that the applicant could not but have foreseen the application of the above-mentioned legal instruments, as all of them had been duly published and had therefore been accessible to him.
56. The Government disputed the applicant’s argument that at the time when he had committed the offences imputed to him the information classified as secret had not been defined by law. In the Government’s submission, the decision of the Constitutional Court of Russia dated 20 December 1995 had established that the requirements of Article 29 § 4 of the Constitution of Russia had been fulfilled by enactment of the State Secrets Act of 21 July 1993, which had defined the notion of State secrets and listed the information classifiable as State secrets. They also submitted that, subsequently, Presidential Decree no. 1203 of 30 November 1995 had enacted the list of information classified as State secrets. The Government pointed out that, in any event, the amendment of 6 October 1997 had not changed the provisions of section 5 of the State Secrets Act which had formed the basis for the applicant’s conviction.
57. In so far as the applicant complained that the domestic courts had relied on a secret Decree

no. 055 of the Ministry of Defence, which had allegedly lead to an extensive interpretation and overly broad application of the State Secrets Act, the Government contended that the said decree only defined the degree of secrecy of information classified as State secrets under federal law and had not prescribed any rules of conduct for individuals, but had been intended only for establishing the manner and criteria for defining the degree of secrecy of information classified as State secrets, and therefore had not pertained to a category of legal instruments which were to be published. The Government thus insisted that Decree no. 055 had been relied on in the applicant's case only in so far as it had been necessary to assess the degree of importance and secrecy of the information collected by the applicant rather than for determining whether that information had constituted a State secret, this latter question having been decided on the basis of the State Secrets Act and Presidential Decree no. 1203.

58. The Government further argued that the applicant's case was distinguishable from the *Nikitin* case referred to by the applicant. They pointed out that in the latter case, the offences imputed to Mr Nikitin had been committed before 5 October 1995, that is, before Presidential Decree no. 1203 had been enacted, whereas in the present case the actions imputed to the applicant had been halted on 20 November 1997, when the said decree was already in force. The Government further contended that the applicant's reference to the case of *Moiseyev* was also incorrect, given that the decision of the Supreme Court of Russia on which the applicant relied had been quashed and Mr Moiseyev had been convicted of espionage in a new set of court proceedings. The Government pointed out that legal arguments concerning the allegedly retrospective application of the State Secrets Act deployed by the appellate court in its final decision in the case of *Moiseyev* had been similar to those of the appellate court in its decision of 25 June 2002 in the applicant's case, and therefore there had been no conflict on that issue in the practice of the domestic courts.
59. They also pointed out that the applicant could not but have realised that the information which he had recorded in his written notes had been classified, since it had been disclosed among a limited group of persons at the meeting of 11 September 1997 on condition that it would be kept secret. The Government concluded that the provisions of Article 7 of the

Convention had not been infringed in the applicant's case.

60. The Government further disputed as unsubstantiated the applicant's argument that he had been a victim of political persecution because of his journalistic activities and critical articles and pointed out that his conviction had been based on various pieces of evidence relied on by the Pacific Fleet Military Court in its judgment of 25 December 2001. The Government argued that the interference with the applicant's freedom of expression had been justified under Article 10 § 2 of the Convention. They submitted that, in accordance with the domestic legislation on the media, divulging information containing State secrets was prohibited and that information must be received and imparted lawfully. They further pointed out that at the material time the applicant had been a serving military officer and by virtue of the relevant legal provisions he had been entitled to have access to any classified information only in so far as this had been rendered necessary by his professional duties and only to write down classified information on the source material that had been registered by a competent authority. Moreover, he had been under an obligation to keep secret any classified information he had received and prevent any leaks of such information. It had also been prohibited to take secret materials outside the premises of the headquarters or to keep them in an inappropriate place. They insisted that, by virtue of his status of a serviceman, the applicant had been fully aware of all those limitations and could have clearly foreseen the negative consequences of a breach of the relevant regulations.
61. The Government conceded that the applicant had indeed been convicted not for the transfer of the imputed information to Mr T.O., but rather for his intention to transfer it. In this connection, however, they pointed out that the elements of an offence punishable under Article 275 of the Russian Criminal Code included not only the transfer itself but also the collection, theft or storage with the intention to transfer of information constituting State secrets and that the applicant's intention to transfer the imputed information to Mr T.O. had been proven by evidence examined by the trial court, namely by the recordings of the applicant's telephone conversations with Mr T.O.
62. The Government further contested the applicant's allegation that the information con-

tained in his handwritten notes had been available from public sources. They submitted that these arguments had been thoroughly examined by the domestic courts and rejected as unfounded. The Government pointed out that the materials of the criminal case against the applicant had contained several publications, including that of the applicant, which had reported on the results of the tactical training exercises but did not disclose any classified information, in particular any information concerning the actual names of military units, or the means and methods of radio electronic warfare. Having compared those publications and the applicant's handwritten notes, the courts rightly concluded that the information in the applicant's handwritten notes had not been accessible from public sources.

63. Lastly, the Government disputed the applicant's assertion that by collecting the impugned information, he had carried out his usual journalistic activity. In this connection they referred to the recordings of the applicant's telephone conversations with Mr T.O., which clearly showed that the latter had expressed an interest only in information of a classified nature.

D. The Court's assessment

64. The Court observes that the applicant was convicted of having collected on 11 September 1997 and kept until 20 November 1997, the date on which he was arrested, information containing State secrets. The applicant complained, in essence, that his conviction had been unlawful, since in so far as the period between 11 September 1997 and 8 October 1997 was concerned, there had been no statutory list of information constituting State secrets, whilst with regard to the period from 9 October 1997, the date on which an amendment incorporating such a list into domestic law had become effective, until 20 November 1997, the domestic courts had extensively interpreted the applicable domestic law and based his conviction on an unpublished ministerial decree. The applicant argued that he had therefore been unable to foresee criminal responsibility for his conduct during either of these periods.
65. Having regard to the circumstances of the present case, the Court considers that the crux of it is the alleged violation of the applicant's right to freedom of expression. It is therefore considers it appropriate to examine the applicant's complaints under Article 10 of the Convention.

66. Bearing in mind that the applicant was a serving officer, the Court reiterates that the freedom of expression guaranteed by Article 10 of the Convention applies to servicemen just as it does to other persons within the jurisdiction of Contracting States. Also, the information disclosure of which was imputed to the applicant does not fall outside the scope of Article 10, which is not restricted to certain categories of information, ideas or forms of expression (see *Hadjianastassiou v. Greece*, 16 December 1992, § 39, Series A no. 252). The Court is therefore satisfied that Article 10 of the Convention is applicable in the present case and that the sentence imposed on the applicant constituted an interference with his right to freedom of expression. Such interference infringes Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of Article 10 and was "necessary in a democratic society" in order to attain those aims.

1. Whether the interference was lawful

67. The Court reiterates that the expression "prescribed by law", within the meaning of Article 10 § 2 of the Convention, requires first of all that the impugned measure should have some basis in domestic law; however, it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must be able to foresee the consequences of his or her actions, and that it should be sufficiently precise.

(a) Basis in national law

68. As regards the first aspect, the Court observes that the Russian Constitution of 12 December 1993 in its Article 29 § 4 states that "the list of information constituting State secrets shall be defined by a federal statute". Until 9 October 1997, section 5 of the State Secrets Act, which predated the Russian Constitution by a few months, only referred to a list of information that "may be" classified as State secrets, following the relevant procedure. Authority to classify information was conferred on the heads of State agencies, and the power to approve such a list was delegated to the President. The latter enacted the relevant decree on 30 November 1995. On 6 October 1997 section 5 of the State Secrets Act was amended so as to incorporate the list of information constituting State secrets, and the amendment was published and entered into force on 9 October 1997 (see paragraphs 38-43 above).

69. Against this background, the applicant suggested that two consecutive periods should be distinguished: the period between 11 September 1997 (the date on which the applicant collected the information in question) and 8 October 1997; and between 9 October 1997 (the date on which the amendments to the State Secrets Act became operative) and 20 November 1997, the date on which the applicant was arrested. The Government and the domestic courts, on the contrary, considered this distinction immaterial because the criminal offence of which the applicant was convicted was classified as “continuous perpetration” that is punishable under the law in force at the time that the applicant was intercepted by the authorities. However, their principal argument was that in any event the applicant’s conduct constituted a criminal offence even before 9 October 1997. The Court will therefore begin by examining the legal basis for the applicant’s conviction in these two periods.

i 11 September-8 October 1997

70. In so far as the first period is concerned, the parties disagreed as to whether the applicant’s conviction for the offence imputed to him had a formal basis in national law, or whether the applicant’s actions were punishable under the Russian law then in force. The applicant contended that there had been no such basis during the relevant period as the State Secrets Act contained only a list of information that “may be” – rather than “shall be” – classified as State secrets, whereas the enactment of that list in Presidential Decree no. 1203 of 30 November 1995 was in contravention of Article 29 § 4 of the Russian Constitution, which clearly required such list to be defined by a federal statute. The Government insisted that the State Secrets Act of 21 July 1993, together with Presidential Decree no. 1203 of 30 November 1995, formed a sufficient legal basis for the applicant’s conviction for the imputed offence during the relevant period, given that both documents had been duly published and were accessible to him.

71. The Court observes that under Article 29 § 4 of the Russian Constitution the list of information classified as secret was to be defined by a federal statute. The said constitutional provision presupposed that in the absence of such a statute there was no legal basis for the criminal prosecution of a person for disclosure of State secrets. However, the State Secrets Act as in force at the relevant time only listed informa-

tion classifiable – and not classified – as secret, and could not therefore be said to have clearly provided a list of such information. On the other hand, during the relevant period such a list was defined by Presidential Decree no. 1203 of 30 October 1995. The domestic courts relied on those two legal instruments as the basis for the applicant’s conviction. The question to be decided in the present case is therefore whether, in view of the relevant requirements of the Russian Constitution, a sufficient legal basis for the alleged interference with the applicant’s rights under Article 10 of the Convention can be established in a situation where a federal statute’s reference to a list of information that “may be” classified as State secret was detailed in a presidential decree – a legal instrument of a lower rank than a statute.

72. The respondent Government advanced an argument to the effect that the Constitutional Court of Russia (“the Constitutional Court”) in its decision of 20 December 1995 had held that the requirements of Article 29 § 4 of the Russian Constitution had been fulfilled by the State Secrets Act of 21 July 1993. In the circumstances of the present case, the Court does not consider it necessary to address the question of whether during the period under examination the State Secrets Act, taken alone, could have constituted a sufficient legal basis for the applicant’s conviction, as in any event it was not applied in his case alone, but in conjunction with the Presidential Decree of 30 November 1995.

73. The Court further reiterates that, according to its settled case-law, the concept of “law” must be understood in its “substantive” sense, not its “formal” one. It therefore includes everything that goes to make up the written law, including enactments of lower rank than statutes and the court decisions interpreting them (see *Association Ekin v. France*, no. 39288/98, § 46, ECHR 2001-VIII). In the present case, the Court notes that the Russian Constitution established a principle that a list of classified information should be defined by a federal statute and that amendments were subsequently made to the State Secrets Act so as to bring it into conformity with the relevant constitutional requirement. It is clear that in the period between 12 December 1993, the date on which the Russian Constitution entered into force, and 9 October 1997, the date on which the amendments to the State Secrets Act became operative, there was a pressing need for a legal instrument which would have provided the competent

- authorities with a legal basis “for the performance of their duty to protect the security of the State, community and individuals” (see paragraph 41 above). The Court is inclined to consider that the Russian authorities were justified in responding to that need through the enactment of a presidential decree – the procedure for the adoption of such a legal instrument being less complicated and more speedy than that of a federal statute – given in particular their margin of appreciation in regulating the protection of State secrecy (see *Stoll v. Switzerland* [GC], no. 69698/01, § 107, ECHR 2007- ...). The adopted decree clearly listed categories of information classified as secret and was accessible to the public so that any individual, including the applicant, could coordinate their conduct accordingly.
74. The Court further notes that in support of his argument that the State Secrets Act in its original version and Presidential Decree no. 1203 of 30 November 1995 could not be regarded as a proper legal basis for his conviction, the applicant referred to two decisions by the Supreme Court of Russia in two other criminal cases concerning disclosure of State secrets, namely those of *Nikitin* and *Moiseyev*, in which the Supreme Court had consistently stated that the list of information constituting State secrets should be defined in a federal statute, and that such a list had first been defined in the federal law of 6 October 1997 introducing changes and amendments to the State Secrets Act of the Russian Federation.
75. In so far as the applicant referred to Mr Nikitin's case, the Court notes the Government's argument that the offences imputed to Mr Nikitin were committed in August and September 1995, when Presidential Decree no. 1203 was not yet in force. The first-instance court in its judgment of 29 December 1999 directly referred to this circumstance as the ground for Mr Nikitin's acquittal, stating that the classification of information as a State secret prior to 30 November 1995 had been arbitrary and not based on law. However, the first-instance court does not seem to have doubted that from that date onwards there was a sufficient legal basis for criminal prosecution for disclosure of State secrets. Admittedly, the trial court stated that the respective requirement of Article 29 § 4 of the Russian Constitution was complied with in full only when the amendment of 6 October 1997 entered into force, but it also consistently held that the State Secrets Act in its original version, applied in conjunction with the Presidential Decree of 30 November 1995, could have constituted a proper legal basis for bringing charges for disclosure of State secrets (see paragraph 45 above).
76. When giving its ruling on appeal, the Supreme Court confirmed that during the period that Mr Nikitin committed his acts there had been no list of information classified as State secrets, and therefore the information that he had collected and disclosed could not be said to have contained State secrets. It is true that the appellate court also stated that such a list had first been defined following the enactment of the amendment of 6 October 1997 to the State Secrets Act; however, it did not express any opinion as to whether prior to the enactment of the amendment, the application of the State Secrets Act, taken together with the Presidential Decree of 30 November 1995, would have sufficed for a criminal prosecution for disclosure of State secrets (see paragraph 46 above).
77. Secondly, as regards Mr Moiseyev's case, the latter was accused of offences that spanned the period from 1992-1993 to July 1998. The decision of the Supreme Court of 25 July 2000 in Mr Moiseyev's case, referred to by the applicant, stated that the first-instance court had failed to determine the precise timing of the commission of the offences, and that it was therefore unclear which of those offences had been committed during the period when the State Secrets Act had complied with the requirements of Article 29 § 4 of the Russian Constitution. As in Mr Nikitin's case, the Supreme Court did not say anything concerning the Presidential Decree of 30 November 1995 (see paragraph 47 above). The Court is not therefore convinced that the court decisions relied on by the applicant are directly relevant in his situation, or that they should be interpreted in the way suggested by him, particularly as those indicating that the State Secrets Act in its original version and the Presidential Decree of 30 November 1995 had not constituted a sufficient legal basis for his conviction.
78. Lastly, the Court notes that the domestic courts in the applicant's case consistently referred to the State Secrets Act and the Presidential Decree of 30 November 1995 as the basis for the applicant's conviction. It reiterates in this connection that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law and that the Court will not express its opinion contrary to theirs unless their interpretation appear arbitrary or mani-

festly unreasonable. In the light of the foregoing considerations, the Court sees no reasons to depart from the interpretation given by the domestic courts. It therefore considers that the State Secrets Act of 21 July 1993 listing categories of information that may be classified as secret, and which was supplemented by Presidential Decree no. 1203 of 30 November 1995, listing information classified as secret with sufficient precision – both documents being publicly available so as to enable the applicant to foresee the consequences of his actions – constituted a sufficient legal basis for the interference with the applicant's rights under Article 10 of the Convention with regard to the period between 11 September and 8 October 1997.

ii *9 October-20 November 1997*

79. As regards the second period, the Court notes that it is not in dispute between the parties that the State Secrets Act in its amended version constituted a legal basis for the applicant's conviction.

iii *Overall*

80. In view of the above the Court finds that there existed sufficient legal basis for the applicant's conviction throughout the whole period between 11 September and 20 November 1997. Furthermore, the Court gives weight to the undisputed existence of such basis as of 20 November 1997 which, given the continuous nature of the offence, was sufficient under the domestic law to bring the applicant's conduct within the provision of the Criminal Code applicable in his case.

(b) Quality of law

81. The applicant also complained that the domestic courts' finding that information collected by him had contained State secrets had been based on Decree no. 055 of the Ministry of Defence, a secret and therefore inaccessible document relied on by the experts in their report of 14 September 2001, which had led to an extensive interpretation and overly broad application of the State Secrets Act and Presidential Decree no. 1203. He insisted that in such circumstances he could not have foreseen that the information he had collected had been classified and that his actions had been criminally liable. The Government conceded that the ministerial decree referred to by the applicant had been applied in his case, but argued that it had only been used to assess the degree of importance and secrecy of the infor-

mation collected by the applicant rather than for deciding whether that information constituted a State secret.

82. The applicant disputed, in essence, that the domestic law applied in his case had met the criteria of foreseeability and accessibility, or, in other words, that his conviction had been "lawful" within the meaning of Article 10 of the Convention. In this connection, the Court notes firstly that, as it has already held above, the State Secrets Act, taken together with Presidential Decree no. 1203, were in themselves sufficiently precise to enable the applicant to foresee the consequences of his actions. In so far as the applicant complained of the extensive and therefore unforeseeable interpretation of the said legal instruments by the domestic courts, which had allegedly relied on an unpublished ministerial decree, it is clear from the facts of the present case that the applicant, by virtue of his office, had access to Decree no. 055, read it and signed a document to that effect in autumn 1996 (see paragraph 19 above), that is, prior to the commission of the offences imputed to him. Against this background, the Court rejects the applicant's argument concerning the alleged lack of accessibility and foreseeability of the domestic law applied in his case.

83. Overall, the Court is satisfied that in the circumstances of the present case the domestic law met the qualitative requirements of accessibility and foreseeability, and that therefore the alleged interference with the applicant's rights under Article 10 of the Convention was lawful, within the meaning of the Convention.

2. Whether the interference pursued a legitimate aim

84. The Court further has no difficulties in accepting that the measure complained of pursued a legitimate aim, namely protection of the interests of national security.

3. Whether the interference was necessary in a democratic society

85. As regards the proportionality of the interference at issue, the Court notes first of all that the applicant's argument that his intent to transfer the impugned information was not proven and that the said information could be found in public sources appear unconvincing. The domestic courts carefully scrutinised each of the applicant's arguments and corroborated their findings with several items of evidence. They

relied, in particular, on several recordings of the applicant's telephone conversations with a Japanese national, proving his intention to transfer the information in question to Mr T.O. (see paragraphs 22 and 32 above). The domestic courts also gave due consideration to, and rejected as unreliable, the applicant's argument that the information collected by him was publicly accessible. Indeed, they critically assessed the expert report of 14 September 2001, having compared the experts' conclusions with other materials of the case, and rejected those conclusions which listed as classified information that could be found in public sources, such as a military reference book on submarines or a Greenpeace report (see paragraph 26 above). In respect of the information collected by the applicant, they noted, however, that it was not openly published (see paragraph 32 above).

86. The Court further cannot but accept the arguments of the domestic courts and the Government that, as a serving military officer, the applicant was bound by an obligation of discretion in relation to anything concerning the performance of his duties (see *Hadjianastassiou*, cited above, § 46). The Court also considers that the disclosure of the information concerning military exercises which the applicant had collected and kept was capable of causing considerable damage to national security. It is true that the applicant did not in fact transfer the information in question to a foreign national; on the other hand, the Court does not overlook the fact that his sentence was very lenient, much lower than the statutory minimum, and notably four years' imprisonment as compared with twelve to twenty years' imprisonment and confiscation of property (see paragraphs 28 and 37 above).

87. Overall, the Court observes that the applicant was convicted as a serving military officer, and not as a journalist, of treason through espionage for having collected and kept, with the intention of transferring it to a foreign national, information of a military nature that was classified as a State secret. The materials in the Court's possession reveal that the domestic courts carefully examined the circumstances of the applicant's case, addressed the parties' arguments and based their findings on various items of evidence. Their decisions appear reasoned and well-founded. On balance, the Court considers that the domestic courts cannot be said to have overstepped the limits of the margin of appreciation which is to be

left to the domestic authorities in matters of national security (see *Hadjianastassiou*, cited above, § 47). Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. There is nothing in the materials of the case to support the applicant's allegation that his conviction was overly broad or politically motivated or that he had been sanctioned for any of his publications.

88. In the light of the foregoing, the Court finds that there has been no violation of Article 10 of the Convention in the present case.
89. The Court further notes that the applicant's complaints under Article 7 of the Convention concern the same facts as those examined under Article 10 of the Convention. Having regard to its findings under this latter provision, the Court considers that it is unnecessary to examine those complaints separately.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been no violation of Article 10 of the Convention;
2. Holds unanimously that the applicant's complaints under Article 7 of the Convention raise no separate issue.

Done in English, and notified in writing on 22 October 2009, pursuant to Rule 77 § § 2 and 3 of the Rules of Court.

Søren Nielsen, *Registrar*

Christos Rozakis, *President*

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

DISSENTING OPINION OF JUDGE MALINVERNI

1. Unlike the majority, I am of the opinion that there has been a violation of Article 10 in respect of the period between 11 September and 8 October 1997. The Court should have strictly interpreted the requirement of Article 29 § 4 of the Russian Constitution and held that in the absence of a federal statute complying with

that requirement, there was no proper basis in domestic law for the applicant's conviction.

2. The reasons why I have serious doubts that the State Secrets Act in its original version, taken alone, could be regarded as a legal basis for the applicant's conviction are the following.
3. Firstly, the Supreme Court of Russia, in its decisions on appeal in the cases of Nikitin and Moiseyev of 17 April and 25 July 2000 respectively, noted that the requirements of Article 29 § 4 of the Russian Constitution had been met only after the amendments of 6 October 1997 were made to the State Secrets Act (see paragraphs 46 and 47). Moreover, the fact that on 30 October 1995 the Russian President enacted Decree no. 1203 on the List of Information classified as State Secrets suggests that the Russian authorities acknowledged the existence of a legal lacuna in this field.
4. As regards Presidential Decree no. 1203, it is true that this document, officially published and publicly available, established the list of information classified as State secrets. Nevertheless, I am not convinced that the relevant constitutional requirements were met by the enactment of this legal instrument, given that Article 29 § 4 of the Russian Constitution clearly referred to "a federal statute" – a legal act adopted by the national parliament as the result of a legislative process – rather than any enactments of lower rank such as presidential or governmental decrees. The fact that the necessary amendments were eventually made to the State Secrets Act to bring it into conformity with Article 29 § 4 of the Russian Constitution indicates, in my view, that the Russian authorities did not themselves consider that the relevant requirements of the Russian Constitution had been met by the adoption of a presidential decree.
5. In the light of the above considerations I am unable to conclude that the State Secrets Act in its original version and the presidential decree of 30 November 1995 could be regarded as a sufficient legal basis for the alleged interference with the applicant's rights under Article 10 of the Convention with regard to the period between 11 September and 8 October 1997.

ECHR

ECJ

SECOND SECTION

CASE OF DOWSETT v THE UNITED KINGDOM

(Application no. 39482/98 39482/98)

JUDGMENT

STRASBOURG

24 June 2003

FINAL

24/09/2003

DISCLOSURE OF EVIDENCE, CRIMINAL PROCEEDINGS,
INVESTIGATION, PUBLIC INTEREST, NATIONAL SECURITY, SECRET

IN THE CASE OF DOWSETT V. THE UNITED KINGDOM,

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

Mr **J.-P. Costa**, *President*,

Sir Nicolas Bratza,

Mr **L. Loucaides**,

Mr **C. Birsan**,

Mr **V. Butkevych**,

Mr **M. Ugrekhelidze**,

Mrs **A. Mularoni**, *judges*,

and Mrs **S. Dollé**, *Section Registrar*,

Having deliberated in private on 3 June 2003,

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

PROCEDURE

1. The case originated in an application (no. 39482/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr James Dowsett ("the applicant"), on 20 September 1994.
2. The applicant, who had been granted legal aid, was represented by Ms A. Bromley, a solicitor practising in Nottingham, and Mr A. Masters, a barrister practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.
3. The applicant alleged that he had been deprived of a fair trial by virtue of the prosecution's failure to disclose all material evidence in their possession.
4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).
5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).
6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
7. By a decision of 14 May 2002, the Chamber declared the application admissible.
8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1946 and is currently detained in HM Prison Kingston, Portsmouth.

A. The Crown Court trial

10. On 22 March 1989 at Norwich Crown Court the applicant was convicted of the murder of Christopher Nugent and sentenced to life imprisonment.
11. Mr Nugent had been the applicant's business partner. He was shot and killed at their business premises on 15 December 1987 by Stephen Gray, who left the scene of the crime in a car driven by Gary Runham.
12. Runham and Gray were arrested in January 1988 and the applicant was arrested in February 1988. He was charged with murder jointly with Runham, Gray and two other men who had allegedly provided money to pay for the killing of Christopher Nugent.
13. The Crown's case was that the applicant had paid Runham and Gray 20,000 pounds sterling (GBP) to kill Nugent, because Nugent knew too much about the applicant's involvement in mortgage fraud.
14. The applicant's defence was that he had hired Runham and Gray to break one of Nugent's limbs in order to put him out of action for a few

weeks while the applicant effected his own transfer to another branch of the firm. He alleged that he had paid Runham and Gray GBP 7,500 for the assault, but that after Gray had killed Nugent, Gray blackmailed the applicant into paying him more money. The applicant claimed that he would have had no motive for killing Nugent, since the latter was himself involved in the fraudulent activities being perpetrated through the business. The applicant submitted, however, that his representatives felt unable to pursue this line of argument satisfactorily because of lack of evidence of Nugent's dishonesty; the jury were asked to accept the applicant's word alone on this issue.

15. Runham and Gray pleaded guilty to murder. Gray gave evidence for the prosecution against the applicant concerning the alleged murder conspiracy. The two alleged co-conspirators, who according to the prosecution had, together with the applicant, paid for Nugent to be murdered, were acquitted.

B. The post-trial disclosure

16. Following his conviction, the applicant complained to the Police Complaints Authority (PCA) about Suffolk Constabulary's refusal to disclose material evidence. After investigation, in a letter of 30 October 1992 to the applicant, the PCA reported that it could not support any allegation of perversion of the course of justice but had found various instances of negligence.
17. According to the applicant, in July 1993 he was informed that there were seventeen boxes of hitherto undisclosed material. The applicant contended that some of this evidence would have supported his defence that he had had no need to murder Nugent to ensure his silence since it showed that the latter was also deeply involved in the fraudulent activities perpetrated through the business. The applicant claimed that some of the material from the seventeen boxes was disclosed to him in the week prior to his appeal hearing, while other material from the boxes remained undisclosed.
18. According to the Government, the evidence which was not disclosed at first instance, but which was disclosed prior to the applicant's appeal, fell into two categories. The first type of evidence derived from the Holmes computer system used by the police officers conducting the murder inquiry to store and cross-reference all the information obtained in the course of the inquiry. The computer data included documents known as "messages" which recorded

information when first received by an officer, and documents known as "actions" which recorded the steps to be taken by an officer in response to a message and the result of any such further inquiry. At the time of the trial, the prosecution took the view that the computer system was being used as a tool for the police investigation and that the data contained in it was not subject to disclosure under the Attorney-General's Guidelines (see "Relevant domestic law and practice" below), although any witness statements or exhibits obtained in response to a message or action should be, and were, disclosed as "unused material".

19. The Government submitted that, following the applicant's conviction, and in the light of developments in the common-law duty of disclosure (see below), the prosecution reviewed their position and decided that the data stored on the computer system did amount to disclosable material. Prior to the applicant's appeal, therefore, the prosecution disclosed the messages and actions held by the police. Some 4,000 actions had been disclosed, one of which was referred to by the applicant in support of his appeal.
20. In the Government's submission, the second category of evidence undisclosed at first instance related to the parallel investigation into mortgage fraud by a number of people, including the applicant and Nugent. At an early stage, the prosecution decided to keep the murder and fraud investigations separate and that there was no duty under the Attorney-General's Guidelines to disclose the material gathered in the fraud inquiry to the defendant charged with murder. Following the applicant's conviction and the development of the common law, the prosecution reconsidered their decision and, prior to the applicant's appeal, made full disclosure of the material obtained in the fraud inquiry.

C. The undisclosed material

21. Prior to the hearing before the Court of Appeal, the prosecution served on the applicant a schedule indicating what material was still being withheld following the review of the prosecution's duty of disclosure. In respect of some of the items in the schedule, the reason given for non-disclosure was "legal and professional privilege"; in respect of other items it was "public interest immunity"; and in respect of certain other items, for example document no. 580, no reason was given to explain the

decision to include the document in the list of withheld evidence. Counsel for the defence was in contact with the prosecution concerning possible further disclosure. A letter dated 23 March 1994 from the Branch Crown Prosecutor indicated that a number of documents, including document no. 580, were on the list of withheld material.

22. Document no. 580 subsequently came into the applicant's possession. It is a letter, dated 12 April 1988, from a firm of solicitors acting for Gray addressed to Detective Chief Inspector Baldry of the Suffolk Constabulary, and reads as follows:

"...

Further to our several discussions concerning Mr Gray, you will of course be aware that I did visit him in Leicester Prison on 26 March.

He has requested a transfer either to Brixton Prison or Wormwood Scrubs if this is at all possible and I should be grateful if you would let me know whether there is any possibility of Mr Gray receiving a transfer.

Secondly I now understand that apparently Mr Gray understands that you would be willing to support him receiving a straight term of life imprisonment and an application for early parole.

Obviously I have explained to Mr Gray the position concerning sentencing but perhaps you would set out your position so far as possible concerning these matters.

Thirdly I understand that Mr Gray's wife is to be produced at fortnightly intervals to Leicester Prison for visits and perhaps again you could clarify the position.

I look forward to hearing from you ..."

D. The appeal

23. The hearing of the applicant's appeal took place on 28 and 29 March 1994. Non-disclosure of evidence at trial, particularly evidence discovered in the parallel mortgage fraud investigation, was one of the applicant's grounds of appeal to the Court of Appeal, but no mention was made of document no. 580 or of the other documents which continued to be withheld by the prosecution. The applicant also relied on the fact that the trial judge had omitted to direct the jury that a person may lie for reasons unconnected with his guilt in relation to the offence with which he is charged (a "Lucas" direction), and that the fact that, during interviews

with the police the applicant had denied all knowledge of any plot to harm Nugent, did not mean that he had been involved in his murder.

24. Dismissing his appeal on 29 March 1994, the Court of Appeal remarked that in the course of his summing-up the judge had not suggested that the applicant's lies could amount to corroboration of the other evidence, and had reminded the jury of defence counsel's submissions in relation to the applicant's lies. Although the summing-up should have included a "Lucas" direction, no miscarriage of justice had occurred. On the question of non-disclosure the court observed:

"... As the trial was conducted, Nugent's dishonesty was made perfectly plain to the jury. The appellant himself had admitted being dishonest, and had said in the course of his evidence that Nugent was party to all the dishonest resorts to which he had lent himself in making false representations and forging documents. Accordingly it was fully before the jury that Mr Nugent was dishonest. ...

We have been taken through various parts of the evidence ... and we are quite satisfied that ... Mr Nugent's involvement in the deep dishonesty of this business was fully canvassed before the jury. ... Accordingly, although ... the stricter regime of prosecution disclosure which now prevails might well have required further disclosure than was actually made, we do not consider that this ground is one which has any substance in regard to the outcome of the case. ..."

The Court of Appeal concluded:

"There was overwhelming evidence that the appellant initiated a plot against the victim Nugent. There was likewise strong evidence that he had indicated what he wanted was to get rid of Nugent. The money actually paid, and indeed even the sum mentioned by the appellant was in our view out of proportion to a plot simply to 'duff up' the victim. Moreover, on analysis such a plot made no sense. Each member of this Court is of the clear opinion, despite the blemishes in an otherwise impeccable summing-up, that no miscarriage of justice has actually occurred. ..."

E. The alleged significance of document no. 580

25. The applicant believed that an inducement was promised to Gray by the prosecuting authorities in exchange for his testifying against him. In addition to the above letter, which the applicant claimed supported his hypothesis, he

referred to the fact that his tariff of imprisonment (that is, the period to be served before review by the Parole Board) under the life sentence had been set at twenty-five years, but was subsequently reduced to twenty-one years. Runham, who had provided the murder weapon and drove the get-away car, received a tariff of sixteen years. Gray, who had shot and killed Nugent, had his tariff set at eleven years and was released in 1999. In April 1999 the Home Office wrote to Runham, refusing to reduce his tariff:

"The Secretary of State holds Stephen Gray to be as culpable as you are, even though he fired the murder weapon and you did not. When the tariff was set for Stephen Gray, the then Secretary of State took into account that he had, like you, pleaded guilty to murder but had in addition been '... a very important witness for the prosecution'. ..."

26. The Government denied that any inducement was offered to Gray. Under cover of a letter dated 27 June 2001, they sent to the Court undated statements from three senior officers in the Suffolk Constabulary who had been involved in the murder investigation.

- (a) The statement of Chief Superintendent Green reads:

"I have seen a copy of the letter dated 12 April 1988 from Ennions, Solicitors ... to my then colleague, Mr Baldry. I can confirm that this letter is genuine and was recorded as Document D-580 during the course of the investigation into the murder of Mr Nugent.

I have no recollection of this letter after thirteen years and I cannot remember ever discussing it with Mr Baldry. At no time was I ever involved in any debate regarding the issue of Mr Gray receiving a 'straight term of life imprisonment and an application for early parole'.

I can confirm that I did not offer Mr Gray any form of inducement to give evidence against Mr Dowsett or other defendants. To the best of my recollection, Gray's motives were that he was simply attempting to 'clear his plate' by telling the whole truth about the circumstances of the case, whilst at the same time ensuring that Dowsett and others faced their share of the responsibility for the crime. I do recall that Mr Gray hoped that his honesty at the trial would one day assist him to make a successful application for parole.

I would like to emphasise that I spent six days with Mr Gray at Winchester Prison during the preparation of his statement and can categori-

cally state that all one hundred and one pages of the document were written with Mr Gray's consent and without any form of inducement."

- (b) The statement of Detective Chief Inspector Baldry, now retired, reads:

"This murder happened in 1987 and is not now fresh in my memory.

However I do remember clearly that I gave no indications to interviewing officers or to Gray himself that in return for his support we would aid an application for a shorter sentence. Gray was a very dangerous murderer who I considered enjoyed carrying out his 'murder' contract with Mr Dowsett. This matter was so grave that no such undertaking could honestly have been given.

I do remember that Gray at one time was on hunger strike in prison and that we helped his wife to visit him in prison. How this help was given I do not remember - it may have been in the role of carrying messages to and from."

- (c) Detective Chief Inspector Abrahams, also now retired, said in his statement:

"Concerning the letter Document D-580 I can categorically state that I did not personally offer Gray any inducement or arrangement relating to his sentence. Nor did I have any discussions with his legal representative with regard to his sentence. Equally, I did not instruct any of my subordinate officers including the interview team questioning Gray so to do.

As far as I am aware Gray throughout his detention and taped questioning was dealt with in accord with the Police and Criminal Evidence Act.

I have been unaware of this letter until now but I am sure Chief Inspector Mike Baldry (now retired) may be of some help to you.

I would point out that Gray was arrested at Mildenhall Police Station on 23 January 1988 after which the murder management team was joined by Mr Christopher Yule of the Crown Prosecution Service, Ipswich, who advised on all legal aspects of the case. He was later joined by Mr (now Sir and a High Court Judge) David Penry-Davey QC and Mr David Lamming of Counsel, who advised on what was to be a complex case not only involving murder, conspiracy to murder but also large scale mortgage fraud.

I am not aware that any representations were made to the trial judge concerning any reduction in Gray's tariff. If this had been the case

then the application would have had to be made through prosecuting counsel.

For your information I include below some relevant dates and points that you may already be aware of in relation to the murder, but I think they are worth emphasising:

15 December 1987: Christopher Nugent found murdered at his business premises that he owned with his partner Dowsett.

23 January 1988: Gray gave himself up at Mildenhall Police Station and admits the offence naming Dowsett, Runham and others as part of a murder conspiracy.

26 January 1988: Gary Runham arrested for the murder. He admits the offence naming Dowsett, Gray and others. Runham did the groundwork in planning Nugent's murder and propositioned Gray at a later stage to do the actual killing.

1 February 1988: Dowsett and others arrested for the murder.

17 February 1988: I was withdrawn from the everyday management of the inquiry and returned to Force Headquarters. DCI Baldry took over this role.

December 1988: Gray and Runham appear at Crown Court, plead guilty to the murder and are sentenced to life imprisonment.

January 1989: Gray agrees to become a witness for the prosecution and Detective Inspector Green (now Chief Superintendent) obtains a witness statement.

30 January 1989: Trial of Dowsett and others commences. ...

Gray appeared as a prosecution witness. Runham did not. The jury unanimously found Dowsett guilty of murder and he was sentenced to life imprisonment.

Prosecution witness O'Dowd gave evidence to the fact that Dowsett admitted the murder to him and stated that Dowsett had said that 'if Abrahams gets too close then he'll get the same' (or words to that effect).

16 December 1990 Dowsett made a formal complaint against me, other officers and Mr Yule [Crown Prosecution Service] that we perverted the course of justice in relation to his trial. The matter was investigated by an outside Police Force and was found by the DPP [Director of Public Prosecutions] and the PCA to be totally unsubstantiated.

Dowsett later appealed against his conviction

to the Court of Appeal but the Judges were unanimous in their judgment to disallow his application.

The above is to the best of my recollection. I do not know what tariffs were set by the Judge in his sentencing of all three defendants but I assume credit was given for Gray and Runham's guilty pleas."

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.
28. In December 1981 the Attorney-General issued guidelines, which did not have the force of law, concerning exceptions to the common-law duty to disclose to the defence certain evidence of potential assistance to it ((1982) 74 Criminal Appeal Reports 302 – "the Guidelines"). According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as follows:

"... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or

might create risk of domestic strife.”

29. Subsequent to the applicant’s trial in 1989 but before the appeal proceedings in March 1994, the Guidelines were superseded by the common law.
30. In *R. v. Ward* ([1993] 1 Weekly Law Reports 619), the Court of Appeal dealt with the duty of the prosecution to disclose evidence to the defence and the proper procedure to be followed when the prosecution claimed public interest immunity. It stressed that the court and not the prosecution was to be the judge of where the proper balance lay in a particular case:

“... [When] the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. Policy considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.”

The Court of Appeal described the balancing exercise to be performed by the judge as follows:

“... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed.”

31. The Court of Appeal’s judgment in *R. v. Davis, Johnson and Rowe* ([1993] 97 Criminal Appeal Reports 110) set out the procedures to be followed if the prosecution wished to withhold unused material from disclosure on grounds of public interest immunity including, where appropriate, making an application to the court *ex parte*.
32. In *R. v. Keane* ([1994] 1 Weekly Law Reports 747), the Court of Appeal emphasised that, since the *ex parte* procedure outlined in *R. v. Davis, Johnson and Rowe* was “contrary to the general principle of open justice in criminal trials”, it should be used only in exceptional cases. It would, however, be an abdication of the prosecution’s duty if, out of an abundance

of caution, it were simply “to dump all its unused material in the court’s lap and leave it to the judge to sort through it regardless of its materiality to the issues present or potential”. Thus, the prosecution should put before the court only those documents which it regarded as material but wished to withhold. The test of “materiality” was that an item should be considered as disclosable if

“[it] can be seen on a sensible appraisal by the prosecution:

(i) to be relevant or possibly relevant to an issue in the case;

(ii) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or

(iii) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (i) or (ii).”

If the prosecution was in any doubt as to the materiality of any such evidence it should ask the court to rule on the question.

33. In 1996 a new statutory scheme covering disclosure by the prosecution came into force in England and Wales. Under the Criminal Procedures and Investigations Act 1996, the prosecution must make “primary disclosure” of all previously undisclosed evidence which, in the prosecutor’s view, might undermine the case for the prosecution. The defendant must then give a defence statement to the prosecution and the court, setting out in general terms the nature of the defence and the matters on which the defence takes issue with the prosecution. The prosecution must then make a “secondary disclosure” of all previously undisclosed material “which might reasonably be expected to assist the accused’s defence as disclosed by the defence statement”. Disclosure by the prosecution may be subject to challenge by the accused and review by the trial court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 3 (B)

34. The applicant alleged that the proceedings be-

fore the Crown Court and the Court of Appeal, taken together, violated his rights under Article 6 § 1 and 3 (b) of the Convention, the relevant parts of which state:

"1. In the determination 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. ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

..."

A. The parties' submissions

1. The applicant

35. The applicant submitted that non-disclosure of evidence which was acknowledged to be relevant and material undermined the right to a fair trial and in particular the principles of equality of arms and the rights under Article 6 § 3 (b) to adequate facilities for the preparation of the accused's defence. Where, as in this case, evidence was withheld by the prosecution at trial and on appeal, without the approval of any judicial authority, there was no safeguard against abuse and the procedure was plainly incompatible with Article 6. Although it was its duty to do so, the prosecution made no application at the trial or during the appeal *ex parte* to obtain the courts' ruling on the withheld items. The defence could not be criticised in the circumstances for not pressing for the Court of Appeal to conduct a review. In any event, the procedure in *R. v. Keane* (see paragraph 32 above) whereby it was for the prosecution to assess whether evidence was material or relevant was inadequate as it provided no basis on which the defence could properly scrutinise or challenge its assessment. The applicant invited the Court to reconsider the arguments for special counsel to review undisclosed material.
36. In this case, there was evidence not disclosed at trial but disclosed on appeal and evidence neither disclosed at trial nor on appeal, such as document no. 580. The Court of Appeal acknowledged that the withholding of the material was unsatisfactory but went on *ex post*

facto to substitute its view for that of the jury. The applicant denied that document no. 580 was disclosed by the prosecution before the appeal, and referred to his own counsel's recollection and to a letter from the Branch Crown Prosecutor, dated 23 March 1994, refusing the disclosure of a number of documents, including no. 580, as "withheld material". Document no. 580 had been sent to him anonymously in prison in late 1997 and was relevant to the issue of Gray's credibility as a prosecution witness. He contended that there might be other material evidence which remained undisclosed. He relied on the Court's judgment in *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), where it was emphasised that the trial court, and not the prosecution, should be the ultimate judge on questions of disclosure of evidence.

2. The Government

37. The Government submitted that the proceedings taken as a whole were fair and in accordance with Article 6 § 1. They contended, relying, *inter alia*, on *Edwards v. the United Kingdom* (judgment of 16 December 1992, Series A no. 247-B), that the prosecution's failure at first instance to disclose the actions and messages held on the Holmes computer system and the materials gathered during the fraud inquiry did not deprive the applicant of a fair trial because this material was disclosed in time for the hearing in the Court of Appeal. His representatives could have asked for an adjournment if they had thought it necessary in order fully to consider the newly disclosed evidence.
38. The Government further submitted that, prior to the hearing in the Court of Appeal, the prosecution served on the applicant a schedule indicating what material had been withheld from disclosure following the review by the prosecution of its duty of disclosure. The schedule included documents nos. 375, 572, 573, 580, 590, 614, 620 and 625. In the event, the prosecution did not place this material before the Court of Appeal or apply for an *ex parte* hearing to decide whether or not it should be disclosed. Instead, the prosecution applied a test of "materiality" similar to that set out by the Court of Appeal in *R. v. Keane* (cited above), and concluded that the items in question were not "material" and thus did not have to be disclosed or placed before the court. The applicant's counsel could have discussed this point with the prosecution before the appeal

hearing and, if necessary, could have applied to the Court of Appeal for a review of the prosecution's decision and for disclosure of any of the documents listed in the schedule.

39. The Government could not explain how document no. 580 came into the applicant's possession, but considered that it must have been disclosed to the applicant by the prosecution shortly before the appeal hearing in March 1994, as the prosecution continued to reassess its duty of disclosure in the light of developments in the common law. The schedule marked by junior prosecution counsel showed that this document had been ticked for disclosure, and on a later schedule it no longer appeared as being withheld. Disclosure was the only sensible explanation for the applicant's possession of the letter.

B. The Court's assessment

40. As the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see *Edwards*, cited above, p. 34, § 33), the Court has not examined the applicant's allegations separately from the standpoint of paragraph 3 (b). It has addressed the question whether the proceedings in their entirety were fair (*ibid.*, pp. 34-35, § 34).
41. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § § 66-67). In addition Article 6 § 1 requires, as indeed does English law (see paragraphs 27-33 above), that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see *Edwards*, cited above, p. 35, § 36).
42. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see, for example, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Doorson* and *Van Mechelen and Others*, both cited above, p. 471, § 72, and p. 712, § 54 respectively).
43. In cases where evidence has been withheld from the defence on grounds of public interest immunity, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see *Edwards*, cited above, pp. 34-35, § 34). Instead, the Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms, and incorporated adequate safeguards to protect the interests of the accused.
44. The Court observes that this case has strong similarities to *Rowe and Davis* (cited above). As in that case, during the applicant's trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds, *inter alia*, of public interest immunity. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information for the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1; nor is it in accordance with the principles recognised in English case-law from the Court of Appeal's judgment in *R. v. Ward* onwards (see paragraphs 30 et seq. above).
45. While at the commencement of the applicant's appeal prosecution counsel disclosed some previously withheld material, it notified the defence that certain information remained undisclosed, but did not reveal the nature of this

material. Unlike in *Rowe and Davis*, however, the Court of Appeal did not proceed itself to review the remaining material in an *ex parte* hearing.

46. As regards the material disclosed by the prosecution prior to the appeal, the so-called “actions” and the materials in the fraud inquiry, the Court observes that the applicant was able to make use of it to support his arguments before the Court of Appeal and that the Court of Appeal was assisted by defence counsel in its assessment of the nature and significance of this material in reaching its conclusion as to whether or not the applicant’s conviction should stand. This procedure was, in the Court’s view, sufficient to satisfy the requirements of fairness as regards the material disclosed after the first-instance hearing (see *Edwards*, cited above, § 36-37).
47. There is a dispute between the parties as to whether one particular item, document no. 580, which contained material possibly relevant to discrediting Gray, was in fact disclosed to the defence shortly before the appeal (see paragraphs 22, 36 and 39 above). The Government on the one hand pointed to the prosecution schedules which they interpreted as indicating that document no. 580 had been removed from the list of withheld material and asserted that disclosure was the only sensible explanation for the applicant’s possession of the document; the applicant on the other hand provided a letter from his counsel stating that the prosecution did not provide the defence with the document and put forward his own account of being sent the document anonymously. There was also a letter from the prosecution dated 23 March 1994, some five days before the appeal hearing, which indicated that document no. 580 continued to be withheld from the defence. There is therefore unambiguous evidence showing that the letter concerned had not been disclosed by the eve of the appeal hearing and only indirect, circumstantial evidence that the prosecution might have changed its mind at the last moment. The Court is not persuaded therefore that the Government have shown that this letter, relevant to the applicant’s defence, was made available to his counsel in time for use at the appeal. This finding is not however essential to the reasoning in this case as in any event it is not in dispute that other documents were not disclosed at this time, on the basis, *inter alia*, of the prosecution’s assessment that public interest immunity was applicable to them.

48. The Government have pointed out that the applicant could himself have requested the Court of Appeal to review this material. This is no doubt true and might in theory have resulted in the court overruling the prosecution’s view and making further documents available at the appeal. However, the Court notes that in *Rowe and Davis* (cited above, § 65) it did not consider that the review procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge:

“Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury’s verdict of guilty into underestimating the significance of the undisclosed evidence.”

49. In this case, in deciding whether the material in issue should be disclosed, the Court of Appeal would neither have been assisted by defence counsel’s arguments as to its relevance nor have been able to draw on any first-hand knowledge of the evidence given at trial. An application to the Court of Appeal in those circumstances could not be regarded as an adequate safeguard for the defence.
50. In conclusion, therefore, the Court reiterates the importance that material relevant to the defence be placed before the trial judge for his ruling on questions of disclosure at the time when it can serve most effectively to protect the rights of the defence. In this respect the instant case can be distinguished from *Edwards* (cited above), where the appeal proceedings were adequate to remedy the defects at first instance since by that stage the defence had received most of the missing information and

the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence (p. 35, § § 36-37).

51. In light of the above, the Court finds no reason to examine the applicant's argument that the procedure set out in *R. v. Keane* fails to satisfy the requirements of Article 6 in placing an obligation on prosecution counsel only to place material it considers relevant before the court for its ruling on disclosure, or to reconsider the arguments militating in favour of special counsel reviewing undisclosed material as an additional safeguard (see, for example, *Fitt v. the United Kingdom* [GC], no. 29777/96, § § 30-33, ECHR 2000-II).
52. It follows that the applicant did not receive a fair trial and that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

54. The applicant claimed 2,675 pounds sterling (GBP) in respect of pecuniary damage for costs incurred by him or on his behalf while in prison from March 1989 to September 2002 (including postage, telephone calls, photocopying, text book and stationery costs). He asked the Court to award a fair and equitable amount in respect of non-pecuniary damage.
55. The Government submitted that it was not apparent how the items listed in respect of pecuniary damage related to his application to the Convention institutions, and that there was no supporting evidence for his claims (as, for example, an estimated hundred letters a year over thirteen years). As regarded non-pecuniary damage, they noted that the applicant had been convicted of a very serious crime and there could be no speculation as to the result of the applicant's trial if there had been no breach of Article 6. They argued that a find-

ing of violation would constitute sufficient just satisfaction.

56. The Court notes that it cannot deduce from the applicant's submissions what items of expenditure relate to the substance of his complaints under the Convention, or can be attributed to the process of exhaustion of domestic remedies in that regard. In any event, this item may be more appropriately considered under the heading "Costs and expenses" below.

Concerning non-pecuniary damage, the Court has had regard to similar cases and concludes that the finding of a violation in this case constitutes in itself sufficient just satisfaction.

B. Costs and expenses

57. The applicant claimed GBP 15,505.63 for costs and expenses in bringing the application, which included GBP 7,960.33 for counsel's fees, inclusive of value-added tax (VAT).
58. The Government considered that the claim was excessive for a case that had not gone beyond the written stage. It noted that the solicitors were charging more than three times the rate applicable under the legal-aid scheme and that the amount of work claimed for particular items seemed unnecessary (for example, seventeen hours by counsel to prepare a five-page letter in November 2001 and twenty-five hours by counsel and solicitors to produce a three-page letter on 30 September 2002).
59. Having regard to the subject matter under the Convention and the procedure adopted before it in this case, the Court finds that the amount claimed by the applicant cannot be regarded as either necessarily incurred or reasonable as to quantum (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). Making an assessment on an equitable basis, it awards 14,000 euros (EUR), plus any VAT that may be payable, for costs and expenses incurred by the applicant's legal representatives. Furthermore, finding that part of the applicant's own claims for expenditure may be regarded as related to the pursuit of redress for the violation in this case, it awards to the applicant personally the sum of EUR 1,500.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b);
2. Holds that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,500 (fifteen thousand five hundred euros) in respect of costs and expenses, to be converted into pounds sterling, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 June 2003, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

S. Dollé, *Registrar*
J.-P. Costa, *President*

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Sir Nicolas Bratza joined by Mr Costa is annexed to this judgment.

CONCURRING OPINION OF JUDGE SIR NICOLAS BRATZA JOINED BY JUDGE COSTA

I fully share the conclusion and reasoning of the Chamber that there has been a violation of Article 6 § 1 of the Convention in the present case. I only wish to add a few supplementary remarks because of the importance of the issues raised by the case and, more particularly, the question whether the appeal proceedings were adequate to remedy the lack of fairness at first instance.

As is noted in the judgment, the facts of the case bear a strong resemblance to those examined by the Grand Chamber in *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), in which documents had similarly been withheld by the prosecution at trial on the grounds of public interest immunity, without notification to the trial judge. At the commencement of the appeal in that case, the prosecuting counsel had notified the defence that certain materials had been withheld, without however revealing the nature of the materials in question. On two separate occasions, the Court of Appeal had reviewed the undisclosed evidence and, following *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, had ruled in favour of non-disclosure.

For the reasons set out in paragraph 65 of that judgment (quoted in paragraph 48 of the present judgment), the Grand Chamber held that such a procedure was insufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. The Court emphasised that, unlike the trial judge who saw the witnesses give their testimony and who was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the relevance of the undisclosed material on the transcript of the Crown Court hearing and on the account of the issues given to them by the prosecution in the *ex parte* hearings.

The Court went on in the following paragraph of the same judgment to distinguish *Edwards v. the United Kingdom* (judgment of 16 December 1992, Series A no. 247-B) on the grounds that at the appeal stage in that case the defence had received most of the information which had been missing at trial and the Court of Appeal was able to consider the impact of the new material on the safety of the

conviction in the light of detailed and informed argument from the defence.

In the present case, following the review of the prosecution's duty of disclosure, full disclosure was made before the hearing of the applicant's appeal of two categories of documents, but other documents continued to be withheld from disclosure. As appears from the judgment, these documents were listed in a schedule. In respect of some of the items in the schedule, the reason for non-disclosure was stated to be "legal and professional privilege" and, in respect of other items, "public interest immunity"; in respect of certain other items in the schedule (including document no. 580) no reason was given for the non-disclosure of the document.

In contrast to what occurred in *Rowe and Davis*, the prosecution made no application to the Court of Appeal to rule on the question whether the material listed in the schedule had been legitimately withheld. Equally, however, as pointed out by the Government, the defence did not apply to the Court of Appeal to review the material, the consequence of which application might have been either that the prosecution consented to further disclosure or that further disclosure was ordered by the Court of Appeal itself.

The central question is whether this omission on the part of the defence to use a procedure which offered the possibility of obtaining the release of the documents serves to distinguish this case from *Rowe and Davis*. In my view, it does not. It seems to me that where material is withheld from the defence on grounds of public interest immunity the burden must in principle lie on the prosecution to place it before the court for a ruling on whether it is properly withheld. The onus cannot rest on the defendant to take steps to compel disclosure. This is more particularly so where, as in the present case, the existence of the material is not made known to the defence until the appeal proceedings. In such a case the deficiencies at first instance are only capable of being cured if the material in question is disclosed to the defence by the prosecution in advance of the hearing of the appeal or if the material is placed before the Court of Appeal for a ruling on its disclosure in proceedings in which the procedural rights of the defendant are fully protected.

ECHR

ECJ

FOURTH SECTION

CASE OF ÖZGÜR GÜNDEM v TURKEY

(Application no. 23144/93)

JUDGMENT

STRASBOURG

16 March 2000

FREEDOM OF EXPRESSION, TERRORISM, SPECIAL CIRCUMSTANCES, PUBLIC INTEREST, NATIONAL SECURITY, SAFETY OF CITIZENS, DEMOCRACY, NAMES, OFFICIALS, DISCLOSURE

IN THE CASE OF ÖZGÜR GÜNDEM V. TURKEY,

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

Mr **M. Pellonpää**, *President*,

Mr **G. Ress**,

Mr **A. Pastor Ridruejo**,

Mr **L. Cafilisch**,

Mr **J. Makarczyk**,

Mr **V. Butkevych**, *judges*,

Mr **F. Gölcüklü**, *ad hoc judge*,

and Mr **V. Berger**, *Section Registrar*,

Having deliberated in private on 10 November 1999 and 3 February 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 23144/93) against the Republic of Turkey lodged with the Commission under former Article 25 by three Turkish nationals, Gurbetelli Ersöz, Fahrî Ferda Çetin and Yaşar Kaya, and by Ülkem Basın ve Yayıncılık Sanayi Ticaret Ltd, a company having its head office in Istanbul, on 9 December 1993. The first two applicants were, respectively, the editor-in-chief and the assistant editor-in-chief of the newspaper *Özgür Gündem* of which the third and fourth applicants were the owners. The Commission later decided not to pursue the examination of the application in so far as it concerned the first applicant, since she had died in 1997.

The application concerned the applicants' allegations that there had been a concerted and

deliberate assault on their freedom of expression through a campaign of targeting journalists and others involved in *Özgür Gündem*. The applicants relied on Articles 10 and 14 of the Convention and on Article 1 of Protocol No. 1.

The Commission declared the application admissible on 20 October 1995. In its report of 29 October 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 (unanimously), that there had been no violation of Article 14 (fifteen votes to two) and that it was not necessary to examine separately whether there had been a violation of Article 1 of Protocol No. 1 (unanimously)¹.

2. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 4 thereof read in conjunction with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 31 March 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.
3. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, assigned the case to the Fourth Section. The Chamber constituted within that Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr M. Pellonpää, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr G. Ress, Mr A. Pastor Ridruejo, Mr L. Cafilisch, Mr J. Makarczyk and Mrs N. Vajić (Rule 26 § 1 (b)).
4. On 1 June 1999 Mr Türmen withdrew from sitting in the Chamber (Rule 28). The Turkish Government ("the Government") accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).
5. On 13 July 1999 the Chamber decided to hold a hearing.
6. Pursuant to Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues raised in the application. The Registrar received the applicants' and Government's memorials on 5 and 20 October 1999 respectively.
7. In accordance with the Chamber's decision, a hearing took place in public in the Human

Rights Building, Strasbourg, on 10 November 1999.

There appeared before the Court:

(a) *for the Government*

Mr M. Özmen, *Co-Agent*,

Mr F. Polat,

Mr F. Çalışkan,

Ms M. Gülsen,

Mr E. Genel,

Mr F. Güney,

Mr C. Aydın, *Advisers*;

(b) *for the applicants*

Mr W. Bowring, *Counsel*,

Mr K. Yıldız, *Adviser*.

The Court heard addresses by Mr Bowring and Mr Özmen.

8. On 3 February 2000 Mrs Vajić, who was unable to take part in the further consideration of the case, was replaced by Mr V. Butkevych (Rule 26 § 1 (c)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. *Özgür Gündem* was a daily newspaper the main office of which was located in Istanbul. It was a Turkish-language publication with an estimated national circulation of up to 45,000 copies and a further unspecified international circulation. It incorporated its predecessor, the weekly publication *Yeni Ülke*, which was published between 1990 and 1992. *Özgür Gündem* was published from 30 May 1992 until April 1994. It was succeeded by another newspaper, *Özgür Ülke*.
10. The case concerns the allegations of the applicants that *Özgür Gündem* was the subject of serious attacks and harassment which forced its eventual closure and for which the Turkish authorities are directly or indirectly responsible.

A. Incidents of violence and threats against *Özgür Gündem* and persons associated with it

11. The applicants made detailed submissions to the Commission, listing the attacks made on journalists, distributors and others associated with the newspaper (see paragraphs 32-34 of the Commission's report). The Government, in their submissions to the Commission, denied that some of these attacks occurred (see paragraphs 43-62 of the Commission's report). In their submissions to the Court, neither party has made any comment on the Commission's findings in this respect (see paragraphs 141-42 of the Commission's report).
12. The following incidents are not contested.

Seven persons connected with *Özgür Gündem* were killed in circumstances originally regarded as killings by "unknown perpetrators": (1) Yahya Orhan, a journalist shot dead on 31 July 1992; (2) Hüseyin Deniz, a staff member of *Özgür Gündem*, shot dead on 8 August 1992; (3) Musa Anter, a regular columnist for *Özgür Gündem*, shot dead on 20 September 1992; (4) Hafız Akdemir, a staff member of *Özgür Gündem*, shot dead on 8 June 1992; (5) Kemal Kılıç, the Şanlıurfa representative of *Özgür Gündem*, shot dead on 18 February 1993 (application no. 22492/93 lodged by Cemil Kılıç concerning alleged State responsibility for this killing is pending before the Court – see the Commission's report of 23 October 1998); (6) Cengiz Altun, a reporter for *Yeni Ülke*, shot dead on 24 February 1992; (7) Ferhat Tepe, the Bitlis correspondent for *Özgür Gündem*, abducted on 28 July 1993 and found dead on 4 August 1993.

The following attacks occurred: (1) on 16 November 1992 an arson attack on the newsstand of Kadir Saka in Diyarbakır; (2) an armed attack on Eşref Yaşa, also a newsagent, on 15 January 1993 in Diyarbakır; (3) an armed attack on the newsagent Haşim Yaşa on 15 June 1993 in Diyarbakır (this incident and that concerning the attack on Eşref Yaşa were the subject of an application under the Convention – see the *Yaşa v. Turkey* judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI); (4) on 26 September 1993 Mehmet Balamir, a newspaper boy, was attacked with a knife in Diyarbakır as he was selling *Özgür Gündem*; (5) in 1993, in Ergani, boys selling the newspaper were attacked by a person with a knife; (6) an arson attack on a newsagent's in

Mazıdagı; (7) in Bingöl, on 17 November 1992 the car of a newsagent was destroyed by fire; (8) in Yüksekova, in October 1993, a bomb explosion damaged a newsagent's; (9) a bomb exploded at the Istanbul office of the newspaper's successor *Özgür Ülke* on 2 December 1994, killing one employee and injuring eighteen others.

13. The applicants listed a large number of other incidents (arson attacks, attacks and threats on newsagents, distributors and newspaper boys) which the Government stated either did not occur or concerning which they stated that they had received no information or complaint (see paragraphs 32-34 and 43-62 of the Commission's report). They also referred to the disappearance of the journalist Aysel Malkaç on 7 August 1993 and to the detention and ill-treatment of many journalists, one of whom, Salih Tekin, was found, upon his application to Strasbourg, to have been subjected to inhuman and degrading treatment while in custody (see paragraph 37 of the Commission's report and the *Tekin v. Turkey* judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517-18, § 53-54).
14. The applicants, and others acting on behalf of the newspaper and its employees, addressed numerous petitions to the authorities concerning the threats and attacks which they claimed had occurred. These are listed in the Commission's report (paragraph 35) and include letters from the applicant Yaşar Kaya to the governor of the state of emergency region, the Minister of the Interior, the Prime Minister and Deputy Prime Minister, informing them of the attacks and requesting investigations to be opened and measures of protection to be taken. There was no reply to the vast majority of these letters.
15. Written complaints were made by persons from the newspaper about specific attacks, incidents and threats concerning which the Government stated that they had received no information or complaint, including the attacks on children distributing the newspaper in Diyarbakır during 1993, the death of newsagent Zülküf Akkaya in Diyarbakır on 27 September 1993 and attacks on distributors by persons with meat axes, also in Diyarbakır, in September 1993 (see paragraph 35 (s) of the Commission's report). A written request for protective measures made on 24 December 1992 to the governor of Şanlıurfa on behalf of the persons involved in the newspaper in Şanlıurfa was refused shortly before the journalist Kemal Kılıç

was shot dead on 18 February 1993 (see paragraph 35 (l) of the Commission's report).

16. Following a request for security measures received by the Diyarbakır police on 2 December 1993, police escorted employees of the two companies dealing with the distribution of newspapers from the border of the province of Şanlıurfa to the distribution stores. Measures were also taken with respect to deliveries of the newspaper from the stores to newsagents. The Government submitted to the Commission that no other requests for protection were received. Following the explosion at the *Özgür Ülke* office on 2 December 1994 and a request from the owner, security measures, including patrolling, were taken by the authorities.

B. The search-and-arrest operation at the *Özgür Gündem* premises in Istanbul

17. On 10 December 1993 the police conducted a search of the *Özgür Gündem* office in Istanbul. During the operation, they took into custody those present in the building (107 persons, including the applicants Gurbetelli Ersöz and Fahri Ferda Çetin) and seized all the documents and archives.
18. Two search-and-seizure documents dated 10 December 1993 record that the police found two guns, ammunition, two sleeping bags and twenty-five gas masks. In a further search-and-seizure document dated 10 December 1993, it is stated that the following items had been found: photographs (described as kept in envelopes with a label "PKK Terrorist Organisation"), a tax receipt stamped with the name ERNK (a wing of the Workers' Party of Kurdistan (PKK)) for 400,000,000 Turkish liras (TRL), found in the desk of the applicant Yaşar Kaya, and numerous printed and hand-written documents, including an article on Abdullah Öcalan. A document dated 24 December 1993, signed by a public prosecutor at the Istanbul National Security Court, listed the following material as having been seized: in a sealed envelope the military identification of Muzaffer Ulutaş killed in Şırnak in March 1993, in a sealed box 1,350 injection kits, one typewriter, one video-cassette and one audio-cassette, and forty books found at the house of the applicant Fahri Ferda Çetin. As a result of these measures, the publication of the newspaper was disrupted for two days.
19. In an indictment dated 5 April 1994, charges were brought against the editor Gurbetelli Ersöz, Fahri Ferda Çetin, Yaşar Kaya,

the*manager Ali Rıza Halis and six others, alleging that they were members of the PKK, had assisted the PKK and made propaganda in its favour. The Government have stated that Gurbetelli Ersöz and Ali Rıza Halis were convicted of aiding and abetting the PKK, by judgment of the Istanbul National Security Court no. 5 on 12 December 1996. Gurbetelli Ersöz had previously been convicted of involvement with the PKK in or about the end of December 1990 and had been released from prison in 1992.

C. Prosecutions concerning issues of *Özgür Gündem*

20. Numerous prosecutions were brought against the newspaper (including the relevant editor, the applicant Yaşar Kaya as the owner and publisher, and the authors of the impugned articles), alleging that offences had been committed by the publication of various articles. The prosecutions resulted in many convictions, carrying sentences imposing fines and prison terms and orders of confiscation of issues of the newspaper and orders of closure of the newspaper for periods of three days to a month.

The prosecutions were brought under provisions rendering it an offence, *inter alia*, to publish material insulting or vilifying the Turkish nation, the Republic or specific State officers or authorities, material provoking feelings of hatred and enmity on grounds of race, region of origin or class, and materials constituting separatist propaganda, disclosing the names of officials involved in fighting terrorism or reporting the declarations of terrorist organisations (see "Relevant domestic law" below).

21. On 3 July 1993 *Özgür Gündem* published a press release announcing that the newspaper was charged with offences which, cumulatively, were punishable by fines totalling TRL 8,617,441,000 and prison terms ranging from 155 years and 9 months to 493 years and 4 months.
22. During one period of sixty-eight days in 1993, forty-one issues of the newspaper were ordered to be seized. In twenty cases, closure orders were issued, three for a period of one month, fifteen for a period of fifteen days and two for ten days.
23. The applicants have further stated, and this was not contested by the Government, that there have been prosecutions in respect of 486 out of 580 issues of the newspaper and

that, pursuant to convictions by the domestic courts, the applicant Yaşar Kaya has been fined up to TRL 35 billion, while journalists and editors together have had imposed sentences totalling 147 years' imprisonment and fines reaching TRL 21 billion.

D. Material before the Commission

1. Domestic court proceedings

24. Both parties provided the Commission with copies of judgments and decisions by the courts relating to the proceedings brought in respect of the newspaper. These involve 112 prosecutions brought between 1992 and 1994. Details of the articles in issue and the judgments given in twenty-one cases are summarised in the Commission's report (paragraphs 161-237).

2. The *Susurluk* report

25. The applicants provided the Commission with a copy of the so-called "*Susurluk* report"², produced at the request of the Prime Minister by Mr Kutlu Savaş, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, although eleven pages and certain annexes were withheld.
26. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.
27. The report analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of "informants" supposedly serving the State, and concludes that there is a connection between the fight to eradicate terrorism in the region and the underground relations that have been formed as a result, particularly in the drug-trafficking sphere. The passages from the report that concern certain matters affecting radical periodicals distributed in the region are reproduced below.

"... In his confession to the Diyarbakır Crime Squad, ... Mr G. ... had stated that Ahmet

Demir[3] [p. 35] would say from time to time that he had planned and procured the murder of Behçet Cantürk[4] and other partisans from the mafia and the PKK who had been killed in the same way ... The murder of ... Musa Anter[5] had also been planned and carried out by A. Demir [p. 37].

...

Summary information on the antecedents of Behçet Cantürk, who was of Armenian origin, are set out below [p. 72].

...

As of 1992 he was one of the financiers of the newspaper *Özgür Gündem*. ... Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Because legal remedies were inadequate *Özgür Gündem* was blown up with plastic explosives and when Cantürk started to set up a new undertaking, when he was expected to submit to the State, the Turkish Security Organisation decided that he should be killed and that decision was carried out [p. 73].

...

All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter presented in economic terms. ... The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9[6]). Other journalists have also been murdered [p. 74] [7]."

28. The report concludes with numerous recommendations, such as improving coordination and communication between the different branches of the security, police and intelligence departments; identifying and dismissing security-force personnel implicated in illegal activities; limiting the use of "confessors"; reducing the number of village guards; terminating the use of the Special Operations Bureau

outside the south-east region and incorporating it into the police outside that area; opening investigations into various incidents; taking steps to suppress gang and drug-smuggling activities; and recommending that the results of the Grand National Assembly Susurluk inquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

29. The relevant provisions of the Criminal Code read as follows:

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence ..."

Article 79

"A person who infringes various provisions of this Code by a single act shall be punished under the provision which prescribes the heaviest punishment."

Article 159 § 1

"Whoever overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government, the ministries or the military or security forces of the State or the moral personality of the judicial authorities shall be punished by a term of imprisonment of one to six years."

Article 311 § 2

"Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled ..."

Article 312

"A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turk-

ish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

30. The conviction of a person under Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to Parliament (Law no. 2839, section 11(f 3)).

B. The Press Act (Law no. 5680 of 15 July 1950)

31. The relevant provision of the Press Act 1950 reads as follows:

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

C. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)

32. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpe-

trated for the purposes of terrorism" (sections 3 and 4) and to which it applies. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged, provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

...

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[9]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8

(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated

in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched^[10]. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8

(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred

million Turkish liras ...

..."

D. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

33. The following amendments were made to the Prevention of Terrorism Act 1991 after the enactment of Law no. 4126 of 27 October 1995:

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4^[11] and 6^[12] of Law no. 647 of 13 July 1965."

THE LAW

I. STANDING OF GURBETELLI ERSÖZ

34. The Court recalls that this application was lodged by four applicants, the first of which was Gurbetelli Ersöz, formerly the editor of *Özgür Gündem*. In its report of 29 October 1998, the Commission decided not to pursue its examination of the case in so far as it concerned Gurbetelli Ersöz as she had died in autumn 1997 and no information had been received that any heir or close relative wished to pursue her complaints.
35. The parties have made no submissions on this aspect of the case.
36. The Court considers, in accordance with Article 37 § 1 (c) of the Convention, that it is no longer justified to continue the examination of the application in so far as it concerns Gurbetelli Ersöz. Accordingly, this part of the case shall be struck out of the list.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicants complained that the newspaper *Özgür Gündem* was forced to cease publication due to the campaign of attacks on journalists and others associated with the newspaper

and due to the legal steps taken against the newspaper and its staff, invoking Article 10 of the Convention which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Concerning the alleged attacks on the newspaper and persons associated with it

38. The applicants claimed that the Turkish authorities had, directly or indirectly, sought to hinder, prevent and render impossible the production of *Özgür Gündem* by the encouragement of or acquiescence in unlawful killings and forced disappearances, by harassment and intimidation of journalists and distributors, and by failure to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger and despite requests for such protection.

The applicants relied on the findings in the Commission's report that there was a disturbing pattern of attacks on persons concerned with *Özgür Gündem* and that the authorities, through their failure to take measures of protection and to conduct adequate investigations in relation to the apparent pattern of attacks on *Özgür Gündem* and persons connected with it, did not comply with their positive obligation to secure to the applicants their right to freedom of expression guaranteed under Article 10 of the Convention.

39. The Government emphasised that *Özgür Gündem* was the instrument of the terrorist organisation PKK and espoused the aim of that organisation to destroy the territorial integrity of Turkey by violent means. They disputed that

any reliance could be placed on previous judgments of the Court or on the Susurluk report in deducing that there was any official complicity in any alleged attacks. In particular, the Susurluk report was not a judicial document and had no probative value.

The Government submitted that the Commission based its findings on general presumptions unsupported by any evidence and that the applicants had not substantiated their claims of a failure to protect the lives and physical integrity of persons attached to *Özgür Gündem*. Nor had they substantiated that the persons attacked were related to the newspaper. They disputed that any positive obligation extends to the protection and promotion of the propaganda instrument of a terrorist organisation but asserted that, in any event, necessary measures were taken in response to individual complaints, investigations being carried out by public prosecutors as required.

40. The Court observes that the Government have disputed the Commission's findings concerning the pattern of attacks in general terms without specifying which are, or in what way they are, inaccurate. It notes that the Government deny specifically that any weight can be given to the Susurluk report and its description of acquiescence and connivance by State authorities in unlawful activities, some of which targeted *Özgür Gündem* and journalists, of whom Musa Anter is specifically named.

In its judgment in the *Yaşa* case (*Yaşa v. Turkey* judgment of 2 September 1998, *Reports* 1998-VI, pp. 2437-38, § § 95-96), in which it was alleged that the security forces had connived in an attack on Eşref Yaşa and his uncle who were both involved in the sale and distribution of *Özgür Gündem* in Diyarbakır, the Court found that the Susurluk report did not provide a basis for enabling the perpetrators of the attack on Eşref Yaşa and his uncle to be identified. It did find that the report gave rise to serious concerns and that it was not disputed in the *Yaşa* case that there had been a number of serious attacks on journalists, newspaper kiosks and distributors of *Özgür Gündem*. Furthermore, while the Susurluk report indeed may not be relied on for establishing to the required standard of proof that State officials were implicated in any particular incident, the Court considers that the report, which was drawn up at the request of the Prime Minister and which he decided should be made public, must be regarded as a serious attempt to provide information

on and analyse problems associated with the fight against terrorism from a general perspective and to recommend preventive and investigative measures. On that basis, the report can be relied on as providing factual substantiation of the fears expressed by the applicants from 1992 onwards that the newspaper and persons associated with it were at risk from unlawful violence.

41. Having regard to the parties' submissions and the findings of the Commission in its report, the Court is satisfied that from 1992 to 1994 there were numerous incidents of violence, including killings, assaults and arson attacks, involving the newspaper and journalists, distributors and other persons associated with it. The concerns of the newspaper and its fears that it was the victim of a concerted campaign tolerated, if not approved, by State officials, were brought to the attention of the authorities (see paragraphs 14-15 above). It does not appear, however, that any measures were taken to investigate this allegation. Nor did the authorities respond by any protective measures, save in two instances (see paragraph 16 above).
42. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, the *Gaskin v. the United Kingdom* judgment of 7 July 1989, Series A no. 160, pp. 17-20, § 42-49) and Article 11 (see the *Plattform "Ärzte für das Leben" v. Austria* judgment of 21 June 1988, Series A no. 139, p. 12, § 32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (see, for example, the *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, p. 49, § 161) and Article 3 (see the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, Reports 1998-VIII, p. 3290, § 102), while a positive obligation to take steps to protect life may also exist under Article 2 (see the *Osman v. the United Kingdom* judgment of 28 October 1998, Reports 1998-VIII, pp. 3159-61, § 115-17).
43. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see *mutatis mutandis*, the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11, § 23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and the *Osman v. the United Kingdom* judgment cited above, pp. 3159-60, § 116).
44. In the present case, the authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence. The steps taken after the bomb attack at the Istanbul office in December 1994 concerned the newspaper's successor. The Court finds, having regard to the seriousness of the attacks and their widespread nature, that the Government cannot rely on the investigations ordered by individual public prosecutors into specific incidents. It is not convinced by the Government's contention that these investigations provided adequate or effective responses to the applicants' allegations that the attacks were part of a concerted campaign which was supported, or tolerated, by the authorities.
45. The Court has noted the Government's submissions concerning its strongly held conviction that *Özgür Gündem* and its staff supported the PKK and acted as its propaganda tool. This does

not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.

46. The Court concludes that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

B. Concerning the police operation at the *Özgür Gündem* premises in Istanbul on 10 December 1993

47. The applicants relied on the findings in the Commission's report that the search-and-arrest operation conducted on the premises of *Özgür Gündem* in Istanbul, during which all the employees were detained and the archives, library and administrative documents seized, disclosed an interference with the newspaper's freedom of expression for which there was no convincing justification. In their submissions to the Commission, they stated that there were innocent explanations for the allegedly incriminating material found on the premises (see paragraph 36 (i) of the Commission's report).
48. The Government pointed to the materials seized during the search, including injection kits, gas masks, an ERNK receipt and the identity card of a dead soldier, which, they submitted, were indisputable proof of the links between the newspaper and the PKK. They referred to the conviction on 12 December 1996 of the editor Gurbetelli Ersöz and manager Ali Rıza Halis for aiding the PKK. They also asserted that, of the 107 persons apprehended at the Istanbul office, 40 could claim no connection with the newspaper, which gave additional grounds for suspicions of complicity with the terrorist organisation.
49. The Court finds that the operation, which resulted in newspaper production being disrupted for two days, constituted a serious interference with the applicants' freedom of expression. It accepts that the operation was conducted according to a procedure "prescribed by law" for the purpose of preventing crime and disorder within the meaning of the second paragraph of Article 10. It does not, however, find that a measure of such dimension was proportionate to this aim. No justification has been provided for the seizure of the newspaper's archives, documentation and library. Nor has the Court received an explanation for the fact that every person found on the newspaper's premises

had been taken into custody, including the cook, cleaner and heating engineer. The presence of forty persons who were not employed by the newspaper is not, in itself, evidence of any sinister purpose or of the commission of any offence.

50. As stated in the Commission's report, the necessity for any restriction in the exercise of freedom of expression must be convincingly established (see, among other authorities, the *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, Series A no. 295-A, p. 19, § 50). The Court concludes that the search operation, as conducted by the authorities, has not been shown to be necessary, in a democratic society, for the implementation of any legitimate aim.

C. Concerning the legal measures taken in respect of issues of the newspaper

1. *The applicants*

51. The applicants claimed that the Government had also sought to hinder, prevent and render impossible the production and distribution of *Özgür Gündem* by means of unjustified legal proceedings. They adopted the findings in the Commission's report that many of the prosecutions brought against the newspaper in respect of the contents of articles and news reports were unjustified and disproportionate in their effects. They submitted that the Commission had analysed thoroughly a representative sample of prosecutions in the light of the principles established by the Court and had found that most of the impugned articles contained no incitement to violence or comments likely to exacerbate the situation which could have justified the measures imposed.

2. *The Government*

52. The Government submitted that the Commission was selective in the manner in which it examined domestic court decisions concerning the *Özgür Gündem* publications. It was furthermore simplistic, in their view, to consider that only words directly and expressly inciting to violence might justifiably be prohibited, an approach which the Commission had taken in examining the articles. Implied, covert and veiled messages could equally have a negative impact. The Government argued that the correct test was to examine the actual danger caused by the publication. They also contended that the intention of the newspaper, namely, that of acting as a tool of propaganda for the

PKK and of supporting its aim of endangering the territorial integrity of Turkey, was crucial in this assessment. It is for the domestic authorities who are in contact with the vital forces of their countries to determine whether safety or security is threatened and the Contracting State must enjoy a wide margin of appreciation in any supervision carried out by Strasbourg.

3. *The Commission*

53. In its report, the Commission examined twenty-one court decisions concerning prosecutions in respect of thirty-two articles and news reports. These prosecutions related to various offences: insulting the State and the military authorities (Article 159 of the Criminal Code), provoking racial and regional hostility (Article 312 of the Criminal Code), reporting statements of the PKK (section 6 of the Prevention of Terrorism Act 1991), identifying officials appointed to fight terrorism (section 6 of the 1991 Act), and publishing separatist propaganda (section 8 of the 1991 Act). The prosecutions resulted in convictions involving prison terms, fines and closure of the newspaper. The Commission found that the criminal convictions and the imposition of sentences could be justified only in respect of three issues. Its summaries of the articles and court decisions are contained in its report (paragraphs 160-237).

4. *The Court's assessment*

54. The Court, firstly, sees no reason for criticising the approach adopted by the Commission which consisted in selecting domestic decisions for examination. The Commission reviewed the material and information provided by the parties, including the convictions and acquittals involved. Given the number of prosecutions and decisions, a detailed analysis of all cases would have been impracticable. The Commission identified decisions reflecting the different criminal offences at stake in the domestic cases. The articles examined varied in subject matter and form and included news reports on different subjects, interviews, a book review and a cartoon. The Government have not provided any reason for holding that this selection was biased, unrepresentative or otherwise gave a distorted picture; nor did they identify any court decisions or articles which should have been examined instead.

55. The Court therefore accepts the approach taken by the Commission and will examine whether, in the cases which the latter included in its report, the measures imposed disclose

any violation of Article 10 of the Convention.

56. It finds first that, prima facie, these measures constituted an interference with the freedom of expression within the meaning of the first paragraph of Article 10 and fall to be justified in terms of the second paragraph. While the applicants submit, in their memorial, that the provisions of the Prevention of Terrorism Act 1991 (see paragraphs 32-33 above) are so vague and potentially all-inclusive as to violate the letter and spirit of Article 10, they have not provided any precise argument as to why the measures in question should not be considered as "prescribed by law".

The Court recalls that it has already considered this point in previous judgments (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § § 45-46, ECHR 1999-IV and twelve other freedom of expression cases concerning Turkey) and found that measures imposed pursuant to the 1991 Act could be regarded as "prescribed by law". The applicants have provided no basis on which to alter this conclusion. As in those other judgments, the Court therefore finds that the measures taken can be said to have pursued the legitimate aims of protecting national security and territorial integrity and of preventing crime and disorder (see, for example, *Sürek (no. 1)* cited above, § 52).

57. The Court shall now examine whether these measures were "necessary in a democratic society" for achieving such aims in the light of the principles established in its case-law (see, among recent authorities, the *Zana v. Turkey* judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 51, and *Sürek (no. 1)* cited above, § 58). These may be summarised as follows:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it extends not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be es-

tablished convincingly.

- (ii) The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with the freedom of expression protected by Article 10.
 - (iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.
58. As these cases also concern measures against newspaper publications, they must equally be seen in the light of the essential role played by the press for ensuring the proper functioning of democracy (see, among many other authorities, the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, § 41, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). While the press must not overstep the bounds set, *inter alia*, for the protection of the vital interests of the State, such as the protection of national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the *Lingens* judgment cited above, p. 26,
- § 5 41-42).
- D. Prosecutions concerning the offence of insulting the State and the military authorities (Article 159 of the Criminal Code)**
59. The Commission examined in this context three articles concerning the alleged destruction of houses in Lice by the security forces, which led to the imposition of a prison sentence of ten months and a fifteen-day closure order, and a cartoon depicting the Turkish Republic as a figure labelled “*kahpe*”¹³, which entailed the imposition of a fine, a ten-month prison term and a fifteen-day closure order (see paragraphs 161-66 of the Commission’s report).
60. The Court reiterates that the dominant position enjoyed by the State authorities makes it necessary for them to display restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting. The Court notes, in respect of the articles concerning the destruction in Lice, that allegations of security-force involvement were circulating widely and indeed are the subject of proceedings in Strasbourg (see, for example, the case of *Ayder and Others v. Turkey*, now pending before the Court, application no. 23656/94, Commission’s report of 21 October 1999, unpublished). The Commission also found that the terms of the article were factual in content and emotional, but not offensive, in tone. In respect of the cartoon, it notes that the domestic court rejected the claim that it was intended as a joke and found that it disclosed “the concentrated nature of the intention to insult”. The Court does not find any convincing reason, however, for penalising any of these publications as described above. It agrees with the Commission’s findings that the measures taken were not “necessary in a democratic society” for the pursuit of any legitimate aim.
- E. Prosecutions concerning the offence of provoking racial and regional hostility (Article 312 of the Criminal Code)**
61. The case examined under this heading concerned an article describing alleged attacks by security forces on villages in the south-east and attacks made by terrorists, including the killing of an imam (see paragraphs 167-69 of the Commission’s report). The domestic court, which imposed a fine and sixteen months’ imprisonment on the author and issued a one-

month closure order, referred to the manner in which the article was written, the reason why it was written and the social context, without offering any explanation. The Court notes that it did not rely on any alleged inaccuracy in the article. The Commission found that the article was factual and of public interest and that it contained no element of incitement to violence or overt support for the use of violence by the PKK. The Court does not find relevant and sufficient reasons for imposing criminal convictions and penalties in respect of this article and agrees with the Commission that the interference was not justified under Article 10 § 2 of the Convention.

F. Prosecutions for reporting statements of the PKK (section 6 of the 1991 Act)

62. The Commission reviewed seven court decisions concerning convictions which were imposed in respect of eight articles, and which involved fines and the confiscation of several issues of the newspaper. The articles included reports of declarations of PKK-related organisations (for example, ARGK), statements, a speech and an interview with Abdullah Öcalan, the PKK leader, a statement by the European representative of the PKK, an interview with Osman Öcalan, a PKK commander, a statement by the *Dev-Sol* European office, and an interview with Cemil Bayık, a PKK commander (see paragraphs 174-95 of the Commission's report).
63. The Court recalls that the fact that interviews or statements were given by a member of a proscribed organisation cannot in itself justify an interference with the newspaper's freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of government policy. Regard must be had instead to the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence (see, for example, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 61, 8 July 1999, unreported).
64. The Court agrees with the Commission that four of the eight articles cannot be regarded as inciting to violence, in view of their content, tone and context. In particular, it finds that the statement of the *Dev-Sol* office in Europe, which recounts alleged police ill-treatment of persons at a Turkish funeral in Germany, did not contain any material relevant to public-

order concerns in Turkey.

65. Three articles were found by the Commission to contain passages which advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood. The Court agrees that, in the context of the conflict in the south-east, these could reasonably be regarded as encouraging the use of violence (see, for example, *Sürek (no. 1)* cited above, § § 61-62). Given also the relatively light penalties imposed, the Court finds that the measures complained of were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society within the meaning of the second paragraph of Article 10.

G. Prosecutions for identifying officials participating in the fight against terrorism (section 6 of the 1991 Act)

66. Five court decisions concerning six articles are listed under this heading. Penalties included fines, the confiscation of issues and, in one instance, a fifteen-day closure order (see paragraphs 199-215 of the Commission's report).
67. The Court observes that the convictions and sentences had been imposed because the articles had identified by name certain officials in connection with alleged misconduct, namely, the death of the son of a DEP (Democratic Party) candidate during detention, the allegation of official acquiescence in the killing of Musa Anter, the forcible evacuation of villages, the intimidation of villagers, the bombing of Şırnak and the revenge killing of two persons after a PKK raid on a gendarmerie headquarters. However, it is significant that in two of the articles the officials named were not in fact alleged to be responsible for the misconduct but merely implicated in the surrounding events. In particular, concerning the death during detention, the Şırnak security director was cited as having previously reassured the family that the man would be released safely and the Şırnak chief public prosecutor was reported as being unavailable for comment. While three village guards were named in the article concerning the revenge killing, it was alleged that the gendarmes had killed the two people.
68. It is true that the other three articles alleged serious misconduct by the officials named and were capable of exposing them to public contempt. However, as for the other articles, the truth of their content was apparently not a fac-

tor taken into account and, if true, the matters described were of public interest. Nor was it taken into account that the names of the officials and their role in fighting terrorism were already in the public domain. Thus, the governor of the state of emergency region who was named in one article was a public figure in the region, while the gendarmerie commanders and village guards named in the other articles would have been well known in their districts. The interest in protecting their identity was substantially diminished, therefore, and the potential damage which the restriction aimed at preventing was minimal. To the extent, therefore, that the authorities had relevant reasons to impose criminal sanctions, these could not be regarded as sufficient to justify the restrictions placed on the newspaper's freedom of expression (see, for example, *Süreç v. Turkey* (no. 2) [GC], no. 24122/94, § § 37-42, 8 July 1999, unreported). Accordingly, these measures could not be justified in terms of Article 10 § 2 of the Convention.

H. Prosecutions for statements constituting separatist propaganda (section 8 of the 1991 Act)

69. Under this heading, the Commission identified six court decisions concerning twelve articles. The penalties imposed upon conviction included prison terms of twenty months and two years, fines, confiscation of issues and, in one instance, a one-month closure order (see paragraphs 218-317 of the Commission's report).
70. The Court observes that the articles in question included reports on economic or social matters (for example, a dam project, public health), commentaries on historical developments in the south-eastern region, a declaration condemning torture and massacres in Turkey and calling for a democratic solution, and accounts of alleged destruction of villages in the south-east. The Court notes that the use of the term "Kurdistan" in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity, may be highly provocative to the authorities. However, the public has the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. The Court is not convinced that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a separate Kurdish entity must be regarded

as inevitably exacerbating the situation. While several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and derogatory terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence. Having regard to the severity of the penalties, it concludes that the restrictions imposed on the newspaper's freedom of expression disclosed in these cases were disproportionate to the aim pursued and cannot be justified as "necessary in a democratic society".

I. D. Conclusion

71. The Court concludes that the respondent State has failed to take adequate protective and investigative measures to protect *Özgür Gündem's* exercise of its freedom of expression and that it has imposed measures on the newspaper, through the search-and-arrest operation of 10 December 1993 and through numerous prosecutions and convictions in respect of issues of the newspaper, which were disproportionate and unjustified in the pursuit of any legitimate aim. As a result of these cumulative factors, the newspaper ceased publication. Accordingly, there has been a breach of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

72. The applicants claimed that the measures imposed on *Özgür Gündem* disclosed discrimination, invoking Article 14 of the Convention which provides:

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

73. The applicants asked the Court to reconsider the opinion, expressed in the Commission's report, that their complaints of discrimination were unsubstantiated. They submitted that the finding of a violation of Article 10 supported the conclusion that they had suffered discrimination on the grounds of their national origin and association with a national minority. They argued that any expression of Kurdish identity was treated by the authorities as advocacy of separatism and PKK propaganda. In the ab-

sence of any justification for the restrictive measures imposed with regard to most of the articles examined by the Commission, these measures could only be explained by prohibited discrimination.

74. The Government submitted that the applicants' claims of discrimination were unsubstantiated.
75. The Court recalls that it has found a violation of Article 10 of the Convention. However, in reaching the conclusion that the measures imposed in respect of twenty-nine articles and news reports were not necessary in a democratic society, it was satisfied that they pursued the legitimate aims of protecting national security and territorial integrity or that of the prevention of crime or disorder. There is no reason to believe that the restrictions on freedom of expression which resulted can be attributed to a difference of treatment based on the applicants' national origin or to association with a national minority. Accordingly, the Court concludes that there has been no breach of Article 14 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as the reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

77. The applicant company, Ülkem Basın ve Yayıncılık Sanayi Ticaret Ltd, claimed that it had suffered pecuniary loss through the prosecution and seizure of its daily production. Prior to the actions of the authorities, the newspaper was selling about 45,000 copies per day. Circulation fell as a result of the violations to around 30,000 and then ceased altogether. The newspaper was sold for 10,000 Turkish liras (TRL). They therefore held that it would be reasonable to claim the equivalent of one year's production of the newspaper, namely TRL 110,000

million.

The applicant company also claimed that it was required to pay lawyers' fees, the costs of medical treatment and other expenses such as travel and communications incurred in respect of attacks on and arrest and trial of correspondents, distributors and other workers. It was estimated that these expenses amounted to TRL 1,000 million. The applicant company also paid all the expenses in respect of the seventeen editors who were remanded in custody, including lawyers' fees totalling TRL 20,000 million. Furthermore, on 10 December 1993, the newspaper's offices in Istanbul, Diyarbakır, Batman, Elâzığ, Van, İzmir, Agri, Antalya and Tatvan were raided and searched and archives and documents seized. None of these documents were returned. The value of the documents and archives was about TRL 10,000 million. The claims totalled TRL 141,000 million.

The applicant company stated that it was unable to supply documentary evidence in respect of the pecuniary loss as all the documents and records of the newspaper, which had been retained by its successor *Özgür Ülke*, were destroyed in the bombing of the building in December 1994.

78. The Government stated that no compensation was payable as there had been no violation of the Convention. However, even assuming a violation, the amounts claimed by the applicants were excessive, inflated and unacceptable.
79. The Court observes that the applicant company is unable to produce any documentary support of its claims for pecuniary loss. Nor has it attempted to specify as far as possible the basis of claims for legal fees and medical and other expenses. The Court is not satisfied that there is a direct causal link between the finding of a failure to protect or investigate and the claimed pecuniary losses in respect of medical and other expenses. It also notes that the company's claims relate to the legal measures taken against the newspaper as a whole, irrespective of whether the measure has been found to be justified or not. Further, additional claims are made for the seizure of archives and documents in a number of offices, although the applicant company's substantive complaints concerned its headquarters in Istanbul.
80. Nonetheless, the Court accepts that some pecuniary loss must have flowed from the breaches identified, both in relation to the search and seizure of archives and documents

at the Istanbul office and to the unjustified restrictions disclosed by the prosecutions and convictions identified in this judgment. It has also found that the cumulative effects of the breaches resulted in the newspaper ceasing publication. Making an assessment on an equitable basis, the Court awards the applicant company TRL 9,000 million.

B. Non-pecuniary damage

81. The applicant Fahri Ferda Çetin claimed 30,000 pounds sterling (GBP) for acute distress, anxiety and mental suffering. He alleged that during his detention for thirteen days he was tortured, and that on release he was forced to flee Turkey, leaving his wife and children behind.
82. The applicant Yaşar Kaya also claims GBP 30,000. He stated that the Istanbul National Security Court no. 5 imposed terms of imprisonment on him for the articles published by him in the newspaper. He too was forced to flee abroad, leaving his wife and children in Turkey, and so also underwent acute distress, anxiety and mental suffering.
83. The Government stated that the amounts claimed were inflated and, if granted, would amount to unjust enrichment.
84. The Court recalls that it has made no findings under the Convention regarding Fahri Ferda Çetin's detention or the periods of imprisonment imposed on Yaşar Kaya. It does not doubt, however, that these applicants suffered considerable anxiety and stress in respect of the breaches established by the Court. Having regard to other awards made in cases against Turkey (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 50, ECHR 1999-IV, and *Arslan v. Turkey* [GC], no. 23462/94, § 61, 8 July 1999, unreported) and ruling on an equitable basis, it awards the applicants GBP 5,000 each.

C. Costs and expenses

85. The applicants claimed legal fees and expenses for Mr Osman Ergin, who acted for the newspaper in domestic proceedings, but they have not supplied any details. Similarly, they have not provided details of claims for fees and expenses of the Turkish lawyers assisting them. They claimed GBP 5,390 (less 5,595 French francs (FRF) received in legal aid from the Council of Europe) for fees, expenses and costs incurred by their United Kingdom lawyers and GBP 7,500 in fees, GBP 1,710 in administrative costs, GBP 12,125 in translation costs and GBP

1,650 in travel expenses incurred by the Kurdish Human Rights Project (KHRP) in assisting with the application. In respect of the hearing before the Court, the applicants claimed GBP 1,450 in fees and GBP 46 in administrative costs (less FRF 3,600 received in legal aid) for their United Kingdom lawyers and also, in respect of the costs and fees of the KHRP for the hearing, GBP 2,490 for fees, costs and expenses.

86. The Government submitted that these claims were excessive, and that incidental expenses, such as those claimed by the KHRP, should not be accepted as this would inflate the award into unjust enrichment.
87. The Court is not satisfied that all the amounts claimed in respect of the KHRP may be regarded as necessarily incurred, save in regard to the translation costs. Taking into account awards made in other cases, and making an equitable assessment, the Court awards GBP 16,000, less the FRF 9,195 received by way of legal aid from the Council of Europe.

D. Default interest

88. The Court deems it appropriate to adopt the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment, which, according to the information available to it, is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. **Decides unanimously to strike the case out of the list in so far as it concerns Gurbetelli Ersöz;**
2. **Holds unanimously that there has been a violation of Article 10 of the Convention;**
3. **Holds unanimously that there has been no violation of Article 14 of the Convention;**
4. **Holds by six votes to one:**
 - (a) **that the respondent State is to pay, within three months:**
 - (i) **to the applicant company TRL 9,000,000,000 (nine thousand million Turkish liras);**
 - (ii) **to Fahri Ferda Çetin and Yaşar Kaya for non-pecuniary damage GBP 5,000 (five thousand pounds sterling) each to be converted into Turkish liras at the rate applicable at the date of delivery of this judgment;**

(iii) to the applicants for costs and expenses GBP 16,000 (sixteen thousand pounds sterling) less FRF 9,195 (nine thousand one hundred and ninety five French francs) to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

5. Dismisses unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 March 2000.

Vincent Berger, *Registrar*

Matti Pellonpää, *President*

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

PARTLY DISSENTING OPINION OF JUDGE GÖLÇÜKLÜ

(Translation)

To my great regret, I am unable to share the conclusion reached by the majority regarding the application of Article 41 in this case. Allow me to explain.

1. The applicant company alleged that it had sustained substantial pecuniary damage as a result of being subjected to prosecution, the seizure of its possessions and other measures. In support of its claims, it has alleged only hypothetical, illusory and imaginary facts, without providing any evidence. In short, it was speculating and, furthermore, certain matters relied on bore no relation whatsoever to the truth. I shall refer to only one of the allegations, so that it can be seen in the light of a finding of the European Commission of Human Rights based on its own investigation in a previous case. Thus, according to the applicant company, prior to

the actions of the authorities, the newspaper *Özgür Gündem* was selling 45,000 copies per day. That figure fell to 30,000 and the newspaper disappeared permanently as a result of those actions (see paragraph 77 of the judgment). That account is shown to be untrue by the Commission. The Commission stated in its report of 23 October 1998 in the case of Kılıç v. Turkey (application no. 22492/93, § 176): "*Özgür Gündem* was a daily newspaper ... with a national circulation of some thousand copies ... In or about April 1994, *Özgür Gündem* ceased publication and was succeeded by another newspaper, *Özgür Ülke* ..." The difference between the alleged figure and the Commission's figure is striking. In addition, *Özgür Gündem* disappeared only in theory, since it was replaced by *Özgür Ülke*. That clearly shows the fanciful and speculative nature of the claim for pecuniary damage in the instant case.

2. Under its settled case-law, the European Court of Human Rights will award compensation for pecuniary damage only if the claims have been duly established and there is an immediate and direct causal link between the facts and the alleged damage. That rule is illustrated in the following examples taken from judgments in cases against Turkey also concerning Article 10 of the Convention.

"81. With regard to pecuniary damage, the Delegate of the Commission suggested that the Court should consider the question of the application of Article 50 in the light of the hypothetical character of the amount claimed. He left the question of non-pecuniary damage to the Court's discretion. Lastly, with regard to the sum claimed for costs and expenses, he mentioned the problem raised by the lack of supporting documents.

82. On the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. It further notes that there is insufficient proof of a causal connection between the breach of Article 10 it has found and the loss of professional and commercial income alleged by the applicant. Moreover, the applicant's claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court can therefore not allow them." (*Incal v. Turkey* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1575)

"47. The applicant sought 262,000 French francs (FRF) for pecuniary damage and FRF 500,000 for non-pecuniary damage.

48. The Government invited the Court to dismiss that claim.

49. As Mr Çıraklar did not specify the nature of the pecuniary damage of which he complained, the Court cannot but dismiss the relevant claim. As to the alleged non-pecuniary damage, it is sufficiently compensated by the finding of a violation of Article 6 § 1." (Çıraklar v. Turkey judgment of 28 October 1998, *Reports* 1998-VII, p. 3074)

"66. The Delegate of the Commission submitted that the applicants' presentation – which was very general and hypothetical – was insufficient to allow their claims under Article 50 to be upheld.

67. The Court notes that the applicants have not furnished any evidence in support of their claims for substantial sums in respect of pecuniary damage and costs and expenses. Consequently, it cannot uphold those claims (see, *mutatis mutandis*, the *Pressos Compania Naviera S.A. and Others v. Belgium* judgment of 3 July 1997 (*Article 50*), *Reports* 1997-IV, p. 1299, § 24). It notes, however, that the applicants received FRF 57,187 in legal aid paid by the Council of Europe." (*Socialist Party and Others v. Turkey* judgment of 25 May 1998, *Reports* 1998-III, p. 1261)

"57. The Government replied that there was no causal connection between the alleged violation of the Convention and the pecuniary damage complained of. In any event, Mr Arslan had not furnished evidence of the income he had referred to.

58. The Court finds that there is not sufficient evidence of a causal connection between the violation of Article 10 it has found and the loss of earnings alleged by the applicant. Moreover, no documentary evidence has been submitted in support of the applicant's claims in respect of pecuniary damage. The Court cannot therefore allow them." (*Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999, unreported)

"66. The Government contended that Mr Karataş had not proved his loss of earnings.

67. The Delegate of the Commission expressed no view on this point.

68. The Court finds that there is insufficient proof of a causal link between the violation and the applicant's alleged loss of earnings. In particular, it has no reliable information on Mr Karataş's salary. Consequently, it cannot make an award under this head (see Rule 60 § 2 of the Rules of Court)." (*Karataş v. Turkey* [GC], no. 23168/94, ECHR 1999-IV)

"53. The Delegate of the Commission considered that there was no reason for the Court to reach a different conclusion from that reached in the cases of the United Communist Party and the Socialist Party cited above.

54. The Court notes that the applicant party has not furnished any evidence in support of its claim. Consequently, it is unable to accept it (Rule 60 § 2 of the Rules of Court; see, *mutatis mutandis*, the *Socialist Party and Others v. Turkey* judgment cited above, p. 1261, § 67)." (*Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, ECHR 1999-VIII).

ECHR

ECJ

SECOND SECTION

CASE OF GERGER v TURKEY

(Application no. 24919/94)

JUDGMENT

STRASBOURG

8 July 1999

FREEDOM OF EXPRESSION, TERRORISM, SPECIAL CIRCUMSTANCES, PUBLIC INTEREST, NATIONAL SECURITY, SAFETY OF CITIZENS, DEMOCRACY

IN THE CASE OF GERGER V. TURKEY,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11, and the relevant provisions of the Rules of Court², as a Grand Chamber composed of the following judges:

Mr **L. Wildhaber**, *President*,

Mrs **E. Palm**,

Mr **A. Pastor Ridruejo**,

Mr **G. Bonello**,

Mr **J. Makarczyk**,

Mr **P. Küris**,

Mr **J.-P. Costa**,

Mrs **F. Tulkens**,

Mrs **V. Strážnická**,

Mr **M. Fischbach**,

Mr **V. Butkevych**,

Mr **J. Casadevall**,

Mrs **H.S. Greve**,

Mr **A. Baka**,

Mr **R. Maruste**,

Mr **K. Traja**,

Mr **F. Gölcüklü**, *ad hoc judge*,

and also of Mr **P.J. Mahoney**
and Mrs **M. de Boer-Buquicchio**, *Deputy Registrars*,

Having deliberated in private on 1 March 1999 and 16 June 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention³, by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Con-

vention. It originated in an application (no. 24919/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Haluk Gerger, on 22 June 1994.

The Commission's request referred to former Articles 44 and 48(a) of the Convention and to Rule 32 § 2 of Rules of former Court A3. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 and Article 10 of the Convention, and under Article 14 taken together with Article 5 § 1.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of former Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (former Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicant's lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).
3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure (former Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial and the applicant's memorials on 24 and 25 August 1998 respectively. On 29 September the Government produced documents as appendices to their memorial.
4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no.

23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24146/94); Erdoğan and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey no. 1 (no. 26682/95); Sürek v. Turkey no. 2 (no. 24122/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, Mr M. Fischbach and Mr J.-P. Costa, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Küris, Mrs F. Tulkens, Mrs V. Stráznická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 5 (a) and 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently Mrs Botoucharova, who was unable to take part in the further consideration of the case, was replaced by Mr K. Traja (Rule 24 § 5 (b)).

6. At the invitation of the Court (Rule 99 § 1) the Commission delegated one of its members, Mr D. Šváby, to participate in the proceedings before the Grand Chamber.
7. On 1 March 1999 the Government lodged observations on the applicant's claims under Article 41 of the Convention and Mr Gerger's lawyer produced documentary evidence relating to part of his costs.
8. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with the case of Erdoğan and İnce v. Turkey. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. Tezcan,

Mr Özmen, *Co-Agents*,

Mr B. Çalışkan,

Miss G. Akyüz,

Miss A. Günyaktı,

Mr F. Polat,

Miss A. Emüler,

Mr I. Batmaz Keremoğlu,

Mr B. Yıldız,

Mr Y. Özbek, *Advisers*;

(b) *for the Commission*

Mr D. Šváby, *Delegate*;

(c) *for the applicant*

Mr E. Sansal, of the Ankara Bar, *Counsel*.

The Court heard addresses by Mr Šváby, Mr Sansal, Mr Tezcan and Mr Özmen and also Mr Sansal's reply to a question put by one of its members.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr Haluk Gerger is a Turkish national and was born in 1950. He lives in Ankara and works as a journalist.
10. On 23 May 1993 a memorial ceremony was held in Ankara for Denis Gezmiş and two of his friends, Yusuf Aslan and Hüseyin İnan. Together, they had started an extreme left-wing movement among university students at the end of the 1960s. They were sentenced to death for seeking to destroy the constitutional order by violence and executed in May 1972.

The applicant was invited to speak at the ceremony, but was unable to attend and sent the organising committee the following message to be read out in public:

"Dear friends,

Though ill health has prevented me from be-

ing with you, I did not want to miss this opportunity to salute you and to express my solidarity with the revolutionary cause.

The Turkish Republic is based on negation of the rights of workers and Kurds. Within the geographical boundaries of this country, any hint of human action, any aspiration for freedom, any claim to assert the rights of the workers and the Kurds has always met with a reaction on the part of the rulers that has been ruthless in its denial and destruction. It has to be said that, because of their origins and historic traditions, the rulers have always distinguished themselves through a cruel militarism that is the product of their mediocrity, backwardness, and thirst for ever more money and, lastly, of the fundamental nature of the Republic and its subservience to imperialism. The more the structural crisis of the established order deepened, the more the ruling classes resorted to imperialism and militarism in their desire to bring it to an end.

The rulers, who had condemned the political and social lands of the country to sterile aridity and, in order to break any resistance and stifle any revolt by the masses, had put a chain of dependence around society's neck and imposed oppressive uniformity upon it, succeeded for many long years in keeping our people in the deep gloom of silence.

However, the 1960s revival, the action organised by dynamic social strata previously excluded from the political life of the country such as the workers, the intelligentsia and young people and, lastly, the revolutionary democratic resistance movement of the early 1970s have helped to transform the history of the nation, and their profound influence can still be felt today.

A red hope is nascent in the tired barren hearts of the workers. A legend is born in the long history of defeat of the oppressed.

From now on, nothing and no-one will be the same!

In the face of the longstanding crisis of the established order, the quest for independence and freedom which at that time became ingrained in society's conscience, in the collective memory of the toiling masses, in the memory of the young and the intelligentsia and in the conscience of the workers henceforth constitutes a refuge for society. The spirit of resistance and revolt of those heroic years, a nightmare for the rulers, has been with the country for more than twenty years. The socialist flag, which was borne aloft at the time and is representative of the only system capa-

ble of replacing the incumbent capitalist system, is still flying. *From the seeds of liberation of the Kurdish people sown in those days the guerrilla campaign in the mountains of Kurdistan was born.*

As for us, the rivers, streams, torrents and waterfalls that emerged from the sweeping waters of those years, we are now flowing on toward the final release of mankind, across the plains formed by our class, our people and democracy into the ocean of liberty of a classless society. Like many Denizes [a reference to Deniz Gezmiş, whose first name means "the sea" in Turkish], we head towards the seas of freedom.

Today, before the Ocean of Liberation, on these fertile alluvia formed of our solidarity and unity in the struggle, we hail those who have been invited to the heavenly feast.

Hail, friends!

Hail to those who are marching 'Towards Future Times, Like many Denizes'!

Hail to you,

the rose Deniz, the rose Yusuf, the rose Hüseyin...
the three roses of Karşıkaya
planted on the branch of my heart
the three roses of Karşıkaya
planted in the spring of my tears
with all their flowers of blood."

11. On 6 August 1993 the Public Prosecutor at the Ankara National Security Court ("National Security Court") accused the applicant of disseminating propaganda against the unity of the Turkish nation and the territorial integrity of the State. In order to request the application of section 8(1) of the Prevention of Terrorism Act (Law no. 3713 – see paragraph 19 above), he relied on passages from Mr Gerger's message, which had been recorded when read out at the memorial ceremony (these are the passages that appear in italics in paragraph 10 above).
12. Mr Gerger pleaded not guilty before the National Security Court, which sat as a chamber of three judges, including a military judge. He did not dispute having drafted the message, but maintained that he had never intended to promote separatism.
13. On 9 December 1993 the National Security Court found the applicant guilty of the offence under section 8(1) of Law no. 3713 and sentenced him to one year, eight months' im-

prisonment and a fine of 208,333,333 Turkish liras (TRL).

The judgment was delivered by a majority of two to one, the military judge dissenting. The latter explained in his dissenting opinion that, in his view, the offence of disseminating separatist propaganda under section 8(1) of Law no. 3713 had not been made out, but that there had been non-public incitement to commit a crime and, consequently, Article 312 § 2 of the Criminal Code (see paragraph 18 below) should have been applied.

The other two members of the chamber found that passages such as: "... From the seeds of liberation of the Kurdish people sown in those days the guerrilla in the mountains of Kurdistan was born... As for us, the rivers, streams, torrents and waterfalls that emerged from the sweeping waters of those years, we are now flowing on ... across the plains formed by our class, our people and democracy..." (see paragraph 10 above), amounted to separatist propaganda against the unity of the Turkish nation and the territorial integrity of the State. In their view, the applicant's conviction was justified by the message – whose wording was not in issue – taken as a whole.

14. In a judgment of 22 April 1994, the Court of Cassation dismissed an appeal by the applicant.
15. On 23 September 1995 the applicant completed his prison sentence. However, as he had not paid the fine that had been imposed, he was kept in detention pursuant to section 5 of the Execution of Sentences Act (Law no. 647), being required to serve an additional day's imprisonment for every TRL 10,000 due (see paragraph 21 below).
On 26 October 1995 Mr Gerger paid the balance of the fine and was released.
16. On 30 October 1995 Law no. 4126 of 27 October 1995 came into force. *Inter alia*, it reduced the length of prison sentences that could be imposed under section 8 of Law no. 3713 while increasing the level of fines (see paragraph 19 below). In a transitional provision relating to section 2, Law no. 4126 provided that sentences imposed pursuant to section 8 of Law no. 3713 would be automatically reviewed (see paragraph 20 below).
17. Consequently, the National Security Court reviewed the applicant's case on the merits. On

17 November 1995 it imposed an additional fine of TRL 84,833,333, with payment suspended. That decision became final on 15 March 1996.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. *The Criminal Code*

18. Article 312 of the Criminal Code reads as follows:

"Non-public incitement to commit an offence

A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a ... fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one third to one half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

2. *The Prevention of Terrorism Act (Law no. 3713)*

19. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), has been amended by Law no 4126 of 27 October 1995, which came into force on 30 October 1995. Sections 8 and 13 read as follows:

Former section 8 § 1

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras."

New section 8 § 1

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine."

Section 17

"Persons convicted of the offences contemplated in the present law who ... have been punished with a custodial sentence shall be granted automatic parole when they have served three-quarters of their sentence, provided they have been of good conduct.

...

The first and second paragraphs of section 19 ... of the Execution of Sentence Act (Law no. 647) shall not apply to the convicted persons mentioned above."

3. *Law no. 4126 of 27 October 1995 amending Law no. 3713*

20. The Law of 27 October 1995 contains a "transitional provision relating to section 2" that applies to the amendments which that law makes to the sentencing provisions of section 8 of Law no. 3713. That transitional provision provides:

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4 and 6 of Law no. 647 of 13 July 1965."

4. *The Execution of Sentence Act (Law no. 647 of 13 July 1965)*

21. Law no. 647 prescribes rules through, *inter alia*, the following provisions, regarding the collection of fines and automatic parole.

Section 5

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits...

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor...

The sentence of imprisonment thus substituted for the fine may not exceed three years..."

Section 19(1)

"... persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct..."

5. *The Code of Criminal Procedure*

22. The relevant provisions of the Code of Criminal Procedure concerning the grounds on which defendants may appeal on points of law against judgments of courts of first instance read as follows:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the imputed judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

..."

B. Case-law

23. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code – see paragraph 18 above), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 19 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor's decision included such con-

siderations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence.

Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the judgments of 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October (no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April 1998 (no. 1998/87) and 17 June 1998 (no. 1998/133).

As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of "propaganda", one of the constituent elements of the offence.

C. The National Security Courts

24. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence ..., they may not be described as courts set up to deal with this or that offence after the commission of such an offence.

The composition and functioning of the Na-

tional Security Courts are subject to the following rules.

1. *The Constitution*

25. The constitutional provisions governing judicial organisation are worded as follows:

Article 138 § 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution"

Article 143 § 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor, shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

..."

Article 145 § 4

“Military legal proceedings

The personal rights and obligations of military judges ... shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law...”

2. *Law no. 2845 on the creation and rules of procedure of the National Security Courts*

26. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts, provide:

Section 1

“In the capitals of the provinces of ... National Security Courts shall be established to try persons accused of offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free, democratic system of government and offences directly affecting the State’s internal or external security.”

Section 3

“The National Security Courts shall be composed of a president, two other regular members and two substitute members.”

Section 5

“The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian ... judges, the other members, whether regular or substitute, military judges of the first rank...”

Section 6 § 5 2, 3 and 6

“The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts ... may not be appointed to another post or place, without their consent, within four years...

...

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves ... may be changed in accordance with the procedure laid down in that legislation.”

Section 9 § 1

“National Security Courts shall have jurisdiction to try persons charged with

...

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free, democratic system of government and offences directly affecting the State’s internal or external security.

...”

Section 27 § 1

“The Court of Cassation shall hear appeals against the judgments of the National Security Courts.”

Section 34 § 1 and 2

“The rules governing the rights and obligations of ... military judges appointed to the National Security Courts and their supervision ..., the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession...”

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors ... and the files on any investigations conducted in respect of them ... shall be transmitted to the Ministry of Justice.”

Section 38

“A National Security Court may be trans-

formed into a Martial Law Court, under the conditions set forth below, when a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court”

3. *The Military Legal Service Act (Law no. 357)*
27. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

“The aptitude of military judges ... appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members ... shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

...”

Additional section 8

“Members ... of the National Security Courts belonging to the Military Legal Service ... shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence...”

Section 16(1) and (3)

“Military judges ... shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces...”

...

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors...”

Section 18(1)

“The rules governing the salary scales, salary increases and various personal rights of military judges ... shall be as laid down in the provisions relating to officers.”

Section 29

“The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

...

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

...

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file...”

Section 38

“When military judges ... sit in court they shall wear the special dress of their civilian counterparts...”

4. *The Military Criminal Code*

28. Article 112 of the Military Criminal Code of 22 May 1930 provides:

“It shall be an offence, punishable by up to five years’ imprisonment, to abuse one’s authority as a civil servant in order to influence the military courts.”

5. *Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court*

29. Under section 22 of Law no. 1602 the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

30. Mr Gerger applied to the Commission on 22

June 1994. In his initial application of the same day and his additional application of 5 August – which he amended on 25 October 1994 –, he said that his conviction constituted a violation of Articles 9 and 10 of the Convention. He further submitted that, by failing to give adequate reasons in its judgment, the National Security Court had denied him a fair hearing within the meaning of Article 6 § 1. Lastly, he complained that he had been discriminated against contrary to Article 14 taken together with Articles 5 § 1 and 6 § 1, in that the conditions for obtaining automatic parole under Law no. 3713 were stricter than those under the general law.

31. The Commission declared the application (no. 24919/94) admissible on 14 October 1996. In its report of 11 December 1997 (former Article 31), it expressed the opinion that:
 - (i) there had been a violation of Article 10 of the Convention, considered jointly with Article 9 (30 votes to 2);
 - (ii) there had been no violation of Article 14 taken together with Article 5 § 1(a) only, Article 6 § 1 not being relevant here (unanimously);
 - (iii) there had been a violation of Article 6 § 1 in that the applicant's case had not been heard by an independent and impartial tribunal; accordingly, it was unnecessary to examine separately the complaint that the National Security Court had given inadequate reasons in its judgment (31 votes to 1);

The full text of the Commission's opinion and of the partly dissenting opinions contained in the report is reproduced as an annex to this judgment⁴.

FINAL SUBMISSIONS TO THE COURT

32. In their memorial the Government invited the Court to hold that the applicant's conviction did not constitute a violation of Articles 6 § 1, 9, 10 or 14 of the Convention.
33. Referring to the Commission's report of 11 December 1997, Mr Gerger requested the Court to hold that there had been a violation of Articles 6 § 1 and 10 of the Convention and of Article 14 taken together with Article 5 § 1, and to have regard in that connection to the fact that he had been punished twice for the same

offence. He also sought just satisfaction under Article 41 of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

34. In his application Mr Gerger submitted that his conviction pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) had breached Articles 9 and 10 of the Convention.

The Court considers however that, as the Government and the Commission have proposed, this complaint should be considered from the standpoint of Article 10 alone (see, among other authorities, the *Incal v. Turkey* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-..., p. ..., § 60), which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Existence of an interference

35. Those appearing before the Court agreed that the applicant's conviction following the reading out of the message at the ceremony on 23 May 1993 (see paragraph 10 above) amounted to an interference with the exercise of his right to freedom of expression. Such an interference breaches Article 10 unless it satisfies the requirements of the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed by law", was directed towards one or more of the legitimate aims set out in that paragraph and was "nec-

essary in a democratic society” to achieve the aims concerned.

B. Justification for the interference

1. *Prescribed by law*

36. The applicant submitted that the notion of the indivisibility of the State, as set out in section 8 of the Prevention of Terrorism Act (Law no. 3713), was so vague as to make his conviction under that provision unforeseeable.
37. The Government contested that submission.
38. In this instance, the Court intends to adopt the Commission’s approach of examining the case on the basis that the section did satisfy the foreseeability requirements inherent in the notion of “law”.

2. *Legitimate aim*

39. The applicant asserted that his conviction did not pursue any of the aims that are legitimate under the second paragraph of Article 10.
40. The Commission considered that the interference was aimed at maintaining “national security” and preventing “[public] disorder”.
41. The Government submitted that it had also been intended to preserve “territorial integrity” and national unity.
42. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the *Zana v. Turkey* judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. *Necessary in a democratic society*

C. Arguments of those appearing before the Court

i *The applicant*

43. The applicant submitted that by associating the opinions expressed in his message with terrorist crime and by convicting him the Na-

tional Security Court had hindered free discussion on the Kurdish problem and criticism of the official ideology. In addition, the National Security Court had not shown that the message was an incitement to violence or set out in its judgment the objective criteria on which it had relied in finding that the applicant’s opinions might threaten the “indivisibility of the State”. Lastly, the applicant complained that he had been punished twice for the same offence, following the amendments made by Law no. 4126 to Law no. 3713.

ii *The Government*

44. The Government emphasised the fact that the ceremony on 23 May 1993 had been held in memory of people who had taken part in acts of terrorism at the end of the 1960s. They quoted passages from the applicant’s message which they said were intended to incite citizens of Kurdish origin to engage in armed combat against the Turkish State, supported separatist violence and glorified the Kurdish independence movement. The message was no mere analysis of the situation or even a criticism of the Turkish authorities but an encouragement for Kurdish terrorism and the activities of the PKK.

Article 10 left Contracting States a particularly broad margin of appreciation in cases where their territorial integrity was threatened by terrorism. What is more, when confronted with the situation in Turkey – where the PKK systematically carried out massacres of women, children, schoolteachers and conscripts – the Turkish authorities had a duty to prohibit all separatist propaganda, which could only incite violence and hostility between society’s various component groups and thus endanger human rights and democracy.

Lastly the Government submitted that, since the message had been read out at a time when, taking advantage of the disorder created on the border with Iraq by the Gulf War, the PKK had been escalating its operations in south-east Turkey, the applicant’s conviction had by no means been disproportionate to the aims pursued.

iii *The Commission*

45. The Commission adverted to the “duties and responsibilities” mentioned in the second paragraph of Article 10, which made it important for people expressing an opinion in public on sensitive political issues to ensure that they

did not condone “unlawful political violence”. Freedom of expression nevertheless included the right to engage in open discussion of difficult problems like those with which Turkey was confronted with a view to analysing, for example, the historical causes of the situation or to expressing opinions on possible solutions.

The Commission noted that in his message the applicant had accused the Turkish State of denying the Kurds their basic rights; he had been particularly robust in his criticism of Turkey and had alluded to the liberation of the Kurds. It nonetheless considered that that was not sufficient to justify the criminal penalty imposed on him. It noted in particular that although the message referred to the guerrilla in the mountains of Kurdistan, it did so solely as a “factual element”, without inciting others to violent action. The applicant’s conviction therefore constituted a form of censorship, which was incompatible with the requirements of Article 10.

D. The Court’s assessment

46. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, the *Zana v. Turkey* judgment (cited above, p. 2547-48, § 51) and the *Fressoz and Roire v. France* judgment of 21 January 1999, *Reports 1999-*, p. ... , § 45).

- (i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.
- (ii) The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent

court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10.

- (iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

47. The Court observes that the message addressed by Mr Gerger to those who attended the ceremony on 23 May 1993 sought to vindicate the acts of Deniz Gezmiş, Yusuf Aslan and Hüseyin İnan, who at the end of the 1960s had founded an extreme left-wing movement and had in May 1972 been executed after receiving the death sentence for using violence with the aim of destroying the constitutional order.

Using words with Marxist overtones, the applicant asserted, in particular, that the Turkish Republic was “based on negation of the rights of workers and Kurds” and that its leaders had “always distinguished themselves through a cruel militarism that [was] the product of their mediocrity, backwardness, and thirst for ever more money”. He added that the revival in the 1960s of “dynamic social strata previously excluded from the political life of the country” and the “revolutionary democratic resistance movement” of the early 1970s had helped to “transform the history of the nation” and instilled in society a “spirit of resistance and revolt”. He stated that socialism was the only system capable of replacing capitalism and proclaimed that “[f]rom the seeds of liberation of the Kurdish people sown in those days were born the guerrilla in the mountains of Kurdistan” (see paragraph 10 above).

The Government took such comments to mean that the applicant accepted the legitimacy of the Kurdish independentist cause. The Court does not share that view: it consid-

ers that the applicant's comments constituted political criticism of the Turkish authorities, to which the use of words such as "revolt" and "oppression" added a certain virulence.

48. The Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the *Wingrove v. the United Kingdom* judgment of 25 November 1996, *Reports 1996-V*, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the *Incal v. Turkey* judgment of 9 June 1998, *Reports 1998-IV*, p. 1567, § 54). Finally, where such remarks constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.
49. The Court takes into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the above-mentioned *Incal* judgment, p. 1568, § 58). On that point, it takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances that have been going on in Turkey for some fifteen years (see paragraph 42 above).

Nonetheless, it is not persuaded by the Government's contention that special weight should be attached in the instant case to the fact that the message was delivered at a time when, taking advantage of the disorder created at the border with Iraq by the Gulf War, the PKK had been escalating its operations in south-east Turkey. Indeed, the events in the present case took place long after that conflict

had ended.

50. Furthermore, the Court observes that the applicant's message was read out only to a group of people attending a commemorative ceremony, which considerably restricted its potential impact on "national security", public "order" or "territorial integrity". In addition, even though it contained words such as "resistance", "struggle" and "liberation", it did not constitute an incitement to violence, armed resistance or an uprising; in the Court's view, this is a factor which it is essential to take into consideration.
51. Lastly, the Court is struck by the severity of the penalty imposed on the applicant. He was sentenced by the National Security Court on 9 December 1993 to one year, eight months' imprisonment and a fine of 208,333,333 Turkish liras (TRL). After completing his sentence, he was detained from 23 September to 26 October 1995 pursuant to section 5 of the Execution of Sentences Act (Law no. 647) before being ordered to pay an additional fine of TRL 84,833,333 for the same offence (see paragraphs 13-17 above).

The Court notes in that connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.

52. In conclusion, Mr Gerger's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

53. The applicant maintained that the Ankara National Security Court was not an "independent and impartial tribunal" and had not given sufficient reasons for its decision in his case. He therefore argued that he had been the victim of a violation of Article 6 § 1, which provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

A. Whether the Ankara National Security Court was independent and impartial

1. *The Government's preliminary objections*

54. The Government contended that domestic

remedies had not been exhausted and that the Court had no jurisdiction *ratione materiae* to examine the issue of the independence and impartiality of the Ankara National Security Court. They submitted that the applicant had not raised this complaint before either the national courts or the Commission and that the latter had considered it of its own motion without having jurisdiction.

55. Both the applicant and the Commission contested those arguments.
56. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, among other authorities, the *Aytekin v. Turkey* judgment of 23 September 1998, *Reports* 1998-VII, p. ... , § 77).

In the instant case, the Court observes that although the applicant did not allege a lack of impartiality or independence on the part of the Ankara National Security Court in his application to the Commission, he did, in his memorial lodged with the Court, make a general reference to the report of the Commission, which had concluded that the complaint was founded. In addition, when communicating the application, the Commission invited the Government (on 27 February 1995) to indicate whether “the applicant had had a fair trial before an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention”. In their observations in reply, the Government did not address that point and raised no objection to the Commission considering it of its own motion. Furthermore, on 31 October 1996 the Commission sent the Government its decision regarding the admissibility of the application and invited the Government to lodge additional observations. Despite the fact that it was clear from the wording of the admissibility decision that the Commission had considered the complaint of its own motion, the Government did not reply.

It follows from the foregoing that the Government are estopped from raising the objections at this stage of the proceedings.

2. Merits of the complaint

57. In the applicant's submission, the Ankara National Security Court could not be regarded as an “independent and impartial tribunal” with-

in the meaning of Article 6 § 1, as one of its members was a military judge.

58. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions. Secondly, when acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

The Government said that the National Security Courts were not special courts but specialised criminal courts. The Turkish authorities had judged it necessary to include a military judge on the bench because of the situation that had prevailed in Turkey for a number of years and the armed forces' experience in combating terrorism.

The Government added that in the present case neither the superiors of the military judge who had sat in the applicant's case, nor the public authorities which had appointed him had had any interest in the proceedings or the outcome of the case. Indeed, the dissenting opinion of the military judge showed that his view of the case had been more favourable to Mr Gerger than the views of the other two judges. Furthermore, the judgment of the National Security Court had been upheld by the Court of Cassation, in which only civil judges sat.

59. The Commission concluded that the Ankara National Security Court could not be regarded as an “independent and impartial tribunal” within the meaning of Article 6 § 1 of the Convention. It referred in that connection to the opinion and reasoning set out in its report of 25 February 1997 in the *Incal v. Turkey* case.
60. The Court recalls that in its *Incal v. Turkey* judgment of 9 June 1998 (*Reports* 1998-IV, p. 1547) and in its *Çıraklar v. Turkey* judgment of 28 October 1998 (*Reports* 1998-, p. ...) the Court had to address arguments similar to those raised by the Government in the instant case. In those judgments the Court noted that the status of

military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (ibid., § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 25-29 above).

61. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Ankara National Security Court functioned infringed Mr Gerger's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çıraklar judgment, p. ..., § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court of disseminating propaganda aimed at undermining the territorial integrity of the State and national unity – should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account he could legitimately fear that the Ankara National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p.1573, § 72 *in fine*).

62. For these reasons the Court finds that there has

been a breach of Article 6 § 1.

B. Alleged absence of reasoning in the judgment of the Ankara National Security Court

63. The applicant maintained that the Ankara National Security Court had not given sufficient reasons for its decision, and had thereby infringed his right to a fair trial.
64. The Government argued that that complaint was unfounded.
65. Like the Commission, the Court holds that in view of its finding of a violation of Mr Gerger's right to be tried by an independent and impartial tribunal (see paragraph 62 above), it is unnecessary to examine this complaint.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 5 § 1

66. The applicant said that the fact that he had been sentenced to a term of imprisonment under Law no. 3713 meant that he had not been entitled to automatic parole until he had served three quarters of his sentence, unlike prisoners sentenced under the ordinary criminal law, who were entitled to parole after serving half their sentence. He considered that that difference constituted unlawful discrimination under Article 14 of the Convention, which provides:

"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."

67. The Court considers that this question relates to "the lawful detention of a person after conviction by a competent court" and should therefore be examined under Article 14 taken together with Article 5 § 1 (a) of the Convention. The latter provision provides:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;"

68. The Government submitted that Article 5 § 1

(a) did not secure convicted prisoners a right to automatic parole. They added that in any event the restrictions on entitlement to parole imposed on persons convicted of an offence under the Prevention of Terrorism Act were warranted by the intrinsic seriousness of such offences.

69. The Court considers, firstly, that, although Article 5 § 1 (a) of the Convention does not guarantee a right to parole, an issue may arise under that provision taken together with Article 14 of the Convention if a settled sentencing policy affects individuals in a discriminatory manner.

The Court notes that in principle the aim of Law no. 3713 is to penalise people who commit terrorist offences and that anyone convicted under that law will be treated less favourably with regard to automatic parole than persons convicted under the ordinary law. It deduces from that fact that the distinction is made not between different groups of people, but between different types of offence, according to the legislature's view of their gravity. The Court sees no ground for concluding that that practice amounts to a form of "discrimination" that is contrary to the Convention. Consequently, there has been no violation of Article 14 taken together with Article 5 § 1 (a) of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. The applicant sought just satisfaction under Article 41, which provides:

"If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

71. Without supplying any details, Mr Gerger sought reparation for damage which he put at 1,000,000 French francs (FRF).
72. The Government replied that there was no causal link between the alleged violation of the Convention and any pecuniary damage. Any non-pecuniary damage would be sufficiently compensated for by a finding of a violation of the Convention.
73. The Court considers that the applicant must have suffered distress on account of the facts of the case. Ruling on an equitable basis, it consequently awards him FRF 40,000 for non-pecuniary damage.
- The Court notes that if it was Mr Gerger's intention to claim pecuniary damage also, he has not supplied any evidence in support of such a claim; accordingly, it makes no award under that head.

B. Costs and expenses

74. The applicant sought payment of FRF 250,000 for his costs and expenses.
75. The Government said the claim was "exorbitant" and argued that the applicant had not produced any supporting evidence.
76. On the basis of the information in its possession, the Court considers it reasonable to award the applicant FRF 20,000 by way of reimbursement of his costs and expenses for the proceedings before the national courts and before the Commission and the Court.

C. Default interest

77. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment which according to the information available to it, is 3.47% per annum.

FOR THESE REASONS THE COURT

1. Holds by 16 votes to 1 that there has been a breach of Article 10 of the Convention;
2. Dismisses unanimously the Government's preliminary objections relating to the complaint that the Ankara National Security Court was not "independent and impartial" within the meaning of Article 6 § 1 of the Convention;
3. Holds by 16 votes to 1 that there has been a violation of Article 6 § 1 of the Convention in that the Ankara National Security Court was not "independent and impartial";
4. Holds unanimously that it is unnecessary to examine the applicant's other complaint under Article 6 § 1 of the Convention;
5. Holds unanimously that there has been no violation of Article 14 of the Convention taken together with Article 5 § 1;

6. Holds by 16 votes to 1

- (a) that the respondent Government is to pay the applicant, within three months, the following amounts to be converted into Turkish liras at the rate applicable at the date of payment:
- (i) 40,000 (forty thousand) French francs for non-pecuniary damage;
 - (ii) 20,000 (twenty thousand) French francs for costs and expenses;
- (b) that simple interest at an annual rate of 3.47% shall be payable from the expiry of the above-mentioned three months until settlement;

7. Dismisses unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius Wildhaber, *President*

Paul Mahoney, *Deputy Registrar*

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve
- (b) concurring opinion of Mr Bonello
- (c) dissenting opinion of Mr Gölcüklü

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of *Incal v. Turkey* of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in the dissenting opinion of Judge Palm and Judge Greve in the case of *Sürek v. Turkey* (no. 1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicants' freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"⁵.

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action⁶. It is a question of proximity and degree⁷.

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action⁸.

It is not manifest to me that any of the words with which the applicants were charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects

on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence"⁹.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Provisional translation)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security.

Nor do I share the majority's view that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench.

Allow me to explain.

1. In the Zana case (judgment of 25 November 1997) the comments concerned, which the applicant when interviewed by journalists, were as follows:

"I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ..."

That statement was published in the national daily newspaper Cumhuriyet.

2. The backdrop to the case (and to a number of similar cases) is the situation in the south-east of Turkey, which was described by the Court in its Zana judgment:

"Since approximately 1985, serious distur-

bances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces." (see § 10)

(see § 10). That figure was approximately 30,000 in 1999.

3. The PKK is recognised by the Court (see Zana, § 58) and international institutions as being a Kurdish terrorist organisation.
4. In the Zana judgment, the Court once again reiterated (§ 51 of the judgment) the fundamental principles which emerge from its judgments relating to Article 10:

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision...

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them..."

5. In paragraph 55 of its judgment the Court said that the above principles applied "also appl[ie]d to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism..."
6. Thus, in the aforementioned case, the Court felt bound to assess whether Mr Zana's conviction met an "pressing social need" and was "proportionate to the legitimate aim pursued". To that end, it considered it important to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time. (see § 56).
7. The Court said that Mr Zana's words "could be interpreted in several ways but, at all events, they are both contradictory and ambiguous. They are contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because whilst Mr Zana disapproves of the

massacres of women and children, he at the same time describes them as "mistakes" that anybody could make." (see § 58).

8. After considering these factors, the Court concluded (-ibid. § § 59-62):

"The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. As the Court noted earlier (see paragraph 50 above), the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time..."

In those circumstances the support given to the PKK – described as a 'national liberation movement' – by [Mr Zana], ... had to be regarded as likely to exacerbate an already explosive situation in that region.

The Court accordingly considers that the penalty imposed on the applicant could reasonably be regarded as answering a 'pressing social need' and that the reasons adduced by the national authorities are 'relevant and sufficient'...

Having regard to all these factors and to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention."

9. In my opinion, this reasoning and these grounds should have acted as the guiding principle in similar cases and avoided any abstract assessment of the remarks concerned, an assessment that I find unrealistic and to be based on a misconception of what is meant by freedom of expression and democracy.
10. The case of Gerger v. Turkey is indistinguishable, if not in form, at least in content, from the Zana case. In his message, dispatched and read out at a time when PKK terrorism was raging not just in south-east Turkey but in the whole country, the applicant spoke of:
 - (i) his "solidarity with the revolutionary cause";
 - (ii) the Turkish Republic which he said was "based on negation of the fundamental rights of workers and Kurds", though the latter had nothing to do and no connection with the memorial ceremony that had been organised;

- (iii) the rulers, whose aim had been to eradicate social and political activity in the country and to weigh society down with the yoke of non-pluralism and dependence in order to “break any resistance and stifle any revolt by the masses”;
- (iv) “the spirit of resistance and revolt of those heroic years, a nightmare for the rulers, has been with the country for more than twenty years”;
- (v) “the seeds of liberation of the Kurdish people sown in those days [from which] the [current] guerrilla campaign in the mountains of Kurdistan was born”
- (vi) their national democratic fight and the war of the “classes”;
- (vii) their “solidarity and unity in the struggle”.
11. These statements clearly incite and condone “violence” and constitute a public invitation to hatred and action. The Court itself accepted (see paragraph 42 of the judgment) that the applicant’s conviction pursued “legitimate aims” within the meaning of Article 10 § 2 of the Convention, namely maintenance of “national security”, prevention of “[public] disorder” and preservation of “territorial integrity” and added that that was “certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence”.
12. In the light of the foregoing, and having regard to the State’s margin of appreciation in this sphere, it is my view that the restriction on the applicant’s freedom of expression was proportionate to the legitimate aims pursued and, accordingly, could reasonably be considered as necessary in a democratic society to achieve them.
13. Secondly, the majority found that there has been a violation of Article 6 § 1 in that the National Security Courts do not provide guarantees of “independence and impartiality” required by that provision of the Convention.
14. In the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of *Incal v. Turkey* of 9 June 1998 and my individual dissenting opinion in the case of *Çıraklar v. Turkey* of 28 October 1998. I explained why the presence of

a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order from which an appeal lies to the Court of Cassation. So as to avoid repetition, I refer to my aforementioned dissenting opinions.

15. I remain firmly of the opinion that:

- (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances;
- (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is “understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service”, and then simply to rely on the *Incal* precedent (*Çıraklar* being a mere repetition of what was said in the *Incal* judgment); and
- (3) the majority’s opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.

ECHR

ECJ

SECOND SECTION

CASE OF ZANA v TURKEY

(69/1996/688/880)

JUDGMENT

STRASBOURG
25 November 1997

FREEDOM OF EXPRESSION, TERRORISM, SPECIAL CIRCUMSTANCES, PUBLIC INTEREST, NATIONAL SECURITY, SAFETY OF CITIZENS, DEMOCRACY

IN THE CASE OF ZANA V. TURKEY,

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A3, as a Grand Chamber composed of the following judges:

Mr **R. Ryssdal**, *President*,

Mr **R. Bernhardt**,

Mr **Thór Vilhjálmsson**,

Mr **F. Gölcüklü**,

Mr **F. Matscher**,

Mr **A. Spielmann**,

Mrs **E. Palm**,

Mr **A.N. Loizou**,

Sir **John Freeland**,

Mr **A.B. Baka**,

Mr **M.A. Lopes Rocha**,

Mr **L. Wildhaber**,

Mr **G. Mifsud Bonnici**,

Mr **D. Gotchev**,

Mr **P. Jambrek**,

Mr **K. Jungwiert**,

Mr **P. Küris**,

Mr **E. Levits**,

Mr **J. Casadevall**,

Mr **P. van Dijk**,

and also of Mr **H. Petzold**, *Registrar*,

and Mr **P.J. Mahoney**, *Deputy Registrar*,

Having deliberated in private on 24 April, 23 June and 24 October 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 May 1996 and by the Turkish Government ("the Government") on 29 July 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and

Fundamental Freedoms ("the Convention"). It originated in an application (no. 18954/91) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr Mehdi Zana, on 30 September 1991.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 and 3 (c) and Articles 9 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the Turkish language in both the written and the oral proceedings (Rule 27 § 3).
3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 10 June 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr S.K. Martens, Mme E. Palm, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici and Mr P. Jambrek (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr K. Jungwiert, substitute judge, replaced Mr Martens, who had resigned (Rule 22 § 1).
4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 11 and 17 December 1996 respectively. On 23 December 1996 the Registrar also received the applicant's claims under Article 50, and on 10 February 1997 the Government's observations in reply.

On 20 December 1996 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's

instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 February 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr A. Gündüz, *co-Agent*,

Mrs D. Akçay, *Adviser*,

Miss A. Emüler, *Expert*;

(b) *for the Commission*

Mr A. Weitzel, *Delegate*;

(c) *for the applicant*

Mr M.S. Tanrikulu,

Mr R. Tanrikulu,

Mr S. Yilmaz, of the Diyarbakır Bar, *Counsel*

Mr M. Zana, *Applicant*.

The Court heard addresses by Mr Weitzel, Mr Zana, Mr M.S. Tanrikulu, Mr Gündüz and Mrs Akçay.

6. On 21 February 1997 the Chamber decided unanimously to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51).
7. The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, the President of the Court, and Mr Bernhardt, the Vice-President, together with the members and the three substitutes of the original Chamber, the latter being Mr A.N. Loizou, Mr E. Levits and Mr R. Macdonald (Rule 51 § 2 (a) and (b)). On 25 February 1997, the President, in the presence of the Registrar, drew by lot the names of the eight additional judges needed to complete the Grand Chamber, namely Mr A. Spielmann, Sir John Freeland, Mr A.B. Baka, Mr L. Wildhaber, Mr D. Gotchev, Mr P. Kūris, Mr J. Casadevall and Mr P. van Dijk (Rule 51 § 2 (c)). Subsequently Mr Macdonald, who was unable to take part in the further consideration of the case, was not replaced after the hearing (Rule 24 § 1 taken in conjunction with Rule 51 § 3).
8. On 25 February 1997 the President asked those who had appeared before the Court if they wanted a new hearing to be held. On 24 and 25 March and 9 April 1997 respectively the Gov-

ernment, the Delegate of the Commission and the applicant replied in the negative.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

9. Mr Mehdi Zana, a Turkish citizen born in 1940, is a former mayor of Diyarbakır, where he currently lives.

A. The situation in the south-east of Turkey

10. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces.
11. At the time of the Court's consideration of the case, ten of the eleven provinces of south-east Turkey had since 1987 been subjected to emergency rule.

B. The applicant's statement to journalists

12. In August 1987, while serving several sentences in Diyarbakır military prison, the applicant made the following remarks in an interview with journalists:

"I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ..."

"... PKK'nın ulusal kurtuluş hareketini destekliyorum. Katliamlardan yana değiliz, yanlış şeyler her yerde olur. Kadın ve çocukları yanlışlıkla öldürüyorlar ..."

That statement was published in the national daily newspaper *Cumhuriyet* on 30 August 1987.

C. The criminal proceedings

13. On 30 August 1987 the "press offences" department of the Istanbul public prosecutor's office began a preliminary investigation in respect of the applicant among others, on the ground that he had "defended an act punishable by law as a serious crime", an offence under Article 312 of the Criminal Code (see paragraph 31 below).
14. On 28 September 1987 the Istanbul public

prosecutor's office ruled that there was no case to answer in respect of the journalists and that it had no jurisdiction *ratione loci* to deal with Mr Zana's case. It sent the file to the Diyarbakir public prosecutor.

15. In an order of 22 October 1987 the Diyarbakir public prosecutor ruled that he had no jurisdiction, on the ground that the offence committed by the applicant was governed by Article 142 § 3–6 of the Criminal Code (a provision which makes it an offence to disseminate propaganda that is racist or calculated to weaken national sentiment). He forwarded the file to the public prosecutor at the Diyarbakir National Security Court.
16. On 4 November 1987 the latter likewise ruled that he had no jurisdiction, on the ground that when the applicant had made his statement to the journalists he was in custody in a military prison and therefore had military status in law. He forwarded the file to the Diyarbakir military prosecutor's office.
17. By means of an indictment dated 19 November 1987, the Diyarbakir military prosecutor's office instituted proceedings in the Diyarbakir Military Court against Mr Zana (among others) under Article 312 of the Criminal Code. The applicant was charged with supporting the activities of an armed organisation, the PKK, whose aim was to break up Turkey's national territory.
18. At a hearing before the Diyarbakir Military Court on 15 December 1987 the applicant argued that the court had no jurisdiction to hear his case and refused to put forward a defence on the merits.
19. At a hearing on 1 March 1988 counsel for Mr Zana asked the Military Court to rule that it had no jurisdiction as the offence with which his client was charged was not a military one and a military prison could not be regarded as military premises. The court dismissed that application on the same day.
20. On 28 July 1988 the applicant was transferred from Diyarbakir military prison to Eskişehir civilian prison.
21. The Eskişehir Air Force Court, acting under powers delegated to it by the Diyarbakir Military Court, summoned the applicant to submit his defence. The applicant, who was on hunger strike, did not appear at the hearing on 2 November 1988. He did appear at one held on 7 December 1988 but refused to address the

court, as he considered that it had no jurisdiction to try him.

22. In a decision of 18 April 1989 the Diyarbakir Military Court held that it had no jurisdiction in the case and sent the file to the Diyarbakir National Security Court.
23. On 2 August 1989 Mr Zana was transferred to the high-security civilian prison at Aydın.
24. At a hearing held on 20 June 1990 by the Aydın Assize Court, acting under powers delegated by the Diyarbakir National Security Court, the applicant refused to speak Turkish and said in Kurdish that he wished to defend himself in his mother tongue. The Assize Court pointed out to him that, if he persisted in his refusal to defend himself, he would be deemed to have waived his right to do so. Since Mr Zana continued to speak in Kurdish, the court noted in the record of the hearing that he had not put forward a defence.

D. The judgment of the Diyarbakir National Security Court

25. The proceedings then continued before the Diyarbakir National Security Court, where the applicant was represented by his lawyers.
26. In a judgment of 26 March 1991 the Diyarbakir National Security Court sentenced the applicant to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" and "endangering public safety". In accordance with the Act of 12 April 1991, he would have to serve one-fifth of the sentence (two months and twelve days) in custody and four-fifths on parole.
27. The National Security Court held that the PKK qualified as an "armed organisation" under Article 168 of the Criminal Code, that its aim was to bring about the secession of part of Turkey's territory and that it committed acts of violence such as murder, kidnapping and armed robbery. The court also held that Mr Zana's statement to the journalists, the exact terms of which had been established during the judicial investigation, amounted to an offence under Article 312 of the Criminal Code.
28. The applicant appealed on points of law on 3 April 1991. In a judgment of 19 June 1991, served on the applicant's representative on 18 July 1991, the Court of Cassation upheld the National Security Court's judgment.
29. In the meantime, on 16 April 1991, Mr Zana,

who had just served the sentences imposed on him earlier, had been released.

30. On 26 February 1992 the Diyarbakır public prosecutor requested the applicant to report to Diyarbakır Prison in order to serve his latest sentence – one-fifth of the prison term, for the remainder of which he would be on parole.

II. RELEVANT DOMESTIC LAW

A. Substantive law

31. The relevant provisions of the Criminal Code at the material time provided:

Article 168

“It shall be an offence punishable by at least fifteen years’ imprisonment to form an armed gang or organisation or to assume control or special responsibility within such a gang or organisation with the intention of committing any of the offences referred to in Articles 125 ...

It shall be an offence punishable by five to fifteen years’ imprisonment to belong to such an organisation.”

Article 312

“It shall be an offence, punishable by six months’ to two years’ imprisonment and a ‘heavy’ [ağır] fine of 6,000 to 30,000 liras publicly to praise or defend an act punishable by law as a serious crime or to urge the people to disobey the law.

It shall be an offence, punishable by one year’s to three years’ imprisonment and by a heavy fine of 9,000 to 36,000 liras, publicly to incite hatred or hostility between the different classes in society, thereby creating discrimination based on membership of a social class, race, religion, sect or region. Where such incitement endangers public safety, the sentence shall be increased by one-third to one-half.

...”

B. Procedure

32. Article 226 § 4 of the Code of Criminal Procedure at the material time provided:

“A person in custody in a prison situated outside the jurisdiction of the court which is to try him may be examined by other courts.”

III. TURKEY’S DECLARATION OF 22 JANUARY 1990 UNDER ARTICLE 46 OF THE CONVENTION

33. On 22 January 1990 the Turkish Minister for Foreign Affairs deposited with the Secretary General of the Council of Europe the following declaration under Article 46 of the Convention:

“On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention, performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of 3 years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration.”

That declaration was renewed on 22 January 1993 for a period of three years and again on 22 January 1996, in slightly different terms, for two years.

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Zana applied to the Commission on 30 September 1991. Relying on Article 6 § § 1 and 3 and Articles 9 and 10 of the Convention, he complained of the length of the criminal proceedings, of an infringement of his right to a fair trial in that he had not been able to appear before the court which convicted him and had not been able to defend himself in his mother

tongue (Kurdish), and of an interference with his freedom of thought and expression.

35. On 21 October 1993 the Commission declared the application (no. 18954/91) admissible as to the complaints concerning the length of the criminal proceedings, the applicant's absence from the hearing and the interference with his freedom of thought and expression and declared it inadmissible as to the remainder. In its report of 10 April 1996 (Article 31), it expressed the opinion that
- (a) there had not been a violation of Article 10 of the Convention (fourteen votes to fourteen, with the President's casting vote);
 - (b) there had been a violation of Article 6 § 1 and 3 (c) of the Convention because the applicant had not been present at his trial (unanimously);
 - (c) there had been a violation of Article 6 § 1 of the Convention in that his case had not been heard within a reasonable time (twenty-three votes to five).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment⁴.

FINAL SUBMISSIONS TO THE COURT

36. In their memorial the Government requested the Court

"(a) to declare that it has no jurisdiction *ratione temporis* as regards the complaint under Article 10 of the Convention;

(b) to declare that domestic remedies have not been duly exhausted as regards the complaints under Article 6 of the Convention;

in the alternative,

(a) to declare that domestic remedies have not been duly exhausted as regards the complaints under Article 10 of the Convention;

(b) to declare that there has not been a breach as regards the complaints under Article 6 of the Convention; and

in the further alternative,

to declare that there has been no breach of Article 10 of the Convention."

37. At the hearing, counsel for the applicant asked the Court to dismiss all the Government's preliminary objections and to rule that there had been breaches of Article 10 and Article 6 § 1 and 3 (c).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. Mr Zana maintained that his conviction by the Diyarbakir National Security Court on account of his statement to journalists had infringed his right to freedom of expression. He relied on Article 10 of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. He also complained of an interference with his right to freedom of thought, guaranteed by Article 9 of the Convention. Like the Commission, the Court considers that this complaint is bound up with the one made under Article 10.

A. The Government's preliminary objections

40. The Government raised two preliminary objections, one based on lack of jurisdiction *ratione temporis* and the other on failure to exhaust domestic remedies.

1. Lack of jurisdiction *ratione temporis*

41. The Government maintained, as their primary submission, that the Court had no jurisdiction *ratione temporis* to entertain the applicant's complaint under Article 10 of the Convention,

given that the principal fact lay in the applicant's declaration to journalists in August 1987 (see paragraph 12 above), that is to say before Turkey recognised the compulsory jurisdiction of the Court. When, on 22 January 1990, Turkey had recognised the Court's compulsory jurisdiction in "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, its intention had been, they said, to remove from the ambit of the Court's review events that had taken place before the date on which the declaration made under Article 46 of the Convention was deposited and also judgments relating to such facts even if they had been delivered after that date.

42. The Court points out that Turkey accepted its jurisdiction only in respect of facts and events subsequent to 22 January 1990, when it deposited its declaration (see paragraph 33 above). In the instant case, however, the Court considers, like the Delegate of the Commission, that the principal fact lay not in Mr Zana's statement to the journalists but in the Diyarbakır National Security Court's judgment of 26 March 1991, whereby the applicant was sentenced to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" under Turkish legislation (see paragraph 26 above), a judgment that was upheld by the Court of Cassation on 26 June 1991 (see paragraph 28 above). It was that conviction and sentence, subsequent to Turkey's recognition of the Court's compulsory jurisdiction, which constituted the "interference" within the meaning of Article 10 of the Convention and whose justification under that Article the Court must determine. This preliminary objection must accordingly be dismissed.

The question whether the Government should, in the light of their reference of the case to the Court (see paragraph 1 above), be regarded as estopped from relying on the terms of the declaration of 22 January 1990 to exclude this complaint on grounds of incompetence *ratione temporis* was not raised before the Court and the Court does not consider it necessary, in the circumstances, to determine that question.

2. Failure to exhaust domestic remedies

43. In the alternative, the Government pleaded failure to exhaust domestic remedies. Mr Zana, they said, had omitted to raise in substance his complaint under Article 10 of the Convention in the Turkish courts.

44. Like the Delegate of the Commission, the Court notes that this objection was not raised when the admissibility of the application was being considered and that there is therefore an estoppel.

B. Merits of the complaint

45. As the Court has already pointed out (see paragraph 42 above), the applicant's conviction and sentence by the Turkish courts for remarks made to journalists indisputably amounted to an "interference" with his exercise of his freedom of expression. This point was, indeed, not contested.

46. The interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

47. The Court notes that the applicant's conviction and sentence were based on Articles 168 and 312 of the Turkish Criminal Code (see paragraph 31 above) and accordingly considers that the impugned interference was "prescribed by law". This point was likewise undisputed.

2. Legitimacy of the aims pursued

48. The Government maintained that the interference had pursued legitimate aims, namely the maintenance of national security and public safety, the preservation of territorial integrity and the prevention of crime. As the PKK was an illegal terrorist organisation, the application of Article 312 of the Turkish Criminal Code by the national courts in the case had had the aim of punishing any act calculated to afford support to that type of organisation.

49. In the Commission's view, such a statement from a person with some political standing – the applicant is a former mayor of Diyarbakır – could reasonably lead the national authorities to fear a stepping up of terrorist activities in the country. The authorities had therefore been entitled to consider that there was a threat to national security and public safety and that measures were necessary to preserve the country's territorial integrity and prevent crime.

50. The Court notes that in the interview he gave the journalists the applicant indicated that he supported "the PKK national liberation movement" (see paragraph 12 above) and, as the

Commission noted, the applicant's statement coincided with the murders of civilians by PKK militants.

That being so, it considers that at a time when serious disturbances were raging in south-east Turkey (see paragraphs 10 and 11 above) such a statement – coming from a political figure well known in the region – could have an impact such as to justify the national authorities' taking a measure designed to maintain national security and public safety. The interference complained of therefore pursued legitimate aims under Article 10 § 2.

3. *Necessity of the interference*

(a) **General principles**

51. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

- (i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see the following judgments: *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, p. 23, § 49; *Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, § 41; and *Jersild v. Denmark*, 23 September 1994, Series A no. 298, p. 26, § 37).
- (ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression

as protected by Article 10 (see the *Lingens* judgment cited above, p. 25, § 39).

- (iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the *Lingens* judgment cited above, pp. 25–26, § 40; and the *Barfod v. Denmark* judgment of 22 February 1989, Series A no. 149, p. 12, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the *Jersild* judgment cited above, p. 26, § 31).

(b) **Application of the above principles to the instant case**

- 52. Mr Zana submitted that his conviction and sentence were wholly unjustified. An activist in the Kurdish cause since the 1960s, he had always spoken out against violence. In maintaining that he was supporting the PKK's armed struggle, the Government had, he argued, misinterpreted what he had said. In reality he had told the journalists that he supported the national liberation movement but was opposed to violence, and he had condemned the massacres of women and children. At all events, he was not a member of the PKK and had been imprisoned for belonging to the "Path of Freedom" organisation, which had always advocated non-violent action.
- 53. The Government, on the other hand, maintained that the applicant's conviction and sentence were perfectly justified under paragraph 2 of Article 10. They emphasised the seriousness of what the applicant had said at a time when the PKK had carried out a number of murderous attacks in south-east Turkey. In their submission, a State faced with a terrorist situation that threatened its territorial integrity had to have a wider margin of appreciation than it would have if the situation in question had consequences only for individuals.
- 54. The Commission accepted the Government's

- views for the most part and expressed the opinion that there had been no violation of Article 10.
55. The Court considers that the principles set out in paragraph 51 above also apply to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism. In this connection, it must, with due regard to the circumstances of each case and a State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.
 56. In the instant case the Court must consequently assess whether Mr Zana's conviction and sentence answered a "pressing social need" and whether they were "proportionate to the legitimate aims pursued". To that end, it considers it important to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time.
 57. The Court takes as a basis the applicant's statement as published in the national daily newspaper *Cumhuriyet* on 30 August 1987 (see paragraph 12 above), which the applicant did not contest in substance. The statement comprises two sentences. In the first of these the applicant expresses his support for the "PKK national liberation movement", while going on to say that he is not "in favour of massacres". In the second he says "Anyone can make mistakes, and the PKK kill women and children by mistake."
 58. Those words could be interpreted in several ways but, at all events, they are both contradictory and ambiguous. They are contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because whilst Mr Zana disapproves of the massacres of women and children, he at the same time describes them as "mistakes" that anybody could make.
 59. The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. As the Court noted earlier (see paragraph 50 above), the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.
 60. In those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.
 61. The Court accordingly considers that the penalty imposed on the applicant could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient"; at all events, the applicant served only one-fifth of his sentence in prison (see paragraph 26 above).
 62. Having regard to all these factors and to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention.
- ## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION
63. Mr Zana complained of an infringement of the principle of a fair trial as he had been unable to appear at the hearing before the Diyarbakır National Security Court, and also of the length of the criminal proceedings against him. He relied on Article 6 § 1 and 3 of the Convention, which provide:
 - "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...
 - ...
 3. Everyone charged with a criminal offence has the following minimum rights:
 - ...
 - (c) to defend himself in person ..."
 - A. The Government's preliminary objection**
 64. The Government pleaded, as their principal submission, failure to exhaust domestic remedies. The applicant, they said, had omitted to raise in substance his complaints under Article 6 § 1 and 3 in the Turkish courts.
 65. Like the Delegate of the Commission, the Court notes that this objection was not raised when

the application's admissibility was considered and that there is therefore an estoppel.

B. Merits of the complaints

1. Article 6 § 1 and 3 (c) of the Convention (fair trial)

66. Mr Zana submitted that his absence from the hearing at the National Security Court had prevented him from defending himself effectively. Had he been present, he would have been able to explain to the judges what his intentions had been when he had made his statement to the journalists.
67. The Government maintained that the applicant had several times appeared before courts acting under delegated powers, as provided in Article 226 § 4 of the Code of Criminal Procedure (see paragraph 32 above). In doing no more than raise objections to jurisdiction and in refusing to speak Turkish at those different hearings, Mr Zana had deliberately waived his right to defend himself on the merits. Furthermore, the presence of his lawyers at the hearing before the Diyarbakır National Security Court had been sufficient to satisfy the requirements of Article 6 § 3 (c).
68. The Court reiterates that the object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing. Moreover, sub-paragraphs (c) and (d) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person" and "to examine or have examined witnesses", and it is difficult to see how these rights could be exercised without the person concerned being present (see the *Colozza v. Italy* judgment of 12 February 1985, Series A no. 89, p. 14, § 27; and the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, p. 22, § 58).
69. In the instant case the Court notes that Mr Zana was not requested to attend the hearing before the Diyarbakır National Security Court, which sentenced him to a twelve-month prison term (see paragraph 26 above). In accordance with Article 226 § 4 of the Code of Criminal Procedure, the Aydın Assize Court had been asked to take evidence from him in his defence, under powers delegated by the National Security Court (see paragraphs 24 and 32 above).
70. Contrary to the Government's contention, the fact that the applicant raised procedural

objections or wished to address the court in Kurdish, as he did at the hearing in the Aydın Assize Court, in no way signifies that he implicitly waived his right to defend himself and to appear before the Diyarbakır National Security Court. Waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see the *Colozza* judgment cited above, p. 14, § 28).

71. In view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence given in person (see, *mutatis mutandis*, the *Botten v. Norway* judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 145, § 53). If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intentions had been when he had made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording.
72. Neither the "indirect" hearing by the Aydın Assize Court nor the presence of the applicant's lawyers at the hearing before the Diyarbakır National Security Court can compensate for the absence of the accused.
73. The Court accordingly considers, as the Commission did, that such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention.

There has consequently been a breach of Article 6 § 1 and 3 (c) of the Convention.

2. Article 6 § 1 of the Convention (length of the proceedings)

(a) Period to be taken into consideration

74. The proceedings began on 30 August 1987, when the preliminary investigation in respect of the applicant was begun (see paragraph 13 above), and ended on 18 July 1991, when the Court of Cassation's judgment was served (see paragraph 28 above). They therefore lasted for almost three years and eleven months.

However, the Court can take cognisance of the complaint relating to the length of the criminal proceedings only from 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited

(see paragraph 33 above). It must nevertheless take account of the state of the proceedings at the time when the aforementioned declaration was deposited (see, as the most recent authority, the *Mitap and Müftüoğlu v. Turkey* judgment of 25 March 1996, Reports 1996-II, p. 410, § 28). On the critical date the proceedings had already lasted two years and five months.

(b) Reasonableness of the length of the proceedings

75. The reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It is also necessary to take account of what is at stake for the applicant in the litigation (see the *Philis v. Greece* (no. 2) judgment of 27 June 1997, Reports 1997-IV, p. 1083, § 35).
76. In *Mr Zana's* submission, the case had not been complex and the excessive length of the criminal proceedings had been due solely to the conduct of the judicial authorities: his case had been transferred from the civil courts to the National Security Court, then to the Military Court and finally back to the National Security Court, going from Istanbul to Diyarbakır, then to Eskişehir and Aydın and finally back to Diyarbakır.
77. The Government underlined the issues of jurisdiction *ratione loci* and *ratione materiae* which the national courts had had to determine in that the applicant had made his statement in Diyarbakır military prison and it had appeared in a daily newspaper published in Istanbul. Furthermore, the attempts to find a co-defendant on the run and the conduct of Mr Zana and his lawyers had contributed to prolonging the proceedings in question. Lastly, the Court of Cassation's judgment had been delivered two years and two months after the Diyarbakır Military Court's decision that it had no jurisdiction.
78. The Court considers, as the Commission did, that the proceedings complained of were not particularly complex, the facts of the case being straightforward, notwithstanding the issues of jurisdiction that could arise.
79. As to the applicant's conduct, the Court reiterates that Article 6 does not require a person charged with a criminal offence to cooperate actively with the judicial authorities (see, among other authorities, the *Yağcı and Sargin v. Turkey* judgment of 8 June 1995, Series A no. 319-A, p. 21, § 66). It considers, like the Commission, that the applicant's conduct, even if it may to some extent have slowed down the proceedings, cannot, on its own, explain such a length of time.
80. The Court also notes that between 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited (see paragraph 33 above), and 18 July 1991, when the Court of Cassation's judgment was served (see paragraph 28 above), one year and six months elapsed. In that period the Diyarbakır National Security Court did not deliver its judgment until 26 March 1991 (see paragraph 26 above), that it is to say nine months after the hearing of 20 June 1990 at the Aydın Assize Court (see paragraph 24 above), during which the applicant had refused to speak Turkish.
81. The Commission also noted a period of inactivity attributable to the judicial authorities between the hearing before the Diyarbakır Military Court on 15 December 1987 (see paragraph 18 above), during which the applicant raised an objection to that court's jurisdiction, and the Military Court's decision of 18 April 1989 in which the court declared it had no jurisdiction (see paragraph 22 above).
82. Even if this latter period does not, strictly speaking, come within the Court's jurisdiction *ratione temporis*, it may nonetheless be taken into account in assessing whether the "reasonable time" requirement was satisfied.
83. The Court reiterates in this connection that Article 6 § 1 of the Convention guarantees to everyone against whom criminal proceedings are brought the right to a final decision within a reasonable time on the charge against him. It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement (see, among many other authorities, the *Mansur v. Turkey* judgment of 8 June 1995, Series A no. 319-B, p. 53, § 68).
84. Lastly, what was at stake in the case was important to the applicant as he was already in custody when he made his statement to the journalists and was sentenced to a further term of imprisonment by the Diyarbakır National Security Court (see paragraph 26 above).
85. In the light of all the circumstances of the case, the Court cannot regard the length of the pro-

ceedings complained of as reasonable.

There has consequently been a violation of Article 6 § 1 of the Convention in this respect.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

86. Article 50 of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

87. Mr Zana sought 250,000 French francs (FRF) for pecuniary damage and FRF 1,000,000 for non-pecuniary damage. He pointed to the ill-treatment he had allegedly sustained during his unlawful detention, the after-effects of which he was still suffering; the excessive length of the criminal proceedings had, moreover, prevented him from being given concurrent sentences, as provided in Law no. 3713 on the prevention of terrorism.

88. Referring to their preliminary objections and to their observations on the merits, the Government requested the Court, as their main submission, to dismiss the claim. In the alternative, they maintained that any finding of a breach would constitute sufficient just satisfaction; in the further alternative, there was no causal link between any violation of the Convention and the alleged damage.

89. The Delegate of the Commission was in favour of awarding the applicant, if a breach of Article 6 was found, compensation in the amount of FRF 40,000, half of it in respect of the applicant's absence from his trial and the other half in respect of the excessive length of the proceedings.

90. As regards pecuniary damage, the Court considers that there is no causal link between the breaches found of Article 6 and the alleged damage. It does, on the other hand, consider that Mr Zana sustained indisputable non-pecuniary damage, for which the findings of breaches in paragraphs 73 and 85 above can-

not compensate on their own. Making its assessment on an equitable basis, it awards him the sum of FRF 40,000 under this head, to be converted into Turkish liras at the rate applicable at the date of settlement.

B. Costs and fees

91. The applicant also sought reimbursement of the costs incurred and fees paid for his defence in Turkey and before the Convention institutions, which he estimated at FRF 142,000 in all.

92. In the Government's submission, the amounts claimed were excessive and unjustified.

93. The Delegate of the Commission proposed awarding FRF 30,000 for lawyers' fees and allowing reimbursement of the costs to the extent that they appeared justified.

94. On the basis of its case-law and the information in its possession, the Court decides on an equitable basis to award Mr Zana the sum of FRF 30,000 to be converted into Turkish liras at the rate applicable at the date of settlement, less the sum of FRF 20,980 received from the Council of Europe in legal aid.

C. Default interest

95. The Court deems it appropriate to adopt the statutory rate applicable in France at the date of adoption of the present judgment, which is 3.87% per annum.

FOR THESE REASONS, THE COURT

1. Dismisses by eighteen votes to two the objection to jurisdiction *ratione temporis* as regards the complaint under Article 10 of the Convention;
2. Dismisses unanimously the objection of failure to exhaust domestic remedies as regards the complaint under Article 10 of the Convention;
3. Holds by twelve votes to eight that there has not been a breach of Article 10 of the Convention;
4. Dismisses unanimously the objection of failure to exhaust domestic remedies as regards the complaints under Article 6 of the Convention;
5. Holds by seventeen votes to three that there has been a breach of Article 6 § 1 and 3 (c) of the Convention on account of the appli-

cant's absence from his trial;

6. Holds by nineteen votes to one that there has been a breach of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
7. Holds by eighteen votes to two that the respondent State is to pay the applicant, within three months, 40,000 (forty thousand) French francs in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
8. Holds by nineteen votes to one that the respondent State is to pay the applicant, within three months, 30,000 (thirty thousand) French francs, less 20,980 (twenty thousand nine hundred and eighty) French francs, already received in legal aid, for costs and lawyers' fees, to be converted into Turkish liras at the rate applicable at the date of settlement;
9. Holds by nineteen votes to one that simple interest at an annual rate of 3.87% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;
10. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1997.

Rudolf Bernhardt, *Vice-President*

Herbert Petzold, *Registrar*

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Matscher, joined by Mr Gölcüklü;
- (b) partly dissenting opinion of Mr Lopes Rocha;
- (c) partly dissenting opinion of Mr van Dijk, joined by Mrs Palm, Mr Loizou, Mr Mifsud Bonnici, Mr Jambrek, Mr Kūris and Mr Levits;
- (d) dissenting opinion of Mr Thór Vilhjálmsson;
- (e) dissenting opinion of Mr Gölcüklü.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, JOINED BY JUDGE GÖLCÜKLÜ

(Translation)

In my view, the wording of the relevant part of Turkey's declaration of 22 January 1990 under Article 46 of the Convention which says:

"This Declaration ... extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

is clear and its interpretation should not give rise to controversy. According to all the generally recognised rules of interpretation, the meaning of the text can only be the one given it by the respondent State's Government.

I accept that this reservation *ratione temporis* is somewhat unusual. It might also be asked whether it is to be regarded as valid, in view of its broad, general nature, but it cannot be denied that the text in itself is clear.

In the instant case the fact to which the text refers was the statement made by the applicant in August 1987, a few days before court proceedings were brought against him, on 30 August 1987. That being so, I consider it artificial and, accordingly, unsustainable to state (see paragraph 42 of the judgment) that "the principal fact" lay in the Diyarbakır National Security Court's judgment of 26 March 1991.

It follows that the complaints under Article 6 § 5 1 and 3 (c) (fair trial) and Article 10 fall outside the Court's jurisdiction *ratione temporis*.

PARTLY DISSENTING OPINION OF JUDGE LOPES ROCHA

(Translation)

I agree with all the conclusions of the majority of the Court, except for the finding of a breach of Article 6 § 5 1 and 3 (c) of the Convention. Primarily for reasons of consistency.

The Court holds, very properly, that there has been no breach of Article 10 of the Convention. In or-

der to reach that conclusion the Court relied on a whole series of reasons, in particular ones relating to the content of Mr Zana's statement to the journalists from the daily newspaper *Cumhuriyet*, pointing out that this statement had a special significance in the circumstances of the case, as the applicant must have realised, and that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

The Court also considers that the penalty imposed on the applicant could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient", especially as the applicant served only one-fifth of his sentence in prison.

Lastly, the Court, having regard to all these factors and to the margin of appreciation which national authorities have in such a case, considers that the interference in issue was proportionate to the legitimate aims pursued.

That said, I have difficulty in understanding why the Court has ruled that there has been a breach of Article 6 § 3 (c) of the Convention on the basis of Mr Zana's absence from the hearing of the Diyarbakir National Security Court, at which he could have said what his intentions had been when he had made his statement and in what circumstances the interview had taken place and summoned journalists as witnesses.

Logically, therefore, the Court should have taken the view that the applicant's "intentions" and the "evidence" of the journalists were indispensable for a just decision from the point of view of analysing the issue of a possible violation of Article 10 of the Convention.

The Court has decided, however, that in the circumstances of the case the content alone of the statement is sufficient to justify the interference in the light of paragraph 2 of Article 10.

Furthermore, there is nothing to show that it was impossible for the applicant to explain, at his hearing before the Aydin Assize Court, which is a judicial body, the true intentions underlying his statement to the journalists and to indicate those journalists as witnesses for the defence.

Besides, looking at the *whole* of the proceedings, before the various courts, I am not persuaded that he was deprived of the opportunity of defending himself in person.

The fact that the Security Court asked for him to be "examined" by the Aydin Assize Court, acting under

delegated powers in accordance with Article 226 § 4 of the Code of Criminal Procedure, does not seem to me a decisive argument for concluding that there was no right to a fair trial within the meaning of Article 6 of the Convention.

As to a *tribunal* belonging to the Turkish court system, I do not see that the applicant was deprived of the right of everyone charged with a criminal offence to be tried by an independent and impartial tribunal established by law, before which he could defend himself in person, and to indicate defence witnesses and also seek to have them called before the National Security Court.

For these reasons I consider that there are no grounds for finding that there has been a breach of Article 6 § 1 and 3 (c) of the Convention.

PARTLY DISSENTING OPINION OF JUDGE VAN DIJK, JOINED BY JUDGES PALM, LOIZOU, MIFSUD BONNICI, JAMBREK, KÜRIS AND LEVITS

I fully endorse the reasoning and conclusions of the majority concerning the jurisdiction of the Court *ratione temporis* and concerning the Government's being estopped from raising the objection of non-exhaustion of domestic remedies. I am equally in agreement with the majority that Article 6 of the Convention has been violated in this case on account both of the applicant's absence from his trial and of the length of the criminal proceedings. However, I do not find it possible to join the majority in concluding that there has not been a breach of Article 10 of the Convention.

In the judgment, the majority summarise the three fundamental principles which the Court has applied so far when determining whether interferences with freedom of expression were necessary in a democratic society (see paragraph 51 of the judgment). In my opinion, however, there are no solid grounds for concluding, as the majority do after applying those principles to the instant case, that here the interference was necessary, and in particular was proportionate to the aim of maintaining national security and public safety.

Even if one accepts – and in view of the circum-

stances prevailing in south-east Turkey at the relevant time I am prepared to do so – that the maintenance of national security and public safety constituted a legitimate aim for the purpose of taking measures in respect of the statement made by the applicant, his conviction and twelve-month prison sentence for making that statement cannot, in my opinion, be held to be proportionate to those aims, considering the content of the statement. If the Government were of the opinion that the statement constituted a threat to national security and public safety, they could have taken more effective and less intrusive measures to prevent or restrict such harm. The fact that the applicant had to serve only one-fifth of his sentence in prison does not suffice to convert me to a different view, since I would also find a sentence of two months' imprisonment disproportionate in the circumstances of the case.

I base my opinion mainly on the following considerations, which are largely to be found in the judgment also:

- (i) Freedom of expression constitutes one of the essential foundations of a democratic society (see paragraph 51 of the judgment). Although relying on the situation in south-east Turkey at the moment when the applicant made his statement, the Government did not claim that the statement was not made in a democratic society and that it deserved less protection on that account.
- (ii) Article 10 also applies to information or ideas that offend, shock or disturb (see paragraph 51 of the judgment). The mere fact that in his statement the applicant indicated support for a political organisation whose aims and means the Government reject and combat cannot, therefore, be a sufficient reason for prosecuting and sentencing him.
- (iii) In assessing whether the interference was necessary, the Court must take into consideration the content of the remarks held against the applicant and the context in which he made them (see paragraph 51 of the judgment). In his statement the applicant expresses support for the PKK but at the same time dissociates himself to some extent from the violence used by the PKK. According to the applicant, he was misinterpreted by the Government and had in reality told the journalists that he was opposed to violence. He claimed that, as an activist in the Kurdish cause since the 1960s, he had always spoken out against violence and referred to having been imprisoned for belonging to the "Path of Freedom" organisation, which had always advocated non-violent action (see paragraph 52 of the judgment). This claim by the applicant as to the content of his statement and the personal background against which it had to be interpreted, was not dealt with by the Government or discussed by the majority in the judgment.
- (iv) I have to grant the majority that the applicant's statement as recorded in *Cumhuriyet* is partly contradictory and ambiguous (see paragraph 58 of the judgment). However – and this is my main point of disagreement with the majority – the Court should have taken into consideration that the Turkish court which ultimately examined the charges against the applicant and convicted and sentenced him did not offer him any opportunity to explain what he had actually said and had meant to say and against what background the statement had to be interpreted. Indeed, when discussing the alleged violation of Article 6 § 1 and 3, the Court makes the following observation: "If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intention had been when he made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording" (see paragraph 71 of the judgment). If the Court deems the fact that this opportunity was withheld from the applicant relevant to its examination under Article 6, why did it not also take that fact into consideration when looking at the content and context of the statement in order to determine the proportionality of the interference?
- (v) Finally, the statement having been made by "the former mayor of Diyarbakır, the most important city in south-east Turkey" (see paragraph 60 of the judgment), the Court should, in order to determine the possible effect the statement might have had in the "already explosive situation in that region" (*ibid.*), have expressly indicated what weight it attached to the fact that the interview was with a *former* mayor who, moreover, was in prison at the relevant time.

These considerations lead me to the conclusion that the interference with the applicant's freedom of expression was not proportionate and amounted to a breach of Article 10. I therefore do not find it possible to concur with the majority in this part of the judgment.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

In August 1987 the newspaper *Cumhuriyet*, which is published in Istanbul, printed the following remarks made by the applicant to journalists who visited him in prison in Diyarbakır in south-east Turkey:

"I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ..."

The plain meaning of these words is that the applicant has the same opinion as the PKK on the question of the status of the territory where Kurds live in Turkey but he disapproves of the methods used by this organisation. I have to believe that this public statement is in breach of Turkish law. However, I do not see how these words, published in a newspaper in Istanbul, can be taken as a danger to national security or public safety or territorial integrity, let alone that they endorse criminal activities.

Accordingly, I am of the opinion that the restrictions and the penalty imposed did not pursue a legitimate aim and were not necessary in a democratic society.

I have therefore found a violation of Article 10 of the Convention.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

As I have joined Mr Matscher's dissenting opinion concerning the validity of the limitation of the Court's jurisdiction *ratione temporis*, it is unnecessary for me to consider the case under Article 6 § 1 and 3 (c), but I would like all the same to emphasise certain relevant facts.

Thus, if the way the case proceeded is looked at, it can be seen that at the hearing before the Diyarbakır Military Court on 15 December 1987 the

applicant refused to put forward a defence.

At the hearing on 1 March 1988 the applicant did not defend himself.

At the hearing on 2 November 1988 the applicant did not appear, because he was on hunger strike.

At the hearing on 7 December 1988 he appeared but refused to address the court.

At the hearing at Aydın Assize Court on 20 June 1990 the applicant refused to speak Turkish and insisted on addressing the court in his mother tongue, Kurdish (see paragraphs 18 et seq. of the judgment).

In those circumstances, can it be argued that the applicant was deprived of the opportunity of defending himself in person?

1. This summary by the registry does not bind the Court.

ECHR

ECJ

GRAND CHAMBER

CASE OF A. AND OTHERS v THE UNITED KINGDOM

(Application no. 3455/05)

JUDGMENT

STRASBOURG
19 February 2009

ARTICLE 15, TERRORISM, LIFE OF A NATION, THREAT, PUBLIC INTEREST, PUBLIC SAFETY, SECURITY, RESTRICTING FREEDOMS, DEMOCRACY

IN THE CASE OF A. AND OTHERS V. THE UNITED KINGDOM,

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

Jean-Paul Costa, *President*,

Christos Rozakis,

Nicolas Bratza,

Françoise Tulkens,

Josep Casadevall,

Giovanni Bonello,

Ireneu Cabral Barreto,

Elisabeth Steiner,

Lech Garlicki,

Khanlar Hajiyev,

Ljiljana Mijović,

Egbert Myjer,

David Thór Björgvinsson,

George Nicolaou,

Ledi Bianku,

Nona Tsotsoria,

Mihai Poalelungi, *judges*,

and **Michael O'Boyle**, *Deputy Registrar*,

Having deliberated in private on 21 May 2008 and on 4 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 3455/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eleven non-United Kingdom nationals ("the applicants"), on 21 January 2005. The President acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Birnberg Pierce and Partners, a firm of solicitors practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.
3. The applicants alleged, in particular, that they had been unlawfully detained, in breach of Articles 3, 5 § 1 and 14 of the Convention and that they had not had adequate remedies at their disposal, in breach of Articles 5 § 4 and 13.
4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 September 2007 a Chamber of that Section, composed of the following judges: Josep Casadevall, Nicolas Bratza, Giovanni Bonello, Kristaq Traja, Stanislav Pavloschi, Lech Garlicki, Liliana Mijović and also of Lawrence Early, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).
5. The composition of the Grand Chamber was determined according to the provisions of Article 27 § 2 and 3 of the Convention and Rule 24 of the Rules of Court.
6. The applicants and the Government each filed written observations on the merits. In addition, third-party comments were received from two London-based non-governmental organisations, Liberty and Justice, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).
7. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 May 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr D. Walton, *Agent*,

Mr P. Sales, *QC*

Ms C. Ivimy, *Counsel*,

Mr S. Braviner-Roman,

Ms K. Chalmers,

Mr E. Adams,

Mr J. Adutt,

Mr L. Smith, *Advisers*;

(b) *for the applicants*

Ms G. Pierce,

Ms M. Willis Stewart,

Mr D. Guedalla, *Solicitors*,

Mr B. Emmerson, *QC*,

Mr R. Husain,

Mr D. Friedman, *Counsel*.

The Court heard addresses by Mr Emmerson and Mr Sales and their answers in reply to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The derogation

9. On 11 September 2001 four commercial aeroplanes were hijacked over the United States of America. Two of them were flown directly at the Twin Towers of the World Trade Center and a third at the Pentagon, causing great loss of life and destruction to property. The Islamist extremist terrorist organisation al'Qaeda, led by Osama Bin Laden, claimed responsibility. The United Kingdom joined with the United States in military action in Afghanistan, which had been used as a base for al'Qaeda training camps.
10. The Government contended that the events of 11 September 2001 demonstrated that international terrorists, notably those associated with al'Qaeda, had the intention and capacity to mount attacks against civilian targets on an unprecedented scale. Further, given the loose-knit, global structure of al'Qaeda and its affiliates and their fanaticism, ruthlessness and determination, it would be difficult for the State to prevent future attacks. In the Government's assessment, the United Kingdom, because of its close links with the United States, was a particular target. They considered that there was an emergency of a most serious kind threatening the life of the nation. Moreover, they considered that the threat came principally,

but not exclusively, from a number of foreign nationals present in the United Kingdom, who were providing a support network for Islamist terrorist operations linked to al'Qaeda. A number of these foreign nationals could not be deported because of the risk that they would suffer treatment contrary to Article 3 of the Convention in their countries of origin.

11. On 11 November 2001 the Secretary of State made a Derogation Order under section 14 of the Human Rights Act 1998 ("the 1998 Act": see paragraph 94 below) in which he set out the terms of a proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15 of the Convention. On 18 December 2001 the Government lodged the derogation with the Secretary General of the Council of Europe. The derogation notice provided as follows:

"Public emergency in the United Kingdom

The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security.

The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom.

The Anti-terrorism, Crime and Security Act 2001

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Secu-

riety Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ('SIAC'), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

The extended power of arrest and detention in the Anti-terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation. It is a temporary provision which comes into force for an initial period of 15 months and then expires unless renewed by the Parliament. Thereafter, it is subject to annual renewal by Parliament. If, at any time, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order, repeal the provision.

Domestic law powers of detention (other than under the Anti-terrorism, Crime and Security Act 2001)

The Government has powers under the Immigration Act 1971 ('the 1971 Act') to remove or deport persons on the ground that their presence in the United Kingdom is not conducive to the public good on national security grounds. Persons can also be arrested and detained under Schedules 2 and 3 to the 1971 Act pending their removal or deportation. The courts in the United Kingdom have ruled that this power of detention can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and that, if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful (*R.*

v Governor of Durham Prison, ex parte Singh [1984] All ER 983).

Article 5(1)(f) of the Convention

It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where 'action is being taken with a view to deportation' (*Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 112). In that case the European Court of Human Rights indicated that detention will cease to be permissible under Article 5(1)(f) if deportation proceedings are not prosecuted with due diligence and that it was necessary in such cases to determine whether the duration of the deportation proceedings was excessive (paragraph 113).

In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) as interpreted by the Court in the *Chahal* case. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 of the Convention. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that Article 3 prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

Derogation under Article 15 of the Convention

The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that 'action is being taken with a view to deportation' within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the

Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.”

The derogation notice then set out the provisions of Part 4 of the Anti-Terrorism Crime and Security Bill 2001.

12. On 12 November 2001 the Anti-Terrorism Crime and Security Bill, containing the clauses which were to eventually become Part 4 of the Anti-Terrorism Crime and Security Act 2001 (“the 2001 Act”: see paragraph 90 below), was introduced into the House of Commons. The Bill was passed by Parliament in two weeks, with three days of debate on the floor of the House of Commons set aside for its 125 clauses in a restrictive programming motion, prompting both the Joint Committee of Human Rights and the Home Affairs Select Committee to complain of the speed with which they were being asked to consider the matter.
13. The 2001 Act came into force on 4 December 2001. During the lifetime of the legislation, sixteen individuals, including the present eleven applicants, were certified under section 21 and detained. The first six applicants were certified on 17 December 2001 and taken into detention shortly thereafter. The seventh applicant was certified and detained in early February 2002; the ninth applicant, on 22 April 2002; the eighth applicant, on 23 October 2002; the tenth applicant, on 14 January 2003; and the eleventh applicant was certified on 2 October 2003 and kept in detention, having previously been held under other legislation.

B. The derogation proceedings

14. In proceedings before the Special Immigration Appeals Commission (“SIAC”: see paragraphs 91-93 below), the first seven applicants challenged the legality of the derogation, claiming that their detention under the 2001 Act was in breach of their rights under Articles 3, 5, 6 and 14 of the Convention. Each, in addition, challenged the Secretary of State’s decision to certify him as an international terrorist.
15. On 30 July 2002, having examined both open and closed material and heard submissions from special advocates in addition to counsel for the parties and for the third party, Liberty, SIAC delivered its ruling on the legality of the derogation. It held that, on the basis of the open material, it was satisfied that the threat from al’Qaeda had created a public emergency

threatening the life of the nation, within the meaning of Article 15 of the Convention, and that the closed material confirmed this view.

SIAC further held that the fact that the objective of protecting the public from international terrorists could possibly have been achieved by alternative methods did not demonstrate that the measures actually adopted were not strictly necessary. Moreover, since the purpose of the detention was the protection of the United Kingdom, the fact that the detainee was at liberty to leave demonstrated that the measures were properly tailored to the state of emergency.

SIAC rejected the applicants’ complaints under Article 3 of the Convention. It held that, insofar as they related to conditions of detention, the applicants should bring proceedings in the ordinary civil courts, and that SIAC had no jurisdiction to determine such a complaint as it was not a “derogation issue”. It further saw no merit in the applicants’ argument that detention for an indefinite period was contrary to Article 3. On this point, SIAC held that the detention was not indefinite, since it was governed by the time limits of the 2001 Act itself and since the 2001 Act provided that each applicant’s certification was subject to automatic review by SIAC every six months. In any event, the mere fact that no term had yet been fixed for preventive detention did not give rise to a breach of Article 3.

SIAC did not accept that Article 6 applied to the certification process. The certification of each applicant as a suspected international terrorist was not a “charge” but instead a statement of suspicion and the proceedings before SIAC were not for the determination of a criminal charge. Furthermore, there was no relevant civil right at issue and Article 6 did not apply in its civil limb either.

SIAC did, however, rule that the derogation was unlawful because the relevant provisions of the 2001 Act unjustifiably discriminated against foreign nationals, in breach of Article 14 of the Convention. The powers of the 2001 Act could properly be confined to non-nationals only if the threat stemmed exclusively, or almost exclusively, from non-nationals and the evidence did not support that conclusion. In paragraphs 94-95 of its judgment SIAC held:

“94. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terror-

ists - and we can see powerful arguments in favour of such a derogation - the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as [counsel for the appellants] contends, the threat stems exclusively or almost exclusively from that alien section.

95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified - mostly in detention abroad - who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin."

SIAC thus quashed the derogation order of 11 November 2001 and issued a declaration of incompatibility in respect of section 23 of the 2001 Act under section 4 of the 1998 Act (see paragraph 94 below).

It adjourned the first seven applicants' individual appeals against certification (see paragraphs 24-69 below) pending the outcome of the Secretary of State's appeal and the applicants' cross-appeal on points of law against the above ruling.

16. On 25 October 2002 the Court of Appeal delivered its judgment (*A. and Others v. Secretary of State for the Home Department* [2002] EWCA Civ 1502).

It held that SIAC had been entitled to find that there was a public emergency threatening the life of the nation. However, contrary to the view of SIAC, it held that the approach adopted by the Secretary of State could be objectively justified. There was a rational connection between the detention of non-nationals who could not be deported because of fears for their safety, and the purpose which the Secretary of State wished to achieve, which was to remove non-nationals who posed a threat to national security. Moreover, the applicants would be detained for no longer than was necessary before they could be deported or until the emergency was resolved or they ceased to be a threat to the country's safety. There was no discrimination contrary to Article 14 of the Convention, because British nationals suspected of being terrorists were not in an analo-

gous situation to similarly suspected foreign nationals who could not be deported because of fears for their safety. Such foreign nationals did not have a right to remain in the country but only a right, for the time being, not to be removed for their own safety. The Court of Appeal added that it was well established in international law that, in some situations, States could distinguish between nationals and non-nationals, especially in times of emergency. It further concluded that Parliament had been entitled to limit the measures proposed so as to affect only foreign nationals suspected of terrorist links because it was entitled to reach the conclusion that detention of only the limited class of foreign nationals with which the measures were concerned was, in the circumstances, "strictly required" within the meaning of Article 15 of the Convention.

The Court of Appeal agreed with SIAC that the proceedings to appeal against certification were not "criminal" within the meaning of Article 6 § 1 of the Convention. It found, however, that the civil limb of Article 6 applied but that the proceedings were as fair as could reasonably be achieved. It further held that the applicants had not demonstrated that their detention amounted to a breach of Article 3 of the Convention.

17. The applicants were granted leave to appeal to the House of Lords, which delivered its judgment on 16 December 2004 ([2004] UKHL 56).

A majority of the Law Lords, expressly or impliedly, found that the applicants' detention under Part 4 of the 2001 Act did not fall within the exception to the general right of liberty set out in Article 5 § 1(f) of the Convention (see Lord Bingham, at paragraphs 8-9; Lord Hoffman, at paragraph 97; Lord Hope, at paragraphs 103-105; Lord Scott, at paragraph 155; Lord Rodger, at paragraph 163; Baroness Hale, at paragraph 222). Lord Bingham summarised the position in this way:

"9. ... A person who commits a serious crime under the criminal law of this country may of course, whether a national or a non-national, be charged, tried and, if convicted, imprisoned. But a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country, and is not charged with any crime, may not under article 5(1)(f) of the Convention and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security".

18. The House of Lords further held, by eight to one (Lords Bingham and Scott with considerable hesitation), that SIAC's conclusion that there was a public emergency threatening the life of the nation should not be displaced. Lord Hope assessed the evidence as follows:

"118. There is ample evidence within [the open] material to show that the government were fully justified in taking the view in November 2001 that there was an emergency threatening the life of the nation. ... [The] United Kingdom was at danger of attacks from the Al Qaeda network which had the capacity through its associates to inflict massive casualties and have a devastating effect on the functioning of the nation. This had been demonstrated by the events of 11 September 2001 in New York, Pennsylvania and Washington. There was a significant body of foreign nationals in the United Kingdom who had the will and the capability of mounting co-ordinated attacks here which would be just as destructive to human life and to property. There was ample intelligence to show that international terrorist organisations involved in recent attacks and in preparation for other attacks of terrorism had links with the United Kingdom, and that they and others posed a continuing threat to this country. There was a growing body of evidence showing preparations made for the use of weapons of mass destruction in this campaign. ... [It] was considered [by the Home Office] that the serious threats to the nation emanated predominantly, albeit not exclusively, and more immediately from the category of foreign nationals.

119. The picture which emerges clearly from these statements is of a current state of emergency. It is an emergency which is constituted by the threat that these attacks will be carried out. It threatens the life of the nation because of the appalling consequences that would affect us all if they were to occur here. But it cannot yet be said that these attacks are imminent. On 15 October 2001 the Secretary of State said in the House of Commons that there was no immediate intelligence pointing to a specific threat to the United Kingdom: see Hansard (HC Debates, col 925). On 5 March 2002 this assessment of the position was repeated in the government's response to the Second Report of the House of Commons Select Committee on Defence on the Threat from Terrorism (HC 348, para 13) where it was stated that it would be wrong to say that there was evidence of a particular threat. I would not conclude from the material which we have seen that there was no current emergency. But I would conclude that the emergency

which the threats constitute is of a different kind, or on a different level, from that which would undoubtedly ensue if the threats were ever to materialise. The evidence indicates that the latter emergency cannot yet be said to be imminent. It has to be recognised that, as the attacks are likely to come without warning, it may not be possible to identify a stage when they can be said to be imminent. This is an important factor, and I do not leave it out of account. But the fact is that the stage when the nation has to face that kind of emergency, the emergency of imminent attack, has not been reached".

Lord Hoffman, who dissented, accepted that there was credible evidence of a threat of serious terrorist attack within the United Kingdom, but considered that it would not destroy the life of the nation, since the threat was not so fundamental as to threaten "our institutions of government or our existence as a civil community". He concluded that "the real threat to the life of the nation ... comes not from terrorism but from laws such as these".

19. The other Law Lords (Lords Bingham, Nicholls, Hope, Scott, Rodger, Carswell and Baroness Hale, with Lord Walker dissenting) rejected the Government's submission that it was for Parliament and the executive, rather than the courts, to judge the response necessary to protect the security of the public. Lord Bingham expressed his view as follows:

"42. It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 [of the 2001 Act] and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parlia-

ment has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right; has required courts (in section 2) to take account of relevant Strasbourg jurisprudence; has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate”.

20. The majority therefore examined whether the detention regime under Part 4 of the 2001 Act was a proportionate response to the emergency situation, and concluded that it did not rationally address the threat to security and was a disproportionate response to that threat. They relied on three principal grounds: first, that the detention scheme applied only to non-nationals suspected of international terrorism and did not address the threat which came from United Kingdom nationals who were also so suspected; secondly, that it left suspected international terrorists at liberty to leave the United Kingdom and continue their threatening activities abroad; thirdly, that the legislation was drafted too broadly, so that it could, in principle, apply to individuals suspected of involvement with international terrorist organisations which did not fall within the scope of the derogation.

On the first point, Lord Bingham emphasised that SIAC's finding that the terrorist threat was not confined to non-nationals had not been challenged. Since SIAC was the responsible fact-finding tribunal, it was unnecessary to examine the basis for its finding, but there was evidence that “upwards of a thousand individuals from the UK are estimated on the basis of intelligence to have attended training camps in Afghanistan in the last five years”; that some British citizens were said to have planned to return from Afghanistan to the United Kingdom; and that the background material relating to the applicants showed the high level of involvement of British citizens and those otherwise connected with the United Kingdom in the terrorist networks. Lord Bingham continued:

“33. ... It is plain that sections 21 and 23 of the 2001 Act do not address the threat presented by UK nationals since they do not provide for the certification and detention of UK nationals. It is beside the point that other sections of the 2001 Act and the 2000 Act do apply to UK nationals, since they are not the subject of derogation, are not the subject of complaint and apply equally to foreign nationals. Yet the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals. It is also plain that sections 21 and 23 do permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him, as two of the appellants did when they left for Morocco and France respectively Such freedom to leave is wholly explicable in terms of immigration control: if the British authorities wish to deport a foreign national but cannot deport him to country 'A' because of *Chahal* their purpose is as well served by his voluntary departure for country 'B'. But allowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. ...

35. The fifth step in the appellants' argument permits of little elaboration. But it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When [the fifth applicant] was released from prison by SIAC on bail ..., it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.

36. In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian

tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day. ... In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom. ...

43. The appellants' proportionality challenge to the Order and section 23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer."

21. In addition, the majority held that the 2001 Act was discriminatory and inconsistent with Article 14 of the Convention, from which there had been no derogation. The applicants were in a comparable situation to United Kingdom nationals suspected of being international terrorists, with whom they shared the characteristics of being irremovable from the United Kingdom and being considered a threat to national security. Since the detention scheme was aimed primarily at the protection of the United Kingdom from terrorist attack, rather than immigration control, there was no objective reason to treat the applicants differently on grounds of their nationality or immigration status.
 22. Although the applicants' appeal had included complaints under Articles 3 and 16 of the Convention, the House of Lords did not consider it necessary to determine these complaints since it had found the derogation to be unlawful on other grounds.
 23. It granted a quashing order in respect of the derogation order, and a declaration under section 4 of the Human Rights Act (see paragraph 94 below) that section 23 of the 2001 Act was incompatible with Articles 5 § 1 and 14 of the Convention insofar as it was disproportionate and permitted discriminatory detention of suspected international terrorists.
- C. The certification proceedings: the "generic" judgment and appeals**
24. Meanwhile, SIAC's hearing of the applicants' individual appeals against certification commenced in May 2003, after the Court of Appeal had given judgment in the derogation proceedings but before the above judgment of the House of Lords.
 25. For the purposes of each appeal to SIAC, the Secretary of State filed an "open statement" summarising the facts connected to the decision to certify each applicant and as much of the supporting evidence which the Secretary of State considered could be disclosed without giving rise to any risk to national security. A further, "closed" statement of facts and evidence was also placed before SIAC in each case.
 26. On 29 October 2003 SIAC issued a "generic" judgment in which it made a number of findings of general application to all the appeals against certification.

As regards preliminary issues, it found, *inter alia*, that it had jurisdiction to hear an appeal against certification even where the person certified had left the United Kingdom and the certificate had been revoked. It held that the tests whether reasonable grounds existed for suspicion that a person was a "terrorist" and for belief that his presence in the United Kingdom was a risk to national security, within the meaning of section 21 of the 2001 Act, fell "some way short of proof even on the balance of probabilities". It further held that "reasonable grounds could be based on material which would not be admissible in a normal trial in court, such as hearsay evidence of an unidentified informant". The weight that was to be attached to any particular piece of evidence was a matter for consideration in the light of all the evidence viewed as a whole. Information which might have been obtained by torture should not automatically be excluded, but the court should have regard to any evidence about the manner in which it was obtained and judge its weight and reliability accordingly.

SIAC held that the detention provisions in the 2001 Act should be interpreted in the light of the terms of the derogation. The threat to the life of the nation was not confined to activities within the United Kingdom, because the nation's life included its diplomatic, cultural and tourism-related activities abroad. Moreover, attacks on the United Kingdom's allies could also create a risk to the United Kingdom, given the interdependence of countries facing a global terrorist threat. The derogation identified the threat as emanating from al'Qaeda and its associates. It was therefore necessary, in respect of both the "national security" and the "international terrorist" limbs of section 21 of the 2001 Act, to show reasonable grounds for suspicion that the person certified was part of a group which was connected, directly or indirectly, to

al'Qaeda. Even if the main focus of the group in question was a national struggle, if it backed al'Qaeda for a part of its agenda and the individual nonetheless supported the group, it was a legitimate inference that he was supporting and assisting al'Qaeda.

SIAC also made a number of findings of fact of general application concerning organisations alleged by the Secretary of State to be linked to al'Qaeda. These findings were based on both "open" and "closed" material. Thus, it held, for example, that the GSPC, or Salafist Group for Call and Combat, which was formed in Algeria in 1998, was an international terrorist organisation linked to al'Qaeda through training and funding, but that the earlier Algerian organisation, Armed Islamic Group (GIA), was not. The Egyptian Islamic Jihad (EIJ) was either part of al'Qaeda or very closely linked to it. The Chechen Arab Mujahaddin was an international terrorist group, pursuing an anti-West agenda beyond the struggle for Chechen independence, with close links to al'Qaeda. SIAC also identified as falling within the terms of the derogation a group of primarily Algerian extremists centred around Abu Doha, an Algerian who had lived in the United Kingdom from about 1999. It was alleged that Abu Doha had held a senior role in training camps in Afghanistan and had many contacts in al'Qaeda, including a connection with the Frankfurt cell which had been accused of plotting to bomb the Strasbourg Christmas market in December 2000. Abu Doha was arrested in February 2001, following an extradition request from the United States of America, but his group remained active.

27. The applicants appealed against SIAC's ruling that evidence which might have been obtained by torture was admissible. For the purposes of the appeal, the parties agreed that the proceedings before SIAC to challenge certification fell within Article 5 § 4 of the Convention and as such had to satisfy the basic requirements of a fair trial. It was not therefore necessary to decide whether Article 6 also applied and the issue was left open.

On 11 August 2004 the Court of Appeal, by a majority, upheld SIAC's decision ([2004] EWCA Civ 1123).

On 8 December 2005 the House of Lords held unanimously that the evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards

of humanity and decency and incompatible with the principles on which courts should administer justice. It followed that such evidence might not lawfully be admitted against a party to proceedings in a United Kingdom court, irrespective of where, by whom and on whose authority the torture had been inflicted. Since the person challenging certification had only limited access to the material advanced against him in the proceedings before SIAC, he could not be expected to do more than raise a plausible reason that material might have been so obtained and it was then for SIAC to initiate the relevant enquiries. The House of Lords therefore allowed the applicants' appeals and remitted each case to SIAC for reconsideration ([2005] UKHL 71).

28. SIAC's conclusions as regards each applicant's case are set out in paragraphs 29-69 below. Of the sixteen individuals, including the eleven applicants, detained under Part 4 of the 2001 Act, one had his certificate cancelled by SIAC.

D. The certification proceedings: the individual determinations

1. The first applicant

29. The first applicant was born in a Palestinian refugee camp in Jordan, is stateless, and was granted indefinite leave to remain in the United Kingdom in 1997. On 17 December 2001 the first applicant was certified by the Secretary of State as a suspected international terrorist under section 21 of the 2001 Act. On 18 December 2001 a deportation order was made on the same grounds.
30. The first applicant was taken into detention on 19 December 2001. He subsequently appealed to SIAC against certification and the decision to make a deportation order. On 24 July 2002 he was transferred to Broadmoor Secure Mental Hospital.
31. The first applicant and his representatives were served with the Secretary of State's "open" material, including a police report which showed that large sums of money had moved through the four bank accounts in his name. SIAC and the special advocate instructed on behalf of the first applicant were in addition presented with "closed" evidence. The first applicant gave oral evidence to SIAC, assisted by an interpreter and called one witness to testify to his good character. He also filed four medical reports concerning his mental health. SIAC observed in its judgment of 29 October 2003:

"We are acutely aware that the open material relied on against the applicant is very general and that the case depends in the main upon assertions which are largely unsupported. The central allegation is that he has been involved in fund raising and distribution of those funds for terrorist groups with links to Al Qa'eda. It is also said that he has procured false documents and helped facilitate the movement of jihad volunteers to training camps in Afghanistan. He is said to be closely involved with senior extremists and associates of Osama Bin Laden both in the United Kingdom and overseas. His case is and always has been that he is concerned and concerned only with welfare projects, in particular a school in Afghanistan for the children of Arab speakers there and projects such as construction of wells and provision of food to communities in Afghanistan. He has also raised money for refugees from Chechnya. Any contact with so-called extremists has been in that context and he had no reason to believe they were terrorists or were interested in terrorism.

We recognise the real difficulties that the Appellant has in making this appeal. We have made appropriate allowance for those difficulties and his mental problems. We note [his counsel's] concerns that there has been gross oversimplification by the Security Service of the situation which is, he submits, highly complex and a tendency to assume that any devout Muslim who believed that the way of life practised by the Taliban in Afghanistan was the true way to follow must be suspect. We note, too, that initially the Respondent asserted that all the Appellant's fund raising activities were for the purpose of assisting terrorism and that it was only when evidence was produced by the Appellant to show that there were legitimate charitable objectives that he accepted that at least some money was raised for those purposes. Insofar as connections with named individuals are relied on, we bear in mind that some of them, who are alleged to be involved in terrorism, have appeals pending ... and that allegations against others have not been tested nor have alleged links been able to be explained.

...

[The first applicant's counsel] accepted, as he had to, the unreliability of the Applicant's evidence about his movements in the 1990s, but asked us not to hold it against him because of his mental state. We do not accept that we can do that. The lies were a deliberate attempt to rebut the allegation that he had been a mujahid in Afghanistan, saying that he spent three years in a Jordanian prison. There was

an overstatement by the police of the amount involved through the bank account. This we accept, but there was still a substantial sum of money going through them. And [the applicant's counsel] submitted that the allegation was that he had provided false documents for others not for himself. Thus his false Iraq passport was not material. It does however show an ability to obtain a false passport. [The applicant's counsel] attacked the reliability of the intelligence relied on against the Appellant since it was only belatedly accepted that he had been involved in genuine charitable work and that some of the money going through his account and raised by him was for such a purpose. We recognise the danger that all activities by one who is under suspicion may be regarded as themselves suspicious and that there may not be a fair consideration of all material to see whether it truly does support the suspicion. We have considered all the material, in particular that which is closed, with that danger in mind.

As we have said, the open evidence taken in isolation cannot provide the reasons why we are dismissing this appeal and we sympathise with [the first applicant's counsel's] concerns that he had a most difficult task. We were not impressed with the appellant as a witness, even making all allowances for his mental state and the difficulties under which he was labouring. He was often evasive and vague and has admittedly told lies in relation to his movements in the 1990s. His explanations about some of the transactions recorded in his bank accounts we have found difficult to follow or accept. We should say that we do not consider that the Respondent's case is significantly advanced by what has been said about the Appellant's involvement with Algeria or Chechnya; the case depends essentially on the evidence about the Appellant's dealings with Afghanistan and with terrorists known to have links with Al Qa'eda.

It is clear that the Appellant was a very successful fundraiser and, more importantly, that he was able to get the money to Afghanistan. Whatever his problems, he was able to and was relied on to provide an efficient service. His explanations both of who were the well known terrorists whose children were at the school and of the various of the more substantial payments shown in the bank accounts are unsatisfactory. He was vague where, having regard to the allegations made against him, we would have expected some detail.

...

We have considered all the evidence critically.

The closed material confirms our view that the certification in this case was correct. There is both a reasonable belief that the Appellant's presence in the United Kingdom is a risk to national security and a reasonable suspicion that he is a terrorist within the meaning of section 21 of the 2001 Act. This appeal is accordingly dismissed."

32. In accordance with the terms of the 2001 Act, the first applicant's case was reviewed by SIAC six months later. In its judgment of 2 July 2004 SIAC found that:

"The updated open generic material ... continues to show that there is a direct terrorist threat to the United Kingdom from a group or groups of largely North African Islamic extremists, linked in various ways to Al Qa'eda.

Although some of his contacts have been detained, the range of extremists prominent in various groups was such that he would have no difficulty and retains the will and ability to add his considerable experience of logistic support to them in pursuit of the extremist Islamic agenda in the UK. The certificate is properly maintained."

33. SIAC reviewed the case again on 15 December 2004 and again found that the certificate should be maintained.

2. *The second applicant*

34. The second applicant is a citizen of Morocco born on 28 February 1963. He entered the United Kingdom as a visitor in 1985 and was granted leave to remain as a student. On 21 June 1988 he was granted indefinite leave to remain on the basis of his marriage to a British citizen, which marriage subsequently broke down. In 1990 and again in 1997 he applied for naturalisation, but no decision was made on those applications. In 2000 he remarried another British citizen, with whom he has a child.
35. On 17 December 2001 the second applicant was certified by the Secretary of State as a suspected international terrorist under section 21 of the 2001 Act. A deportation order was made on the same date. The second applicant was taken into detention on 19 December 2001. He appealed against the certification and deportation order but, nonetheless, elected to leave the United Kingdom for Morocco on 22 December 2001. He pursued his appeals from Morocco.
36. The "open" case against the second applicant was summarised by SIAC in its judgment of 29

October 2003 as follows:

"(1) he has links with both the GIA and the GSPC [Algerian terrorist groups: see paragraph 26 above] and is a close associate of a number of Islamic extremists with links to Al Qa'eda and/or Bin Laden.

(2) he has been concerned in the preparation and/or instigation of acts of international terrorism by procuring high-tech equipment (including communications equipment) for the GSPC and/or Islamic extremists in Chechnya led by Ibn Khattab and has also procured clothing for the latter group.

(3) he has supported one or more of the GIA, the GSPC and the Ibn Khattab faction in Chechnya by his involvement in fraud perpetrated to facilitate the funding of extremists and storing and handling of propaganda videos promoting the jihad.

The Secretary of State's open case expands on those allegations and further indicates the use of at least one alias and a pattern of association with individuals known or assessed to be involved in terrorism [five individuals were identified]. All these were described by [counsel for the Secretary of State] as 'known Algerian Islamic extremists'.

Witness B [for the Secretary of State] confirmed that the allegation against [the second applicant] is that he is a member of a network, rather than a member of any particular organisation such as the GSPC or the GIA".

SIAC continued by explaining the findings it had made against the applicant:

"Like the other Appellants, [the second applicant] is not charged in these proceedings with a series of individual offences. The issue is whether, taking the evidence as a whole, it is reasonable to suspect him of being an international terrorist (as defined). When we look at the material before us, as we do, we treat it cumulatively. It might be that the material relating to fraud alone, or to clothing alone, or to videos alone, or to associations, would not by itself show that a person was in any way involved in terrorism or its support. But we need to assess the situation when various factors are found combined in the same person. Those factors are as follows. First is his involvement in acts of fraud, of which he must be aware but of which he seeks to provide no explanation, excusing himself apparently on the ground that he is not aware which particular act or acts the Secretary of State has in mind. Secondly, he has been involved in raising consciousness (and hence in raising money)

about the struggle in Chechnya, and has been doing so in a specifically Islamic (rather than a merely humanitarian) context, using and distributing films which, according to the evidence before us, tend to be found in extremist communities. In the generic evidence, we have dealt with the Chechen Arab Mujahaddin and the significance of support for it which we accepted is given in full knowledge of its wider jihadist agenda. ... [He] has done so as a close associate of Abu Doha. Given the information we have about Abu Doha which, as we have said, we have no reason to doubt, we regard [the second applicant's] claim that Abu Doha was doing nothing illegal (save that he was hiding his activities from the Russians) as entirely implausible. ... [He] has had associations with a number of other individuals involved in terrorism. They are for the most part specified by name in the open case but are not mentioned in his own statement. ...

These are the five features which meet in [the second applicant]. No doubt the Secretary of State could have made his case by demonstrating various combinations of them in a single person. With all five, we regard the case as compelling. We are entirely satisfied that the Secretary of State is reasonable in his suspicion that [the second applicant] supports or assists the GIA, the GSPC, and the looser group based around Abu Doha, and in his belief that at any time [the second applicant] is in the United Kingdom his presence here is a risk to national security."

3. *The third applicant*

37. The third applicant is of Tunisian nationality, born in 1963 and resident in the United Kingdom from about 1994. He was certified by the Secretary of State on 18 December 2001 and detained the following day.
38. In its judgment of 29 October 2003, dismissing the third applicant's appeal against certification, SIAC observed:

"The case against the Appellant, as framed in the open material, is that he is a key member of an extreme Islamist group known as the Tunisia Fighting Group (TFG). It is said that this group was formed during 2000 and had its origins in the Tunisian Islamic Front (known as the FIT since the name is in French). Its ultimate aim is said to be to establish an Islamic State in Tunisia. It is further asserted that the Appellant has been in regular contact with a number of known extremists including some who have been involved in terrorist activities or planning. Both the FIT and the TFG are said to have links with Al Qa'eda.

The open material deployed against the Appellant is not at all substantial. The evidence which is relied on against him is largely to be found in the closed material. This has meant that he has been at a real disadvantage in dealing with the case because he is not aware of those with whom he is alleged to have been in contact.

...

In his statement the Appellant says that he has never heard of the TFG and is certainly not a member of it. ... We have no doubts that the TFG exists ... [and] also that it has links to Al Qa'eda. Our reasons for so concluding must be given in the closed judgment.

In May 1998 the Appellant and some 10 others were arrested in a joint Special Branch and Security Service operation pursuant to warrants under the Prevention of Terrorism Act. The Appellant was released without charge and in due course received £18,500 compensation for wrongful arrest. The arrests were in connection with allegations of involvement in a plot to target the World Cup in France. We of course give weight to the absence of any admissible evidence to support the Appellant's involvement in the alleged conspiracy, but it is not and cannot be the answer to this appeal. We have to consider all the material to see whether there are reasonable grounds for a belief or suspicion of the kind referred to in section 21(a) or (b) of the 2001 Act.

...

We are satisfied that the Appellant is a member of the TFG, itself an international terrorist organisation within the scope of the 2001 Act, and that he has links with an international terrorist group. We appreciate that our open reasons for being so satisfied are sparse. That is because the material which drives us to that conclusion is mainly closed. We have considered it carefully and in the context of knowing the appellant denies any involvement in terrorism or any knowing support for or assistance to terrorists. We have therefore been careful only to rely on material which cannot in our judgment have an innocent explanation."

39. SIAC reached similar conclusions in its periodic reviews of the case on 2 July and 15 December 2004.

4. *The fourth applicant*

40. The fourth applicant was born in Algeria in 1971 and first entered the United Kingdom in 1994. In May 1997 he was arrested and charged with

a number of offences, including a conspiracy to export to Algeria material which it was alleged was to be used for the purposes of terrorism. It was alleged that he was a member of GIA. The case against the applicant was abandoned in March 2000 when a key witness, a Security Service agent, who was to give evidence concerning the need for civilians to defend themselves against atrocities allegedly committed by the Algerian Government, decided that it was too dangerous for him to give evidence.

41. In 1998 the fourth applicant married a French national. He became a French citizen in May 2001, although he did not inform the United Kingdom authorities of this. The Secretary of State certified him under section 21 of the 2001 Act on 17 December 2001 and he was detained on 19 December 2001. On 13 March 2002 he left for France, where he was interviewed on arrival by security officials and then set at liberty. Since he had left the United Kingdom, the certificate against him was revoked and the revocation was back-dated to 22 March 2002.
42. In its judgment of 29 October 2003, SIAC held that the back-dating of the revocation meant that the fourth applicant could not be regarded as having been certified at the time he lodged his appeal and that, therefore, he had no right of appeal. It nonetheless decided to consider the appeal on the basis that this conclusion might be wrong. Since the Secretary of State could not reasonably have known at the time the certificate was issued that the applicant was a French citizen and could safely be removed to France, it could not be said on that ground that the certificate should not have been issued. SIAC therefore continued by assessing the evidence against him:

“In reaching our decision, we will have to consider not only the open but also the closed material. The Appellant appears to have suspected that he was the subject of surveillance over much of the relevant period.

We are conscious of the need to be very careful not to assume guilt from association. There must be more than friendship or consorting with those who are believed to be involved in international terrorism to justify a reasonable suspicion that the Appellant is himself involved in those activities or is at least knowingly supporting or assisting them. We bear in mind [his solicitor's] concerns that what has happened here is an attempt to resurrect the prosecution with nothing to add from his activities since. Detention must be regarded as a last resort and so cannot be justified on the

basis of association alone and in any event the guilt of the associates has never been established. ...

Nonetheless, continued association with those who are suspected of being involved in international terrorism with links to Al Qa'eda in the light of the reasonable suspicion that the Appellant was himself actively involved in terrorist activities for the GIA is a matter which can properly be taken into account. The GSPC, which broke away from the GIA, has links to Al Qa'eda and the Appellant has continued to associate with those who took to the GSPC rather than the GIA. We are in fact satisfied that not only was the Appellant actively involved initially with the GIA and then with the GSPC but also that he provided false documentation for their members and for the Mujahaddin in Chechnya as is alleged in the open statement. But we accept that his activities in 2000 and 2001 justify the use of the expression that he had been maintaining a low profile, and we make that observation having regard to both open and closed material. Nonetheless, a low profile does not mean that he is not properly to be regarded as an international terrorist within the meaning of section 21. An assessment has to be made of what he may do in the light of what he has done and the fact that he has shown willingness and the ability to give assistance and support in the past and continues the associations and to provide some help (e.g. the use of his van) is highly relevant.

We have not found this aspect of the Appellant's case at all easy. We have given full weight to all [his solicitor's] submissions which were so persuasively put before us but in the end have reached the view that, looking at the evidence as a whole, the decision to issue a certificate was not wrong. Accordingly, we would not have allowed the appeal on the facts.”

5. *The fifth applicant*

43. The fifth applicant was born in Algeria in 1969. In his statement to SIAC he claimed to have developed polio as a child which left him with a permanently weak and paralysed right leg. He was arrested and tortured by the Algerian Government in 1991, whereupon he left Algeria for Saudi Arabia. In 1992 he moved to Pakistan and travelled to Afghanistan on several occasions. In August 1995 he entered the United Kingdom and claimed asylum, alleging in the course of that claim that his leg had been injured by a shell in Afghanistan in 1994. His asylum claim was refused and his appeal against the refusal was dismissed in December 1999.

The applicant married a French citizen and had a child with her.

44. He was certified by the Secretary of State under section 21 of the 2001 Act on 17 December 2001 and detained on 19 December 2001. In its judgment of 29 October 2003, dismissing the fifth applicant's appeal against certification, SIAC observed:

"The open statements provided to justify the certification do not refer to a great deal of source material and so consist mainly of assertions. As with most of these appeals, the main part of the evidence lies in closed material and so, as we are well aware, the Appellants have been at a disadvantage in that they have not been able to deal with what might be taken to be incriminating evidence. The Special Advocates have been able to challenge certain matters and sometimes to good effect. That indeed was the case in relation to a camp in Dorset attended by a number of those, including the Appellant, of interest to the Security Service. ...

The case against the Appellant is that he was a member of the GIA and, since its split from the GIA, of the GSPC. He is associated with a number of leading extremists, some of whom are also members of or associated with the GSPC, and has provided active support in the form of the supply of false documents and facilitating young Muslims from the United Kingdom to travel to Afghanistan to train for jihad. He is regarded as having undertaken an important role in the support activities undertaken on behalf of the GSPC and other Islamic extremists in the United Kingdom and outside it. All this the Appellant denies and in his statement he gives innocent explanations for the associations alleged against him. He was indeed friendly with in particular other Algerians in the United Kingdom and, so far as [the fourth applicant] was concerned, the families were close because, apart from anything else, their respective wives were French. He attended [the eighth applicant's] mosque. He was an impressive preacher and the appellant says he listened but was never involved. Indeed he did not know [the eighth applicant] except through Chechen relief, which the Appellant and many hundreds of other Muslims supported, and he had never spoken to him on the telephone. He had on occasions approached [the eighth applicant] at Friday prayers at the mosque if he wanted guidance on some social problem."

SIAC referred to "open" surveillance reports which showed the applicant to have been in

contact with other alleged members of GIA and the GSPC, including at a camp in Dorset in July 1999. Further "open" evidence concerned his "unhelpful" and "not altogether truthful" responses to questioning by officers of the Security Service in July and September 2001. SIAC continued:

"Reliance is placed on various articles found in his house when he was arrested. These include a copy of the fatwa issued by Bin Laden. The Appellant says he had never seen it and could not explain its presence. A GSPC communiqué was, he says, probably one handed out at the mosque. Analysis of the hard drive of his computer showed it had visited an internet site that specialised in United States military technology. This was not something which could be relevant to the Appellant's studies. And a hand drawn diagram of a missile rocket he has not seen before. It might, he thinks, have been in a book about Islam he had bought second hand from the mosque.

We note the denials, but we have to consider all the evidence. As will be clear from this judgment, we have reason to doubt some of the Appellant's assertions. But the closed material confirms our view that there is indeed reasonable suspicion that the Appellant is an international terrorist within the meaning of section 21 and reasonable belief that his presence in the United Kingdom is a risk to national security. We have no doubt that he has been involved in the production of false documentation, has facilitated young Muslims to travel to Afghanistan to train for jihad and has actively assisted terrorists who have links with Al Qa'eda. We are satisfied too that he has actively assisted the GSPC. We have no hesitation in dismissing his appeal."

45. On 22 April 2004, because of concerns about his health, the fifth applicant was released from prison on bail on strict conditions, which amounted to house arrest with further controls. In its review judgment of 2 July 2004, SIAC held:

"... in granting bail, [SIAC] did not revise its view as to the strength of the grounds for believing he was an international terrorist and a threat to national security. The threat could be managed proportionately in his case in view of his severe mental illness. That however is no reason to cancel the certificate. There might be circumstances in which he breaches the terms of his bail or for other reasons it was necessary to revoke it. The need for the certificate to continue must depend on whether the terms of the statute and of the derogation

continue to be met.

A number of his contacts remain at large including some who are regarded as actively involved in terrorist planning. There is nothing to suggest that his mental illness has diminished his commitment to the extremist Islamic cause; he has the experience and capacity to involve himself once more in extremist activity. The bail restraints on him are essential; those are imposed pursuant to his certification and the SIAC dismissal of his appeal against it. The certificate is properly maintained."

46. On 15 December 2004, SIAC again reviewed the case and decided that the certificate should be maintained.

6. *The sixth applicant*

47. The sixth applicant was born in Algeria in 1967 and was resident in the United Kingdom from 1989. The Secretary of State issued a certificate against him on 17 December 2001 and he was taken into detention on 19 December 2001.
48. In its judgment of 29 October 2003 SIAC observed as follows:

"Although we have to make our decision on the basis both of the open and of the closed material, it is important to indicate the case against [the sixth applicant] as it has been set out by the Secretary of State in open material, because that is the case that [the sixth applicant] knows that he has to meet. In assessing his statement and the other evidence and arguments submitted on his behalf, we remind ourselves always that he is not aware of the Secretary of State's closed material, but nevertheless that he is not operating entirely in a vacuum because of the open allegations; and we may test the Appellant's own case by the way he deals with those allegations.

The Secretary of State's case against [the sixth applicant] is summarised as follows:

- (1) he belongs to and/or is a member of the GSPC, and previously was involved with the GIA;
- (2) he has supported and assisted the GSPC (and previously the GIA) through his involvement in credit card fraud which is a main source of income in the United Kingdom for the GSPC;
- (3) from about August 2000, [the sixth applicant] took on an important role in procuring telecommunication equipment for the GSPC and the provision of logistical support for satellite phones by way of purchase and alloca-

tion of airtimes for those phones;

(4) he has also played an important part in procuring telecommunications equipment and other equipment for the Mujahedin fighting in Chechnya – that is to say the faction which until 2002 was under the command of Ibn Khattab."

SIAC then reviewed the open evidence before it regarding the purchase by Abu Doha, assisted by the sixth and seventh applicants, of a number of satellite telephones and other telecommunications equipment to the value of GBP 229,265 and the nature and extent of the connection between the sixth and seventh applicants. It concluded:

"In the circumstances we have set out, it appears to us that the Secretary of State has ample ground for suspicion that [the sixth applicant's] procurement activities were directed to the support of the extremist Arab Islamist faction fighting in Chechnya. That support arises from [the sixth applicant's] connexions with and support of the GSPC. We emphasise, as is the case with other appeals as well, that it is the accumulation of factors, each lending support to the others rather than undermining other points, providing colour and context for the activities seen as a whole which is persuasive; it would be wrong to take a piece in isolation, thereby to diminish its significance and to miss the larger picture. The generic judgment supports these conclusions. These are activities falling centrally within the derogation. [The sixth applicant] has provided only implausible denials and has failed to offer credible alternative explanations. That is sufficient to determine his appeal, without making any further reference to the Secretary of State's other allegations which, as was acknowledged in the open statement and in open evidence before [SIAC], can be properly sustained only by examination of the closed material."

49. SIAC reviewed the case on 2 July 2004 and 28 February 2005 and, on each occasion, decided that there were still grounds for maintaining the certificate.

7. *The seventh applicant*

50. The seventh applicant was born in Algeria in 1971 and apparently entered the United Kingdom using false French identity papers in or before 1994. On 7 December 2001 he was convicted of a number of driving offences and sentenced to four months' imprisonment. He was certified by the Secretary of State on 5 February 2002 and taken into detention pursuant

to the certificate as soon as his prison sentence ended on 9 February 2002.

51. In its judgment of 29 October 2003, SIAC noted that the allegations against the seventh applicant were that he had been a member of the GSPC since 1997 or 1998, and before that a member of the GIA; that his contacts with leading GSPC members in the United Kingdom showed that he was a trusted member of the organisation; and that he had been involved with Abu Doha and the sixth applicant in purchasing telecommunications equipment for use by extremists in Chechnya and Algeria. It further noted that:

“[The seventh applicant] did not give evidence before [SIAC] and, indeed, chose not to attend the hearing of his appeal. His statement, which we have of course read, is in the most general terms, and, perhaps not surprisingly, [his counsel’s] submissions, both oral and written, were similarly general. [The seventh applicant’s] approach to the present proceedings of themselves and the fact that he did not give oral evidence or make any detailed written statement are not matters to be put in the scale against him. We well understand the difficulty that Appellants have in circumstances where the allegations against them are only summarised and where much of the evidence on which those allegations are based cannot, for reasons of national security, be communicated to the Appellants themselves. However, [the seventh applicant] is in the best position to know what his activities and motives have been in the relevant period. Nothing prevents him from giving a full description and account of those activities if he wishes to do so. The fact that he has chosen to provide no detailed account of his activities means that he has provided no material to counter the evidence and arguments of others”.

SIAC concluded that the open and closed material supported the allegations against the seventh applicant and it dismissed his appeal.

52. In its review judgments of 2 July and 15 December 2004 SIAC decided that the certificate should be maintained.

8. *The eighth applicant*

53. The eighth applicant is a Jordanian national, born in Bethlehem in 1960. He arrived in the United Kingdom on 16 September 1993 and claimed asylum. He was recognised as a refugee and granted leave to remain until 30 June 1998. On 8 May 1998 he applied for indefinite leave to remain but the application had not

been determined at the time of the coming into force of the 2001 Act.

54. The eighth applicant was convicted *in absentia* in Jordan for his involvement in terrorist attacks there and in relation to a plot to plant bombs to coincide with the millennium. He was investigated in February 2001 by anti-terrorism police officers in connection with a plot to cause explosions at the Strasbourg Christmas market in December 2000, but no charges were brought against him. When the 2001 Act was passed he went into hiding. He was arrested on 23 October 2002 and was immediately made the subject of a section 21 certificate and taken into detention. On the same date a deportation order was made against him.
55. In its judgment of 8 March 2004, dismissing the eighth applicant’s appeal against certification, SIAC observed as follows:

“[The eighth applicant’s counsel], on instructions from the appellant, informed us that his client had chosen not to attend the hearing or to participate in any way. He had read the decisions relating to the appellants who had been certified when the 2001 Act came into force and the generic judgment and so felt certain that the result of his appeal was a foregone conclusion. There had been many references to his role in the other appeals and some had been certified and detained, at least in part, on the basis that they associated with him. Since that association was regarded as sufficient to justify their continued detention, he considered that the decision on his appeal had, in effect, already been taken. He had chosen not to play any part precisely because he has no faith in the ability of the system to get at the truth. He considered that the SIAC procedure had deliberately been established to avoid open and public scrutiny of the respondent’s case, which deprived individuals of a fair opportunity to challenge the case against them.

Having said that, [the eighth applicant’s counsel] made it clear that the appeal was not being withdrawn. It was accordingly necessary for us to consider it and to take into account the statement made by the appellant. [His counsel] emphasised a number of matters which, he suggested, should be regarded as favourable to the appellant’s contention that he was not and never had been involved in terrorism within the meaning of the 2001 Act. Furthermore, the allegations showed that a distorted and over-simplified view was being taken by the security services of the appellant’s activities and his role as a respected teacher and believer in the rights of Islamic

communication throughout the world.

We should make it clear that we have considered the case against the appellant on its merits. We have not been influenced by any findings made in other appeals or the generic judgments. One of the reasons why this judgment has taken a long time to be prepared was the need for us to read through and consider the evidence, both open and closed, that has been put before us. There is much more of it than in most of the other appeals. That is a reflection of the fact that the appellant has been associated with and had dealings with many of the others who have been certified and with individuals and groups themselves linked to Al Qa'ida. We see no reason to dissent from the views expressed in the generic judgment of the significance of the various individuals and groups referred to in it. But that does not mean we have therefore automatically accepted its views. We draw attention to the fact that the panel which produced the generic judgment was not the same constitution as this panel and that such input as there was by the chairman of this panel to the generic judgment was limited to issues of law. We have considered the case against the appellant on the material put before us in this appeal. ...

When it came to the closed session, the Special Advocates informed us that after careful consideration they had decided that it would not be in the appellant's interests for them to take any part in the proceedings. We were very concerned at this, taking the view that the decision was wrong. The appeal was still being pursued and the appellant did not know what was relied on against him in the closed material. We were unable to understand how in the circumstances it could not be in his interests for the Special Advocates, at their discretion, to elicit or identify matters favourable to the appellant and to make submissions to us to seek to persuade us that evidence was in fact unreliable or did not justify the assessment made. When we asked [one of the two Special Advocates appointed on behalf of the eighth applicant] to tell us why he had decided as he had he told us that he could not do so since to do so would not be in the appellant's interest. We adjourned to enable the Special Advocates to seek to discover from the appellant through his representatives whether he did wish them to do what they could on his behalf and we also contacted the Solicitor General who had appointed the Special Advocates to seek her help in trying to persuade them to assist us. The appellant's representatives indicated that they had nothing to say on the subject and the Solicitor General took the view

that it would be wrong for her to intervene in any way. Our further attempts to persuade the Special Advocates to change their minds were unsuccessful and since we could not compel them to act in any particular way we had to proceed without them. [Counsel for the Secretary of State], at our request, identified various matters which might be regarded as possibly exculpatory and we ourselves raised other matters in the course of the closed hearing.

We are conscious that the absence of a Special Advocate makes our task even more difficult than it normally is and that the potential unfairness to the appellant is the more apparent. We do not doubt that the Special Advocates believed they had good reasons for adopting the stance that they did and we are equally sure that they thought long and hard about whether they were doing the right thing. But we are bound to record our clear view that they were wrong and that there could be no reason for not continuing to take part in an appeal that was still being pursued. ... As it happens, the evidence in this case against the appellant is so strong that no Special Advocates, however brilliant, could have persuaded us that reasonable suspicion had not been established so that the certification was not justified. Thus the absence of Special Advocates has not prejudiced the appellant. ..."

56. SIAC then summarised the open case against the applicant, which was that he had associated with and acted as spiritual adviser to a number of individuals and groups linked with al'Qaeda. He held extreme and fundamentalist views and had been reported as having, in his speeches at a London mosque, given his blessing to the killing of Jews and Americans, wherever they were. SIAC concluded:

"We are satisfied that the appellant's activities went far beyond the mere giving of advice. He has certainly given the support of the Koran to those who wish to further the aims of Al Qa'ida and to engage in suicide bombing and other murderous activities. The evidence is sufficient to show that he has been concerned in the instigation of acts of international terrorism. But spiritual advice given in the knowledge of the purposes for which and the uses to which it is to be put provides assistance within the meaning of s.21(4) of the 2001 Act.

...

There are a large number of allegations made. We see no point in dealing with them seriatim. We have indicated why we have formed the view that the case made against the appellant is established. Indeed, were the standard

higher than reasonable suspicion, we would have had no doubt that it was established. The appellant was heavily involved, indeed was at the centre in the United Kingdom of terrorist activities associated with Al Qa'ida. He is a truly dangerous individual and these appeals are dismissed."

9. *The ninth applicant*

57. The ninth applicant is Algerian, born in 1972. In 1991 he left Algeria for Afghanistan, where he taught Arabic in a refugee camp. He claimed asylum in the United Kingdom in 1993. In 1994 he was granted leave to remain for four years and in 2000 he was granted indefinite leave to remain, on the basis that he was to be regarded as a refugee. On four occasions, the last in May 1998, the applicant was arrested and released without charge. The first three arrests related to credit card fraud. The arrest in May 1998 related to alleged terrorist activities and the applicant was subsequently paid compensation by the police for false arrest.
58. The ninth applicant was certified by the Secretary of State and made the subject of a deportation order on 22 April 2002. He was detained on the same day. According to the evidence of one of the witnesses for the Secretary of State, he was not certified, with the other applicants, in December 2001 because one of his files had been lost.
59. In its judgment of 29 October 2003, SIAC noted that the allegations against the ninth applicant were that he was an active supporter of the GSPC and had raised considerable sums of money for it through fraud. There was evidence that the applicant had in the past been found, by customs officers, attempting to enter the United Kingdom by ferry with large amounts of cash and that he had close links with others who had been convicted of credit card fraud. SIAC held that evidence of involvement in fraud did not establish involvement in terrorism. However, it noted that the applicant had been present at a camp in Dorset in the company of the fifth applicant and a number of others suspected of being GSPC supporters and that a telephone bill had been found at his house at the time of his arrest in the name of Yarkas, who had been arrested in Spain in November 2001 due to his alleged links with al'Qaeda. The applicant had given evidence but had not been a convincing witness and had not given a credible explanation for the foregoing. The closed evidence supported the Secretary of State's allegations and SIAC there-

fore dismissed the applicant's appeal against certification.

60. In its review judgments of 2 July 2004 and 15 December 2004, SIAC held that the certificate was properly maintained.

10. *The tenth applicant*

61. The tenth applicant is an Algerian national. Following a bomb explosion in Algeria, his left hand was amputated at the wrist and his right arm was amputated below the elbow. In 1999 he travelled to the United Kingdom, via Abu Dhabi and Afghanistan, and claimed asylum. His claim was refused on 27 February 2001. He was then in custody, having been arrested on 15 February 2001 and charged with possession of articles for suspected terrorist purposes, conspiracy to defraud and conspiracy to make false instruments. At the time of his arrest he was found to have in his possession approximately 40 blank French driving licences, identity cards and passports, a credit card reader, laminators and an embossing machine. The charges were not, however, proceeded with and he was released on 17 May 2001.
62. On 14 January 2003 the Secretary of State issued a certificate against him under section 21 of the 2001 Act and he was taken into detention. A deportation order was made against him on the same day.
63. In its judgment of 27 January 2004 SIAC noted that the essence of the case against the tenth applicant was that since his arrival in the United Kingdom he had been closely associated with a network of extremists formerly led by Abu Doha (see paragraph 26 above). In particular, it was alleged that he had provided logistical support in the form of false documentation and money raised through credit card fraud. He had spent a lot of time at the Finsbury Park Mosque, a known centre of Islamist extremism, and was alleged to have attended a meeting there in June 2001 at which threats were made against the G8 summit in Genoa.

The applicant submitted a written statement on 28 June 2003 in which he denied the allegations against him. He did not, however, participate in the hearing of his appeal, as SIAC explained in its judgment:

"He was, said [his counsel], a genuine refugee, a member of no organisation or group and not involved in terrorism or in advocating terrorism. He had no knowledge of any planned terrorist attacks and could not understand why

the accusations had been made against him. He had seen none of the underlying material and had no means of challenging it. In effect, he could do no more than assert that it could not justify the conclusion that he was an international terrorist within the meaning of the Act since he was not. He had had read to him the decisions of [SIAC] in the previous appeals. Given the relevance which was placed on the closed material and the statutory test applicable, he felt that the result was a foregone conclusion. He did not wish in participating in the appeal to give an impression which was false that he could deal with the matters which were being relied on against him. He had no confidence in the proceedings. Accordingly he would take no active part in them beyond the statement which [his counsel] made on his behalf.

He did not withdraw his appeal. While we appreciate the handicap under which he and indeed all the appellants labour, we wish to make it clear that no appeal is a foregone conclusion. We have to and we do consider the evidence put before us, whether open or closed, with care because we recognise that the result is detention for an unspecified period without trial. While we recognise that the Special Advocate has a difficult task when he has and can obtain no instructions on closed material, he is able to test evidence from the Security Service and to draw our attention to material which assists the appellant's case."

SIAC found that there was ample evidence to support the view that the applicant was involved in fraudulent activities. The evidence before it, most of it closed, was sufficient to establish that he was doing it to raise money for terrorist causes and to support those involved in terrorism. It therefore dismissed the appeal against certification.

64. SIAC reached similar decisions in its review judgments of 4 August 2004 and 16 February 2005. In the latter judgment, it noted that although the applicant had been transferred to Broadmoor Secure Mental Hospital because of mental health problems, that made no difference to the assessment of the risk to national security which he would pose if released.

11. *The eleventh applicant*

65. The eleventh applicant is an Algerian national. He entered the United Kingdom in February 1998, using a false Italian identity card, and claimed asylum the following week. While his claim was pending, in July 2001, he travelled to Georgia using a false French passport and

was deported back to the United Kingdom, where he was informed that his travel outside the United Kingdom had terminated his asylum claim. He made a second claim for asylum, which was refused on 21 August 2001. The applicant absconded. He was arrested on 10 October 2001 and held in an Immigration Detention centre, from which he absconded in February 2002. He was rearrested on 19 September 2002 and detained at Belmarsh Prison under immigration law provisions.

66. On 2 October 2003 the Secretary of State certified him as an international terrorist under section 21 of the 2001 Act and made a deportation order against him on grounds of national security.

67. In its judgment of 12 July 2004, dismissing the eleventh applicant's appeal against certification, SIAC set out the open case against him. It was alleged that he was an established and senior member of the Abu Doha group (see paragraph 26 above). In July 2001 he had attempted to travel to Chechnya and, when arrested by the Georgian police, he had been found in possession of telephone numbers associated with a senior member of the Abu Doha group and a named member of the GSPC, who was known to be involved in fundraising for the Chechen Mujahaddin. He was alleged to have provided money and logistical support to a North African extremist Islamist network based in Pakistan and Afghanistan, with links to al'Qaeda, and to have assisted members of the Abu Doha group in travelling to Afghanistan, Pakistan and Chechnya. He had lived at the Finsbury Park Mosque for over a year in 1999/2000. He was very security conscious and during a trip to St Albans in September 2001 he had taken measures to avoid being followed. When he was arrested in September 2002 he was found in possession of a false Belgian passport bearing the photograph of a senior member of the Abu Doha group. He was alleged to have been heavily involved in the supply of false documents and the fraudulent use of cheque books and credit cards.

68. The applicant filed a written statement in which he denied being an international terrorist. He admitted that he had travelled to Afghanistan in 1999 and that he had attempted to go to Chechnya in 2001, but claimed that his interest in these countries was no more than that shown by many devout Muslims. He refused to participate in the hearing of his appeal or to be represented by a lawyer, in protest at

the fundamental unfairness of the procedure. In view of the applicant's position, the Special Advocates decided that his interests would best be served if they refrained from making submissions on his behalf or asking questions of the witnesses in the closed session.

69. In dismissing the applicant's appeal, SIAC held as follows:

"We recognise the difficulties faced by an Appellant who only sees only the open material and can understand [the eleventh applicant's] perception that the procedures are unfair. However, each case will turn upon its own individual facts, and it would be wrong to give the impression, which [his solicitor] sought to do, that this particular appellant had been placed in a position where he was prevented by reason of the procedures under the Act from mounting an effective defence in response to the case made against him.

We have summarised the information made available to [the eleventh applicant] at the various stages of the procedure ... and [his] response to this information in his Written Statement. While some of the assessments in the open material can fairly be described as general assertions unsupported by any documentary evidence, in response to which [the eleventh applicant] would not have been able to give any more than an equally general denial, it is clear that in respect of other assessments [he] was provided with a great deal of detailed information: names, dates, places and supporting documents.

[The eleventh applicant] is in the best position to give an account of his whereabouts and activities since he first claimed asylum in 1998. His written statement is significant not so much for what it says, as for what it does not say. To take one example: the visit to St Albans and the photo-booth where [the eleventh applicant] says that the Respondent's specific assertion is 'completely wrong' ... [The eleventh applicant] has not denied that he went to St Albans. He knows who accompanied him and why they went there. He has not explained why they went there, nor has he identified his companion, despite having been provided with the photographs taken during the surveillance operation. ..."

SIAC continued by noting the inconsistencies in the applicant's various accounts of his trips to Afghanistan, Georgia and Dubai and his failure to deal with the Secretary of State's allegations that he had associated with various members of the Abu Doha group, identified by

name. SIAC continued:

"The matters referred to ... are not an exhaustive list, merely the most obvious examples of the way in which [the eleventh applicant's] written statement fails to deal with the open case made against him. Given the unsatisfactory nature of the statement we do not feel able to give any significant weight to the general denials contained within it ... We have dealt with these matters in some detail because they are useful illustrations of the extent to which [the eleventh applicant] would have been able to answer the case against him, if he had chosen to do so. While we do not draw any adverse inference from [his] failure to give evidence, or otherwise participate in the hearing of his appeal, we do have to determine his appeal on the evidence and we are left with the position that there has been no effective challenge by way of evidence, cross-examination or submission to the open material produced by the Respondent.

...

The standard of proof prescribed by section 25(2) of the 2001 Act is relatively low: are there reasonable grounds for belief or suspicion. As explained above, we are satisfied that this low threshold is easily crossed on the basis of the open material alone. If the totality of the material, both open and closed, is considered, we have no doubt that [the eleventh applicant] was a senior, and active, member of the Abu Doha group as described in the Respondent's evidence."

E. The conditions of detention and the effect of detention on the applicants' health

70. The detained applicants were all initially detained at Belmarsh Prison in London. The sixth applicant was transferred to Woodhill Prison and the first, seventh and tenth applicants were transferred to Broadmoor Secure Mental Hospital.
71. They were held in prison under the same regime as other standard risk Category A prisoners, which was considered the appropriate security classification on the basis of the risk they posed. They were allowed visitors, once those visitors had been security-cleared, and could associate with other prisoners, make telephone calls and write and receive letters. They had access to an imam and to their legal representatives. They had the same level of access to health care, exercise, education and work as any other prisoner of their security ranking.

Following a recommendation of the inspector

appointed under the 2001 Act to review the detention regime, the Government created a Special Unit at Woodhill Prison to house the 2001 Act detainees. The Unit, which was refurbished in consultation with the detained applicants and their representatives and had a specially selected and trained staff, would have allowed for a more relaxed regime, including more out-of-cell time. The applicants, however, chose not to move to the Unit, a decision which the inspector found regrettable.

72. The first applicant, who alleged a history of ill-treatment in Israeli detention and who had first been treated for depression in May 1999, suffered a severe deterioration in his mental health while detained in Belmarsh Prison. He was transferred to Broadmoor Secure Mental Hospital in July 2002.
73. The seventh applicant reported a family history of psychiatric disorder and had experienced depression as an adolescent. He claimed to suffer increasingly throughout his detention from depression, paranoia and auditory hallucinations. He attempted suicide in May 2004 and was transferred to Broadmoor Secure Mental Hospital on 17 November 2004.
74. The tenth applicant, a double amputee, claimed to have been detained and tortured in Algeria. He suffered a deterioration in his physical and mental health in Belmarsh Prison. He went on hunger strike in May/June 2003 and refused to use the prostheses which had been issued to him or to cooperate with his nurses. Early in November 2003, the prison authorities withdrew his nursing care. His legal representatives applied for judicial review of this decision and in December 2003 nursing care was resumed following the order of the Administrative Court. On 1 November 2004 the tenth applicant was transferred to Broadmoor Secure Mental Hospital.
75. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") visited the detained applicants in February 2002 and again in March 2004, and made a number of criticisms of the conditions in which the detained applicants were held. The Government rejected these criticisms (see paragraphs 101-102 below).
76. In October 2004, at the request of the applicants' legal representatives, a group of eight consultant psychiatrists prepared a Joint Psychiatric Report on the detained applicants, which concluded:

"The detainees originate from countries where mental illness is highly stigmatized. In addition, for devout Muslims there is a direct prohibition against suicide. This is particularly significant given the number who have attempted or are considering suicide. All of the detainees have serious mental health problems which are the direct result of, or are seriously exacerbated by, the indefinite nature of the detention. The mental health problems predominantly take the form of major depressive disorder and anxiety. A number of detainees have developed psychotic symptoms, as they have deteriorated. Some detainees are also experiencing PTSD [post-traumatic stress disorder] either as a result of their pre-migration trauma, the circumstances around their arrest and imprisonment or the interaction between the two.

Continued deterioration in their mental health is affected also by the nature of, and their mistrust in, the prison regime and the appeals process as well as the underlying and central factor of the indefinite nature of detention. The Prison Health Care system is unable to meet their health needs adequately. There is a failure to perceive self harm and distressed behaviour as part of the clinical condition rather than merely being seen as manipulation. There is inadequate provision for complex physical health problems.

Their mental health problems are unlikely to resolve while they are maintained in their current situation and given the evidence of repeated interviews it is highly likely that they will continue to deteriorate while in detention.

The problems described by the detainees are remarkably similar to the problems identified in the literature examining the impact of immigration detention. This literature describes very high levels of depression and anxiety and eloquently makes the point that the length of time in detention relates directly to the severity of symptoms and that it is detention per se which is causing these problems to deteriorate."

77. For the purposes of the present proceedings, the Government requested a Consultant Psychiatrist, Dr. J., to comment on the above Joint Psychiatric Report. Dr J. was critical of the methodology and conclusions of the authors of the Joint Report. In particular, he wrote (references to other reports omitted):

"I would comment that I find many of the assertions made do not bear close inspection. For example in the case of [the first applicant] it was my finding after a careful and detailed

assessment that his mental state after imprisonment and then detention in Broadmoor Hospital was, overall, no worse and arguably no better than it had been before he was arrested. Nor do his records suggest initial improvement followed by deterioration in Broadmoor Hospital. I found he deteriorated in HMP Belmarsh because he chose to go on hunger strike and that he had a fluctuating course in Broadmoor Hospital despite agreeing to eat, his histrionic behaviour in both places being essentially the same. In his case I found the diagnosis to be one of Personality Disorder, diagnoses of Major Depressive Disorder, psychosis and PTSD not being sustainable. Moreover, it was my finding that his frequent self-harming was indeed manipulative.

...

I am not alone in finding the diagnoses claimed by the authors of this report to be mistaken and have drawn attention in my own report to the scepticism of some others who have reported on [the first and seventh applicants]. It is not the case therefore that there is the consensus of opinion claimed in the report and I note that in both the cases I assessed [the first and seventh applicants], their so-called psychotic symptoms claimed by some reporters and said not to be present before they were detained, were in fact present before they were arrested.

An issue I find to be of the greatest concern relates to the tacit acceptance of information gained by self-report. It appears to be accepted by the authors of the report, for example, that three of the detainees had been the victims of detention and torture and all felt themselves seriously threatened prior to migration. Nowhere have I seen any evidence to corroborate these claims or indeed any attempt to check them. As it is the case that immigrants and asylum-seekers need to justify their attempts to gain entry to another country, is it not possible or even probable that some may not always be entirely truthful in what they claim about their past experiences or their current symptoms? Where alleged terrorists are concerned it should be borne in mind that they have denied such allegations in spite of the open and closed evidence against them, which has been considered at the highest level. Surely this should raise doubts about their truthfulness?"

F. The release of the fifth applicant on bail

78. On 20 January 2004, SIAC decided that it should, in principle, grant bail to the fifth applicant. The Secretary of State attempted to

appeal against this decision but was informed by the Court of Appeal in an interim decision dated 12 February 2004 that it had no jurisdiction to entertain an appeal.

79. SIAC explained its reasons for granting bail in greater detail in a judgment dated 22 April 2004. It held that under the 2001 Act it had a power to grant bail only in an exceptional case, where it was satisfied that if bail were not granted the detainee's mental or physical condition would deteriorate to such an extent as to render his continued detention a breach of Article 3 of the Convention, because inhuman, or Article 8, because disproportionate.
80. SIAC noted that there had been concerns about the fifth applicant's mental health amongst prison staff from May 2002, although these concerns had not been communicated to his legal representatives. In December 2003 he had suffered a serious relapse into severe depression with psychotic symptoms, including auditory hallucinations and suicide ideation. A number of psychologists and psychiatrists had examined him, at the request of his legal representatives and at the initiative of the Home Office, and had agreed that he was seriously ill and that his mental health would be likely to improve if he were allowed to go home. SIAC concluded:

"We do not think that the threshold has been crossed so that there is a breach of [the fifth applicant's] human rights. The jurisprudence of the [European Court of Human Rights] emphasises the high threshold which must be crossed and that detention is unlikely to be regarded as disproportionate unless it at least verges on treatment which would constitute a breach of Article 3. But we are satisfied that, if he were not released, there would be such a breach. To permit someone to reach a state whereby he requires treatment in a special hospital or continuous care and attention to ensure he does not harm himself can constitute a breach of Article 8, unless perhaps there is no possible alternative to detention, and probably of Article 3. As we have said, we do not have to wait until that situation exists. Provided that we are persuaded, as we are, that the conditions we impose are sufficient to minimise the risk to the security of the state if [the fifth applicant] is released, we can act as we have.

We must emphasise that the grant of bail is exceptional. We are only doing so because the medical evidence is all one way and the detention has caused the mental illness which will

get worse. ...”

81. The fifth applicant was, therefore, released on bail on 22 April 2004 on conditions amounting to house arrest. He was not permitted to leave his home address and had to wear an electronic tag at all times. He had no internet access and a telephone link to the Security Service only. He was required to report by telephone to the Security Service five times a day and allow its agents access to his home at any time. He was not permitted contact with any person other than his wife and child, legal representative and a Home Office approved doctor or see any visitor except with prior Home Office approval.

G. Events following the House of Lords' judgment of 16 December 2004

82. The declaration of incompatibility made by the House of Lords on 16 December 2004, in common with all such declarations, was not binding on the parties to the litigation (see paragraph 94 below). The applicants remained in detention, except for the second and fourth applicants who had elected to leave the United Kingdom and the fifth applicant who had been released on bail on conditions amounting to house arrest. Moreover, none of the applicants were entitled, under domestic law, to compensation in respect of their detention. The applicants, therefore, lodged their application to the Court on 21 January 2005.

83. At the end of January 2005, the Government announced its intention to repeal Part 4 of the 2001 Act and replace it with a regime of control orders, which would impose various restrictions on individuals, regardless of nationality, reasonably suspected of being involved in terrorism.

84. Those applicants who remained in detention were released on 10-11 March 2005 and immediately made subject to control orders under the Prevention of Terrorism Act 2005, which came into effect on 11 March 2005.

85. The Government withdrew the notice of derogation on 16 March 2005.

86. On 11 August 2005, following negotiations commenced towards the end of 2003 to seek from the Algerian and Jordanian Governments assurances that the applicants would not be ill-treated if returned, the Government served Notices of Intention to Deport on the fifth, sixth, seventh, eighth, ninth, tenth and eleventh ap-

plicants. These applicants were taken into immigration custody pending removal to Algeria (the fifth, sixth, seventh, ninth, tenth and eleventh applicants) and Jordan (the eighth applicant). On 9 April 2008 the Court of Appeal ruled that the eighth applicant could not lawfully be extradited to Jordan, because it was likely that evidence which had been obtained by torture could be used against him there at trial, in flagrant violation of his right to a fair trial. At the date of adoption of the present judgment, the case was pending before the House of Lords.

II. B. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention pending deportation before the passing of the 2001 Act

87. Under section 3(5) of the Immigration Act 1971 the Secretary of State could make a deportation order against a non-national, on the ground that the deportation would be conducive to the public good, for reasons of national security, *inter alia*. A person who was the subject of a deportation order could be detained pending deportation (1971 Act, Schedule 3, paragraph 2). However, it was held in *R. v. Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 that the power to detain under the above provision was limited to such time as was reasonable to enable the process of deportation to be carried out. Detention was not, therefore, permissible under the 1971 Act where deportation was known to be impossible, whether because there was no country willing to take the person in question or because there would be a risk of torture or other serious ill-treatment to the proposed deportee in his or her country of origin.

B. The Terrorism Act 2000

88. In July 2000 Parliament enacted the Terrorism Act 2000. As Lord Bingham noted in his judgment in the present case, “this was a substantial measure, with 131 sections and 16 Schedules, intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism”. “Terrorism” was defined, in section 1 of the Act, as:

“... the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it—

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person's life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

- (a) 'action' includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation”.

For the purposes of the Act, an organisation was “proscribed” if:

3. (1) ...

- (a) it is listed in Schedule 2, or
 - (b) it operates under the same name as an organisation listed in that Schedule.
- (2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.

(3) The Secretary of State may by order—

- (a) add an organisation to Schedule 2;
- (b) remove an organisation from that Schedule;

(c) amend that Schedule in some other way.

(4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4) an organisation is concerned in terrorism if it—

- (a) commits or participates in acts of terrorism,
- (b) prepares for terrorism,
- (c) promotes or encourages terrorism, or
- (d) is otherwise concerned in terrorism.”

89. Part II of the Act created offences of membership and support of proscribed organisations; it created offences of fund raising, use and possession of terrorist funds, entering into an arrangement for the transfer of terrorist funds, money laundering and failing to disclose suspect money laundering. There were a number of further substantive offences in Part IV, including offences of weapons training; directing terrorism; possession, without reasonable excuse, of items likely to be useful to person committing or preparing an act of terrorism; and collection, without reasonable excuse, of information likely to be useful to a person committing or preparing an act of terrorism. By section 62, the Act had extra-territorial scope, in that a person within the jurisdiction of the United Kingdom might be prosecuted for any of the above offences regardless of where the acts in furtherance of those offences were committed.

C. The Anti-Terrorism, Crime and Security Act 2001

90. Part 4 of the 2001 Act (see paragraph 12 above), which was headed “Immigration and Asylum”, set out powers which enabled the detention of non-nationals suspected of being international terrorists, even where their deportation was for the time being impossible. The 2001 Act provided, so far as material:

“PART 4

IMMIGRATION AND ASYLUM

Suspected international terrorists

21. Suspected international terrorist: certification

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) 'terrorist' means a person who-

(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,

(b) is a member of or belongs to an international terrorist group, or

(c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if—

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part—

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c. 11), and

"suspected international terrorist" means a person certified under subsection (1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable-

(a) take reasonable steps to notify the person certified, and

(b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) A decision of the Secretary of State in connection with certification under this section may be questioned in legal proceedings only under section 25 or 26.

(9) An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under-

(a) section 25 or 26, or

(b) section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) (appeal).

22. Deportation, removal, etc.

(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of-

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration ...

(2) The actions mentioned in subsection (1) are -

...

(e) making a deportation order ...

(3) Action of a kind specified in subsection (2) which has effect in respect of a suspected international terrorist at the time of his certification under section 21 shall be treated as taken again (in reliance on subsection (1) above) immediately after certification.

23. Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by-

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration

(2) The provisions mentioned in subsection (1) are—

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)."

Part 4 of the 2001 Act included a provision that the legislation would remain in force for five years only and was subject to an annual affirmative resolution by both Houses of Parliament.

D. The Special Immigration Appeals Commission

91. The Special Immigration Appeals Commission ("SIAC") was set up in response to the Court's

judgment in *Chahal v. the United Kingdom* [GC], judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V). It is a tribunal composed of independent judges, with a right of appeal against its decisions on a point of law to the Court of Appeal and the House of Lords.

By section 25 of the 2001 Act:

“(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal [SIAC] must cancel the certificate if –

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

(b) if it considers that for some other reason the certificate should not have been issued.”

SIAC was required to carry out a first review to ensure that the certificate was still justified six months after the issue of the certificate or six months after the final determination of an appeal against certification, and thereafter at three-monthly intervals.

Under section 30 of the 2001 Act, any legal challenge to the derogation under Article 15 of the Convention had also to be made to SIAC.

92. SIAC has a special procedure which enables it to consider not only material which can be made public (“open material”) but also material which, for reasons of national security, cannot (“closed material”). Neither the appellant nor his legal advisor can see the closed material. Accordingly, one or more security-cleared counsel, referred to as “special advocates”, are appointed by the Solicitor General to act on behalf of each appellant.
93. In the certification appeals before SIAC at issue in the present case, the open statements and evidence concerning each appellant were served first, and the special advocate could discuss this material with the appellant and his legal advisors and take instructions generally. Then the closed material would be disclosed to the judges and to the special advocate, from which point there could be no further contact between the latter and the appellant and/or his representatives, save with the permission of SIAC. It was the special advocate’s role during the closed sessions to make submissions on behalf of the appellant, both as

regards procedural matters, such as the need for further disclosure, and as to the substance of the case. In respect of each appeal against certification, SIAC issued both an “open” and a “closed” judgment. The special advocate could see both but the detainee and his representatives could see only the open judgment.

E. Declarations of incompatibility under the Human Rights Act 1998

94. Section 4 of the 1998 Act provides that where a court finds that primary legislation is in breach of the Convention, the court may make a declaration of incompatibility. Such a declaration does not affect the validity of the provision in respect of which it is made and is not binding on the parties to the proceedings in which it is made, but special arrangements may be made (section 10) to amend the provision in order to remove the incompatibility (see further *Burden v. the United Kingdom* [GC], no. 13378/05, § § 21-24 and 40-44, ECHR 2008).

F. The Terrorism Act 2006

95. The Terrorism Act 2006 came into force on 30 March 2006, creating a number of offences to extend criminal liability to acts preparatory to the terrorist offences created by the Terrorism Act 2000. The new offences were encouragement, dissemination of publications, preparation and training. The offences were designed to intervene at an early stage in terrorist activity and thus prevent the development of more serious conduct. They were also designed to be easier to prove.

G. Consideration of the use of special advocates under the Prevention of Terrorism Act 2005

96. On 31 October 2007 the House of Lords gave judgment in *Secretary of State for the Home Department (Respondent) v. MB (FC) (Appellant)* [2007] UKHL 46, which concerned a challenge to a non-derogating control order made by the Secretary of State under sections 2 and 3 (1)(a) of the Prevention of Terrorism Act 2005. The House of Lords had to decide, *inter alia*, whether procedures provided for by section 3 of the 2005 Act, involving closed hearings and special advocates, were compatible with Article 6 of the Convention, given that, in the case of one of the appellants, they had resulted in the case against him being in its essence entirely undisclosed, with no specific allegation of terrorism-related activity being contained in open material.

The House of Lords was unanimous in holding that the proceedings in question determined civil rights and obligations and thus attracted the protection of Article 6. On the question of compliance, the majority (Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood) held that although in many cases the special advocate procedure would provide a sufficient counterbalance where the Secretary of State wished to withhold material upon which she wished to rely in order to establish the existence of reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity, each case had to be considered individually. Baroness Hale put it as follows:

"65. ... It would all depend upon the nature of the case; what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be; what steps had been taken to summarise the closed material in support without revealing names, dates or places; the nature and content of the material withheld; how effectively the special advocate had been able to challenge it on behalf of the controlled person; and what difference its disclosure might have made. All of these factors would be relevant to whether the controlled person had been 'given a meaningful opportunity to contest the factual basis' for the order.

66. I do not think that we can be confident that Strasbourg would hold that every control order hearing in which the special advocate procedure had been used, as contemplated by the 2005 Act and Part 76 of the Civil Procedure Rules, would be sufficient to comply with article 6. However, with strenuous efforts from all, difficult and time consuming though it will be, it should usually be possible to accord the controlled person 'a substantial measure of procedural justice'. Everyone involved will have to do their best to ensure that the 'principles of judicial inquiry' are complied with to the fullest extent possible. The Secretary of State must give as full as possible an explanation of why she considers that the grounds in section 2(1) are made out. The fuller the explanation given, the fuller the instructions that the special advocates will be able to take from the client before they see the closed material. Both judge and special advocates will have to probe the claim that the closed material should remain closed with great care and considerable scepticism. There is ample evidence from elsewhere of a tendency to overclaim the need for secrecy in terrorism cases:

see Serrin Turner and Stephen J Schulhofer, *The Secrecy Problem in Terrorism Trials*, 2005, Brennan Centre for Justice at NYU School of Law. Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge.

67. The best judge of whether the proceedings have afforded a sufficient and substantial measure of procedural protection is likely to be the judge who conducted the hearing. ..."

Lord Carswell observed:

"There is a very wide spectrum of cases in which closed material is relied on by the Secretary of State. At one extreme there may be cases in which the sole evidence adverse to the controlee is closed material, he cannot be told what the evidence is or even given its gist and the special advocate is not in a position to take sufficient instructions to mount an effective challenge to the adverse allegations. At the other end there may be cases where the probative effect of the closed material is very slight or merely corroborative of strong open material and there is no obstacle to presenting a defence. There is an infinite variety of possible cases in between. The balance between the open material and the closed material and the probative nature of each will vary from case to case. The special advocate may be able to discern with sufficient clarity how to deal with the closed material without obtaining direct instructions from the controlee. These are matters for the judge to weigh up and assess in the process of determining whether the controlee has had a fair trial. The assessment is ... fact-specific. The judge who has seen both the open and the closed material and had the benefit of the contribution of the special advocate is in much the best position to make it. I do consider, however, that there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight. The courts should not be too ready to hold that a disadvantage suffered

by the controlee through the withholding of material constitutes a breach of article 6.”

Lord Brown held as follows:

“There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State’s case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at ...), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even ‘a substantial measure of procedural justice’ (*Chahal* [cited above] § 131) notwithstanding the use of the special advocate procedure; ‘the very essence of [his] right [to a fair hearing] [will have been] impaired’ (*Tinnelly & Sons Ltd and McElduff and others v United Kingdom* [cited below] § 72).

Lord Bingham did not dissent but employed different reasoning. He held that it was necessary to look at the process as a whole and consider whether a procedure had been used which involved significant injustice to the controlee; while the use of special advocates could help to enhance the measure of procedural justice available to a controlled person, it could not fully remedy the grave disadvantages of a person not being aware of the case against him and not being able, therefore, effectively to instruct the special advocate.

Lord Hoffmann, dissenting, held that once the trial judge had decided that disclosure would be contrary to the public interest, the use of special advocates provided sufficient safeguards for the controlee and there would never in these circumstances be a breach of Article 6.

97. In *Secretary of State for the Home Department v. AF* [2008] EWCA Civ 1148, the Court of Appeal (Sir Anthony Clark MR and Waller LJ; Sedley LJ dissenting), gave the following guidance, based on the majority opinions in *MB*, regarding compliance with Article 6 in control order cases using special advocates (extract from the head-note):

(1) In deciding whether the hearing under s 3(10) of the 2005 Act infringed the controlee’s

rights under art 6 the question was whether, taken as a whole, the hearing was fundamentally unfair to the controlee, or he was not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing was impaired. More broadly, the question was whether the effect of the process was that the controlee was exposed to significant injustice.

(2) All proper steps ought to be taken to provide the controlee with as much information as possible, both in terms of allegation and evidence, if necessary by appropriate gisting. (3) Where the full allegations and evidence were not provided for reasons of national security at the outset, the controlee had to be provided with a special advocate. In such a case the following principles applied. (4) There was no principle that a hearing would be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there was, the irreducible minimum could, depending on the circumstances, be met by disclosure of as little information as was provided in AF’s case, which was very little indeed. (5) Whether a hearing would be unfair depended on all the circumstances, including the nature of the case, what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be, what steps had been taken to summarise the closed material in support without revealing names, dates or places, the nature and content of the material withheld, how effectively the special advocate was able to challenge it on behalf of the controlee and what difference its disclosure would or might make. (6) In considering whether open disclosure to the controlee would have made a difference to the answer to whether there were reasonable grounds for suspicion that the controlee was or had been involved in terrorist related activity, the court had to have fully in mind the problems for the controlee and the special advocates and take account of all the circumstances of the case, including what if any information was openly disclosed and how effective the special advocates were able to be. The correct approach to and the weight to be given to any particular factor would depend upon the particular circumstances. (7) There were no rigid principles. What was fair was essentially a matter for the judge, with whose decision the Court of Appeal would very rarely interfere.”

III. DOMESTIC AND INTERNATIONAL COMMENT ON PART 4 OF THE 2001 ACT

A. The Newton Committee

98. Part 4 of the 2001 Act provided for the creation of a Committee of Privy Counsellors to review its operation. The Committee, under the chairmanship of Lord Newton, reported in December 2003. Having recorded the Home Office's argument that the threat from al-Qaeda terrorism was predominantly from foreigners, the Newton Committee's report drew attention to:

"accumulating evidence that this is not now the case. The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ('the Shoe Bomber'), and recent arrests suggest that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals."

Given this evidence, the Newton Committee observed that not only were there arguments of principle against having discriminatory provisions, but there were also compelling arguments of limited efficacy in addressing the terrorist threat. The Newton Committee therefore called for new legislation to be introduced as a matter of urgency which would deal with the terrorist threat without discrimination on grounds of nationality and which would not require a derogation from Article 5 of the Convention.

99. In February 2004 the Government published its response to the Newton Committee's report. It continued to accept that the terrorist threat "came predominantly, but not exclusively from foreign nationals" and made the following observation about the Newton Committee's suggestion that counter-terrorist measures should apply to all persons within the jurisdiction regardless of nationality:

"While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to support from all parts of the public that is so

essential to countering the terrorist threat".

The Government also indicated that work was under way to try to establish framework agreements with potential destination countries for the purposes of deportation of terrorist suspects.

B. The Joint Parliamentary Committee on Human Rights

100. The Joint Committee has constitutional responsibility in the United Kingdom for scrutinising legislation to ensure that it is compatible with Convention rights. In its Second Report of the Session 2001-2002, drawn up very shortly after publication of the Bill which became the 2001 Act, the Joint Committee expressed concern at the potentially discriminatory effect of the proposed measure, as follows:

"38. Second, by relying on immigration legislation to provide for the detention of suspected international terrorists, the Bill risks discriminating, in the authorization of detention without charge, between those suspected international terrorists who are subject to immigration control and those who have an unconditional right to remain in the United Kingdom. We are concerned that this might lead to discrimination in the enjoyment of the right to liberty on the ground of nationality. If that could not be shown to have an objective, rational and proportionate justification, it might lead to actions which would be incompatible with Article 5 of the ECHR either taken alone or in combination with the right to be free of discrimination in the enjoyment of Convention rights under Article 14 of the ECHR. It could also lead to violations of the right to be free of discrimination under Article 26 and the right to liberty under Article 9 of the ICCPR.

39. We raised this matter with the Home Secretary in oral evidence. Having considered his response, we are not persuaded that the risk of discrimination on the ground of nationality in the provisions of Part 4 of the Bill has been sufficiently taken on board."

In its Sixth Report of the Session 2003-2004 (23 February 2004), the Joint Committee expressed deep concern "about the human rights implications of making the detention power an aspect of immigration law rather than anti-terrorism law" and warned of "a significant risk that Part 4 violates the right to be free of discrimination under ECHR Article 14." Following the Report of the Newton Committee and the Secretary of State's discussion paper published in response to it, the Joint Committee returned to this subject in its Eighteenth Report of the

Session 2003-2004 (21 July 2004), paragraphs 42-44:

"42. The discussion paper rejects the Newton Report's recommendation that new legislation replacing Part 4 [of the 2001 Act] should apply equally to all nationalities including British citizens. It states the Government's belief that it is defensible to distinguish between foreign nationals and UK nationals because of their different rights and responsibilities.

43. We have consistently expressed our concern that the provisions of Part 4 [of the 2001 Act] unjustifiably discriminate on grounds of nationality and are therefore in breach of Article 14 ECHR. Along with Lord Newton, we find it extraordinary that the discussion paper asserts that seeking the same power to detain British citizens would be 'a very grave step' and that 'such draconian powers would be difficult to justify.'

44. The interests at stake for a foreign national and a UK national are the same: their fundamental right to liberty under Article 5 ECHR and related procedural rights. Article 1 of the ECHR requires States to secure the Convention rights to everyone within their jurisdiction. Article 14 requires the enjoyment of Convention rights to be secured without discrimination on the ground of nationality. The Government's explanation in its discussion paper of its reluctance to seek the same powers in relation to UK nationals appears to suggest that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals, which is impermissible under the Convention."

C. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT")

101. The CPT visited the detained applicants in February 2002 and again in March 2004. In its report published on 9 June 2005, the CPT was critical of the conditions in which the applicants were held in Belmarsh Prison and Broadmoor Hospital and reported allegations of ill-treatment by staff. It found the regime in Woodhill Prison to be more relaxed. The CPT found that the health of the majority of the detained applicants had declined as a result of their detention, in particular its indefinite character. The CPT stated in its report:

"In fact, the information gathered during the 2004 visit reveals that the authorities are at a loss as to how to manage this type of detained

person, imprisoned with no real prospect of release and without the necessary support to counter the damaging effects of this unique form of detention. They also highlight the limited capacity of the prison system to respond to a task that is difficult to reconcile with its normal responsibilities. The stated objective, in the response to the CPT's report on the February 2002 visit, of formulating a strategy to enable the Prison Service to manage most appropriately the care and detention of persons held under the 2001 Act, has not been achieved.

Two years after the CPT visited these detained persons, many of them were in a poor mental state as a result of their detention, and some were also in poor physical condition. Detention had caused mental disorders in the majority of persons detained under the [2001 Act] and for those who had been subjected to traumatic experiences or even torture in the past, it had clearly reawakened the experience and even led to the serious recurrence of former disorders. The trauma of detention had become even more detrimental to their health since it was combined with an absence of control resulting from the indefinite character of their detention, the uphill difficulty of challenging their detention and the fact of not knowing what evidence was being used against them to certify and/or uphold their certification as persons suspected of international terrorism. For some of them, their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment."

102. The Government published their response to the CPT's 2004 report on 9 June 2005. The Government strongly disputed the allegations of ill-treatment by prison staff and pointed out that the detained applicants had at their disposal the remedies provided by administrative and civil law to all prisoners to complain of ill-treatment. The Government's response continued:

"Although the Government respects the conclusions reached by the delegates of the [CPT] based on the observations on the day of visit, it categorically rejects the suggestion that at any point during their detention the [2001 Act] detainees were treated in an 'inhuman or degrading' manner that may have amounted to a breach in the United Kingdom's international human rights obligations. The Government firmly believes that at all times the detainees received appropriate care and treatment in Belmarsh and had access to all necessary medical support, both physical and

psychological, from medical support staff and doctors. The Government accepts that the individuals had difficult backgrounds prior to detention, but does not accept that 'detention had caused mental disorders'. Some of the detainees had mental health issues prior to detention, but that did not stop them engaging in the activities that led to their certification and detention. Mental health issues do not prevent an individual from posing a risk to national security.

...

The Government does not accept that those certified under [the 2001 Act] were detained without any prospect of their release. ...

...

On no occasion did SIAC, or any other court, find that the conditions of detention breached the absolute obligation imposed upon the Government by Article 3 of [the Convention]. It is the Government's view that, given the extensive judicial safeguards available to the detainees, the government would not have been able to maintain the detention of these individuals had the powers breached the detainees' Article 3 rights in any way. To suggest otherwise would be to ignore the extensive contact the detainees had with the British judicial system and the absolute obligation upon the judiciary to protect against any such breach."

D. The European Commissioner for Human Rights

103. In August 2002 the European Commissioner for Human Rights to the Council of Europe published his opinion on certain aspects of the United Kingdom's derogation from Article 5 of the Convention and Part 4 of the 2001 Act. In that Opinion he expressly criticised the lack of sufficient scrutiny by Parliament of the derogation provisions and questioned whether the nature of the al'Qaeda threat was a justifiable basis for recognising a public emergency threatening the life of the nation:

"Whilst acknowledging the obligations of the governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11 2001 cannot, on their own be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do

so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown."

The Commissioner continued, with reference to the detention scheme under Part 4 of the 2001 Act:

"In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals."

104. On 8 June 2005 the Commissioner published a report arising out of his visit to the United Kingdom in November 2004. He specifically referred to the House of Lords decision in the applicants' case and noted the fact that the Government had not sought to renew the relevant provisions of the 2001 Act in March 2005. He welcomed the decision of the House of Lords, which corresponded with his own previously published opinion, and also welcomed the release of the applicants, emphasising that as a result of his visit he was in a position personally to testify to "the extremely agitated psychological state of many of them". As a result of interviews which he had conducted with, amongst others, the Home Secretary, the Lord Chancellor, the Attorney General, the Lord Chief Justice and the Director of Public Prosecutions, the Commissioner also expressed a conclusion about the availability under the law of the United Kingdom of alternative measures to combat the threat of terrorism:

"Terrorist activity not only must but can be combated within the existing framework of human rights guarantees, which provide precisely for a balancing, in questions concerning national security, of individual rights and the public interest and allow for the use of proportionate special powers. What is required is well-resourced policing, international cooperation and the forceful application of the law. It is to be noted, in this context, that in the Terrorist Act 2000, the United Kingdom already has amongst the toughest and most comprehensive anti-terror legislation in Europe."

E. The United Nations Committee on the Elimination of All Forms of Racial Discrimination

105. The Committee's Concluding Observations on the United Kingdom, dated 10 December 2003, stated at paragraph 17:

"17. The Committee is deeply concerned

about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities.

While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to 'ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.'

IV. OTHER RELEVANT COUNCIL OF EUROPE MATERIALS

A. Council of Europe Parliamentary Assembly Resolution 1271 (2002)

106. On 24 January 2002 the Council of Europe's Parliamentary Assembly passed Resolution 1271 (2002) which resolved, in paragraph 9, that:

"In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights."

It also called on all Member States (paragraph 12) to:

"refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)."

Apart from the United Kingdom, no other Member State chose to derogate from Article 5 § 1 after 11 September 2001.

B. The Committee of Ministers of the Council of Europe

107. Following its meeting on 14 November 2001 to discuss "Democracies facing terrorism" (CM/AS(2001) Rec 1534), the Committee of Ministers adopted on 11 July 2002 "Guidelines on human rights and the fight against terrorism", which provided, *inter alia*:

"I. States' obligation to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

II. Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision."

C. The European Commission against Racism and Intolerance ("ECRI")

108. In its General Policy Recommendation No 8 on Combating Racism while Fighting Terrorism, published on 8 June 2004, ECRI considered it the duty of the State to fight against terrorism; stressed that the response should not itself encroach on the values of freedom, democracy, justice, the rule of law, human rights and humanitarian law; stressed that the fight against terrorism should not become a pretext under which racial discrimination was allowed to flourish; noted that the fight against terrorism since 11 September 2001 had in some cases resulted in the adoption of discriminatory legislation, notably on grounds of nationality, national or ethnic origin and religion; stressed the responsibility of member States to ensure that the fight against terrorism did not have a negative impact on any minority group; and recommended States:

"to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or group of persons, notably on grounds of 'race', colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation."

V. THE NOTION OF A "PUBLIC EMERGENCY" UNDER ARTICLE 4 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ("ICCPR")

109. Article 4(1) of the ICCPR states as follows:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

In Spring 1984, a group of 31 experts in international law, convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Italy to consider the above provision, *inter alia*. Paragraphs 39-40 of the resulting "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" declare, under the heading "Public Emergency which Threatens the Life of the Nation":

"39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

(a) affects the whole of the population and either the whole or part of the territory of the State, and

(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4."

The Siracusa Principles continue, in paragraph 54:

"54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of poten-

tial danger."

110. The United Nations Human Rights Committee, in "General Comment No 29 on Article 4 of the ICCPR (24 July 2001), observed in paragraph 2 that:

"Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."

VI. OTHER MATERIALS CONCERNING NON-DISCLOSURE OF EVIDENCE IN NATIONAL SECURITY CASES

111. In *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, observed (§ 53):

"Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it."

That right was not absolute and might be limited in the interests of national security (§ 57-58) but (§ 64):

"... The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?"

112. In *Hamdi v Rumsfeld* 542 US 507 (2004), O'Connor J, writing for the majority of the Supreme Court of the United States, said (p. 533):

"We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker [authority cited]. 'For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified ...' These essential constitutional promises may not be eroded."

113. The Council of Europe's Commissioner for Human Rights, in paragraph 21 of his report of 8 June 2005 (see paragraph 104 above), and

the Joint Parliamentary Committee on Human Rights (see paragraph 100 above), in paragraph 76 of its Twelfth Report of Session 2005-2006, (HL Paper 122, HC 915) had difficulty in accepting that a hearing could be fair if an adverse decision could be based on material that the controlled person has no effective opportunity to challenge or rebut.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION AND ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLE 3

114. The applicants alleged that their detention under Part 4 of the 2001 Act breached their rights under Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

They further complained that they were denied an effective remedy for their Article 3 complaints, in breach of Article 13 of the Convention, which states:

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

A. The parties' submissions

1. *The applicants*

115. The applicants stressed that each was in the United Kingdom because the opportunity of a safe haven in his own country or elsewhere was denied to him. The first applicant was a stateless Palestinian and had nowhere else to go. Several had experienced torture before coming to the United Kingdom. Under the 2001 Act they were put in the position of having to choose between conditions of detention which they found intolerable and the risk of whatever treatment they might have to suffer if they consented to deportation. Moreover, their previous experiences and pre-existing mental and physical problems made them particularly vulnerable to the ill effects of arbitrary detention. The discrimination they suffered,

since only foreign nationals were subject to detention under the 2001 Act, compounded their anguish.

116. The high security conditions of detention, in Belmarsh Prison and Broadmoor Hospital, were inappropriate and damaging to their health. More fundamentally, however, the indeterminate nature of the detention, with no end in sight, and its actual long duration gave rise to abnormal suffering, in excess of that inherent in detention. This was compounded by other unusual aspects of the regime, such as the secret nature of the evidence against them. The fact that the indifference of the authorities to the applicants' situation was sanctioned by Parliamentary statute did not mitigate their suffering.

117. Taken cumulatively, these factors caused the applicants an intense degree of anguish. The medical evidence and reports of the CPT and group of consultant psychiatrists (see paragraphs 101 and 76 above) demonstrated that the detention regime also harmed or seriously risked harming all of them and, in the case of the first, fifth, seventh and tenth applicants, did so extensively.

118. The applicants claimed that SIAC's power to grant bail did not effectively function during the period when they were detained: first, because the scope of the remedy was jurisdictionally unclear; secondly, because the procedure was subject to delay; thirdly, because the threshold for granting bail was too high. An applicant for bail was required to demonstrate an “overwhelming likelihood” that his continued detention would lead to a physical or mental deterioration, such as to constitute inhuman and degrading treatment contrary to Article 3. The jurisdiction was described as “exceptional”, requiring the “circumstances to be extreme”. Even then, the only available remedy was to substitute house arrest for detention (see paragraph 78 above).

2. *The Government*

119. The Government denied that the applicants' rights under Article 3 had been infringed. They pointed out that SIAC and the Court of Appeal had rejected the applicants' complaints under Article 3 and that the House of Lords had not found it necessary to determine them (see paragraphs 15, 16 and 22 above).

120. Detention without charge was not in itself contrary to Article 3 and in many instances it

was permitted under Article 5 § 1. The detention was indeterminate but not indefinite. The legislation remained in force for only five years and was subject to annual renewal by both Houses of Parliament. Each applicant's detention depended on his individual circumstances continuing to justify it, including the degree of threat to national security which he represented and the possibility to deport him to a safe country, and was subject to review every six months by SIAC. Each applicant was informed of the reason for the suspicion against him and given as much of the underlying evidence as possible and provided with as fair a procedure as possible to challenge the grounds for his detention. Moreover, SIAC was able to grant bail if necessary. The applicants were not, therefore, detained without hope of release: on the contrary there was the opportunity to apply for release together with mandatory review by the court to ensure detention remained both lawful and proportionate in all the circumstances. It also remained open to the applicants to leave the United Kingdom, as the second and fourth applicants chose to do.

121. The applicants were judged to pose a serious threat to national security and were accordingly held in high security conditions, which were not inhuman or degrading. Each was provided with appropriate treatment for his physical and mental health problems and the individual circumstances of each applicant, including his mental health, were taken into account in determining where he should be held and whether he should be released on bail. A special unit was created at HMP Woodhill of which the applicants refused to make use (see paragraph 71 above).

122. To the extent that the applicants relied upon their individual conditions of detention and their personal circumstances, they had not exhausted domestic remedies because they had not made any attempt to bring the necessary challenges. Any specific complaint about the conditions of detention could have been the subject of separate legal challenge. The prison authorities were subject to the requirements of the 1998 Act (see paragraph 94 above) and had an obligation under section 6(1) to act compatibly with the Article 3 rights of the applicants in their custody. Insofar as the applicants' complaints under Article 3 were based on the indeterminate nature of their detention, this was provided for by primary legislation (Part 4 of the 2001 Act), and Article 13 did not import the right to challenge in a domestic court a deliber-

ate choice expressed by the legislature.

B. The Court's assessment

1. Admissibility

123. The Court observes that the second applicant was placed in detention under Part 4 of the 2001 Act on 19 December 2001 and that he was released on 22 December 2001, following his decision voluntarily to return to Morocco (see paragraph 35 above). Since he was, therefore, detained for only a few days and since there is no evidence that during that time he suffered any hardship beyond that inherent in detention, his complaint under Article 3 is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

Since Article 13 requires the provision of a domestic remedy in respect of "arguable complaints" under the Convention (see, for example, *Ramirez Sanchez v. France* [GC], no. 59450/00, § 157, ECHR 2006-IX), it follows that the second applicant's complaint under Article 13 is also manifestly ill-founded.

Both these complaints by the second applicant must therefore be declared inadmissible.

124. The Court notes the Government's assertion that there was a remedy available to the applicants under the 1998 Act, which they neglected to use. However, since the applicants complain under Article 13 that the remedies at their disposal in connection with their Article 3 complaints were ineffective, the Court considers that it is necessary to consider the Government's objection concerning non-exhaustion together with the merits of the complaints under Articles 3 and 13.

125. The Court considers that, save those of the second applicant, the applicants' complaints under Articles 3 and 13 of the Convention raise complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

2. The merits

(a) General principles

126. The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it

all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 notwithstanding the existence of a public emergency threatening the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment (*Ramirez Sanchez*, cited above, § 115-116).

127. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 95, ECHR 2008). The Court has considered treatment to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a punishment or treatment was “degrading” within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (*Ramirez Sanchez*, cited above, § 118-119).
128. Where a person is deprived of his liberty, the State must ensure that he is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure

do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see *Kudła*, cited above, § 92-94). Although Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical and mental well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see *Hurtado v. Switzerland*, judgment of 28 January 1994, § 79 opinion of the Commission, Series A no. 280-A; *Mouisel v. France*, no. 67263/01 67263/01, § 40, ECHR 2002-IX; *Aerts v. Belgium*, judgment of 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V; *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III). When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (*Ramirez Sanchez*, cited above, § 119). The imposition of an irreducible life sentence on an adult, without any prospect of release, may raise an issue under Article 3, but where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient (*Kafkaris*, cited above, § 97-98).

(b) Application to the facts of the present case

129. The Court notes that three of the applicants were held approximately three years and three months while the others were held for shorter periods. During a large part of that detention, the applicants could not have foreseen when, if ever, they would be released. They refer to the findings of the Joint Psychiatric Report and contend that the indefinite nature of their detention caused or exacerbated serious mental health problems in each of them. The Government dispute this conclusion and rely on Dr J.'s Report, which criticised the methodology of the authors of the Joint Report (see paragraphs 76-77 above).
130. The Court considers that the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. Furthermore, it is probable that the stress was sufficiently serious and enduring to affect the mental health of certain of the applicants. This is one of the factors which the Court must take into account when assessing whether the

threshold of Article 3 was attained.

131. It cannot, however, be said that the applicants were without any prospect or hope of release (see *Kafkaris*, cited above, § 98). In particular, they were able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and were successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant was able to bring an individual challenge to the decision to certify him and SIAC was required by statute to review the continuing case for detention every six months. The Court does not, therefore, consider that the applicants' situation was comparable to an irreducible life sentence, of the type designated in the *Kafkaris* judgment as capable of giving rise to an issue under Article 3.
132. The applicants further contend that the conditions in which they were held contributed towards an intolerable level of suffering. The Court notes in this respect that the Joint Psychiatric Report also contained criticisms of the Prison Health Care system and concluded that there was inadequate provision for the applicants' complex health problems. These concerns were echoed by the CPT, which made detailed allegations about the conditions of detention and concluded that for some of the applicants, "their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment". The Government strongly disputed these criticisms in their response to the CPT's report (see paragraphs 101-102 above).
133. The Court observes that each detained applicant had at his disposal the remedies available to all prisoners under administrative and civil law to challenge conditions of detention, including any alleged inadequacy of medical treatment. The applicants did not attempt to make use of these remedies and did not therefore comply with the requirement under Article 35 of the Convention to exhaust domestic remedies. It follows that the Court cannot examine the applicants' complaints about their conditions of detention; nor can it, in consequence, take the conditions of detention into account in forming a global assessment of the applicants' treatment for the purposes of Article 3.
134. In all the above circumstances, the Court does not find that the detention of the applicants reached the high threshold of inhuman and

degrading treatment.

135. The applicants also complained that they did not have effective domestic remedies for their Article 3 complaints, in breach of Article 13. In this connection, the Court repeats its above finding that civil and administrative law remedies were available to the applicants had they wished to complain about their conditions of detention. As for the more fundamental aspect of the complaints, that the very nature of the detention scheme in Part 4 of the 2001 Act gave rise to a breach of Article 3, the Court recalls that Article 13 does not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention (*James and Others v. the United Kingdom*, judgment of 21 February 1986, § 85, Series A no. 98; *Roche v. the United Kingdom* [GC], no. 32555/96 32555/96, § 137, ECHR 2005-X).
136. In conclusion, therefore, the Court does not find a violation of Article 3, taken alone or in conjunction with Article 13.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

137. The applicants contended that their detention was unlawful and incompatible with Article 5 § 1 of the Convention.
138. In their first set of written observations, following the communication of the application by the Chamber, the Government indicated that they would not seek to raise the question of derogation under Article 15 of the Convention as a defence to the claim based on Article 5 § 1, but would leave that point as determined against them by the House of Lords. Instead, they intended to focus argument on the defence that the applicants were lawfully detained with a view to deportation, within the meaning of Article 5 § 1(f).

However, in their written observations to the Grand Chamber, dated 11 February 2008, the Government indicated for the first time that they wished to argue that the applicants' detention did not in any event give rise to a violation of Article 5 § 1 because the United Kingdom's derogation under Article 15 was valid.

139. Article 5 § 1 of the Convention provides, so far as relevant:
- "1. Everyone has the right to liberty and security of person. No one shall be deprived of his

liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition."

Article 15 of the Convention states:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

A. The parties' submissions

1. *The applicants*

140. The applicants objected that before the domestic courts the Government had not sought to argue that they were detained as "person[s] against whom action is being taken with a view to deportation or extradition", but had instead relied on the derogation under Article 15. In these circumstances, the applicants contended that it was abusive and contrary to the principle of subsidiarity for the Government to raise a novel argument before the Court and that they should be stopped from so doing.

141. In the event that the Court considered that it could entertain the Government's submission, the applicants emphasised that the guarantee in Article 5 was of fundamental importance and exceptions had to be strictly construed. Where, as in their case, deportation was not possible because of the risk of treatment contrary to Article 3 in the receiving country, Article 5 § 1(f) would not authorise detention, irrespective of whether the individual posed a risk to national security. Merely keeping the possibility of de-

portation under review was not "action ... being taken with a view to deportation"; it was action, unrelated to any extant deportation proceedings, that might make the deportation a possibility in the future. Detention pursuant to such vague and non-specific "action" would be arbitrary. Moreover, it was clear that during the periods when the applicants' cases were being considered by SIAC on appeal (July 2002-October 2003), the Government's position was that they could not be deported compatibly with Article 3 and that no negotiations to effect deportation should be attempted with the proposed receiving States. As a matter of fact, therefore, the Government were not keeping the possibility of deporting the applicants "under active review".

142. The applicants further contended that it was abusive of the Government, so late in the proceedings before the Grand Chamber, to challenge the House of Lords' decision quashing the derogation. In the applicants' view, it would be inconsistent with Article 19 and the principle of subsidiarity for the Court to be asked by a Government to review alleged errors of fact or law committed by that Government's own national courts. The Government's approach in challenging the findings of its own supreme court about legislation which Parliament had chosen to repeal aimed to limit the human rights recognised under domestic law and was thus in conflict with Article 53 of the Convention. Since the legislation had been revoked and the derogation withdrawn, the Government were in effect seeking to obtain from the Court an advisory opinion to be relied on potentially at some later stage. To allow the Government to proceed would impact substantially on the right of individual petition under Article 34 by deterring applicants from making complaints for fear that Governments would try to upset the decisions of their own supreme courts.

143. In the event that the Court decided to review the legality of the derogation, the applicants contended that the Government should not be permitted to rely on arguments which they had not advanced before the domestic courts. These included, first, the contention that it was justifiable to detain non-national terrorist suspects while excluding nationals from such measures, because of the interest in cultivating loyalty amongst Muslim citizens, rather than exposing them to the threat of detention and the risk that they would thereby become radicalised and, secondly, the argument that the

use of detention powers against foreign nationals freed up law enforcement resources to concentrate on United Kingdom nationals (see paragraph 151 below). Since the Government was seeking to introduce these justifications for the derogation which were never advanced before the domestic courts, the Court was being asked to act as a first-instance tribunal on highly controversial matters.

144. Again, if the Court decided to examine the legality of the derogation, there was no reason to give special deference to the findings of the national courts on the question whether there was an emergency within the meaning of Article 15. In the applicants' submission, there were no judicial precedents for recognising that an inchoate fear of a terrorist attack, which was not declared to be imminent, was sufficient. All the examples in the Convention jurisprudence related to derogations introduced to combat ongoing terrorism which quite clearly jeopardized the entire infrastructure of Northern Ireland or the South-East of Turkey. The domestic authorities were wrong in interpreting Article 15 as permitting a derogation where the threat was not necessarily directed at the United Kingdom but instead at other nations to which it was allied.

145. In any event, the enactment of Part 4 of the 2001 Act and the power contained therein to detain foreign nationals indeterminately without charge was not "strictly required by the exigencies of the situation", as the House of Lords found. The impugned measures were not rationally connected to the need to prevent a terrorist attack on the United Kingdom and they involved unjustifiable discrimination on grounds of nationality. SIAC – which saw both the closed and open material on the point – concluded that there was ample evidence that British citizens posed a very significant threat. There could be no grounds for holding that the fundamental right of liberty was less important for a non-national than a national. Aliens enjoyed a right of equal treatment outside the context of immigration and political activity, as a matter of well established domestic, Convention and public international law. There were other, less intrusive, measures which could have been used to address the threat, for example, the use of control orders as created by the Prevention of Terrorism Act 2005; the creation of additional criminal offences to permit for the prosecution of individuals engaged in preparatory terrorist activity; or the lifting of the ban on the use of material obtained by the

interception of communications in criminal proceedings.

2. *The Government*

146. The Government contended that States have a fundamental right under international law to control the entry, residence and expulsion of aliens. Clear language would be required to justify the conclusion that the Contracting States intended through the Convention to give up their ability to protect themselves against a risk to national security created by a non-national. As a matter of ordinary language, "action being taken with a view to deportation" covered the situation where a Contracting State wished to deport an alien, actively kept that possibility under review and only refrained from doing so because of contingent, extraneous circumstances. In *Chahal*, cited above, a period of detention of over six years, including over three years where the applicant could not be removed because of an interim measure requested by the Commission, was held to be acceptable under Article 5 § 1(f).

147. Each applicant was served a Notice of Intention to Deport at the same time as he was certified under the 2001 Act. The second and fourth applicants elected to go to Morocco and France, respectively, and were allowed to leave the United Kingdom as soon as could be arranged, so no issue could arise under Article 5 § 1 in their respect. The possibility of deporting the other applicants was kept under active review throughout the period of their detention. This involved monitoring the situation in their countries of origin. Further, from the end of 2003 onwards the Government were in negotiation with Algeria and Jordan, with a view to entering into memoranda of understanding that the applicants who were nationals of those countries would not be ill-treated if returned.

148. The Government relied upon the principle of fair balance, which underlies the whole Convention, and reasoned that sub-paragraph (f) of Article 5 § 1 had to be interpreted so as to strike a balance between the interests of the individual and the interests of the State in protecting its population from malevolent aliens. Detention struck that balance by advancing the legitimate aim of the State to secure the protection of the population without sacrificing the predominant interest of the alien to avoid being returned to a place where he faced torture or death. The fair balance was

further preserved by providing the alien with adequate safeguards against the arbitrary exercise of the detention powers in national security cases.

149. In the alternative, the detention of the applicants was not in breach of the Convention because of the derogation under Article 15. There was a public emergency threatening the life of the nation at the relevant time. That assessment was subjected to full scrutiny by the domestic courts. The evidence in support, both open and closed, was examined by SIAC in detail, with the benefit of oral hearings at which witnesses were cross-examined. SIAC unanimously upheld the Government's assessment, as did the unanimous Court of Appeal and eight of the nine judges in the House of Lords. In the light of the margin of appreciation to be afforded to the national authorities on this question, there was no proper basis on which the Court could reach a different conclusion.
150. The Government explained that they accorded very great respect to the House of Lords' decision and declaration of incompatibility and that they had repealed the offending legislation. Nonetheless, when the decision was made to refer the case to the Grand Chamber, they decided that it was necessary to challenge the House of Lords' reasoning and conclusions, bearing in mind the wide constitutional importance of the issue and the ongoing need for Contracting States to have clear guidance from the Grand Chamber as to the measures they might legitimately take to try to prevent the terrorist threat from materialising. They submitted that the House of Lords had erred in affording the State too narrow a margin of appreciation in assessing what measures were strictly necessary; in this connection it was relevant to note that Part 4 of the 2001 Act was not only the product of the judgment of the Government but was also the subject of debate in Parliament. Furthermore, the domestic courts had examined the legislation in the abstract, rather than considering the applicants' concrete cases, including the impossibility of removing them, the threat each posed to national security, the inadequacy of enhanced surveillance or other controls short of detention and the procedural safeguards afforded to each applicant.
151. Finally, the House of Lords' conclusion had turned not on a rejection of the necessity to detain the applicants but instead on the absence of a legislative power to detain also a

national who posed a risk to national security and was suspected of being an international terrorist. However, there were good reasons for detaining only non-nationals and the Convention expressly and impliedly recognised that distinction was permissible between nationals and non-nationals in the field of immigration. The primary measure which the Government wished to take against the applicants was deportation, a measure permitted against a non-national but not a national. The analogy drawn by the House of Lords between "foreigners [such as the applicants] who cannot be deported" and "British nationals who cannot be deported" was false, because the applicants at the time of their detention were not irremovable in the same way that a British citizen is irremovable. Furthermore, at the relevant time the Government's assessment was that the greater risk emanated from non-nationals and it was legitimate for a State, when dealing with a national emergency, to proceed on a step-by-step basis and aim to neutralise what was perceived as the greatest threat first, thereby also freeing resources to deal with the lesser threat coming from British citizens. In addition, it was reasonable for the State to take into account the sensitivities of its Muslim population in order to reduce the chances of recruitment amongst them by extremists.

3. *The third party, Liberty*

152. Liberty (see paragraph 6 above) submitted that, by reserving before the domestic courts the issue whether the detention was compatible with Article 5 § 1, the Government had deprived the Court of the benefit of the views of the House of Lords and had pursued a course of action which would not be open to an applicant. In any event, the detention did not fall within the exception in Article 5 § 1(f), since Part 4 of the 2001 Act permitted indefinite detention and since there was no tangible expectation of being able to deport the applicants during the relevant time. If the Government were unable to remove the applicants because of their Article 3 rights, they could not properly rely on national security concerns as a basis for diluting or modifying their Article 5 rights. Instead, the proper course was either to derogate from Article 5 to the extent strictly required by the situation or to prosecute the individuals concerned with one of the plethora of criminal terrorist offences on the United Kingdom's statute books, which included professed membership of a proscribed organisation, failure to notify the authorities of suspected

terrorist activity, possession of incriminating articles and indirect encouragement to commit, prepare or instigate acts of terrorism (see paragraphs 89 and 95 above).

B. The Court's assessment

1. *The scope of the case before the Court*

153. The Court must start by determining the applicants' first preliminary objection, that the Government should be precluded from raising a defence to the complaints under Article 5 § 1 based on the exception in subparagraph 5 § 1(f), on the ground that they did not pursue it before the domestic courts.

154. The Court is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (see *Burden*, cited above, § 42). It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a Government to put to the Court arguments which are inconsistent with the position they adopted before the national courts (see, *mutatis mutandis*, *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, § 47, Series A no. 222; *Kolmpar v. Belgium*, judgment of 24 September 1992, § § 31-32, Series A no. 235-C).

155. The Court does not, however, consider that the Government are estopped from seeking to rely on sub-paragraph (f) of Article 5 § 1 to justify the detention. It is clear that the Government expressly kept open, in the text of the derogation and during the derogation proceedings before the domestic courts, the question of the application of Article 5. Moreover, the majority of the House of Lords either explicitly or impliedly considered whether the detention was compatible with Article 5 § 1 before assessing the validity of the derogation (see paragraph 17 above).

156. The applicants further contended that the Government should not be permitted to dispute before the Court the House of Lords' finding that the derogation was invalid.

157. The present situation is, undoubtedly, unusual in that Governments do not normally resort to challenging, nor see any need to contest, decisions of their own highest courts before this Court. There is not, however, any prohibition on a Government making such a challenge, particularly if they consider that the national supreme court's ruling is problematic under the Convention and that further guidance is required from the Court.

158. In the present case, because a declaration of incompatibility under the Human Rights Act is not binding on the parties to the domestic litigation (see paragraph 94 above), the applicants' success in the House of Lords led neither to their immediate release nor to the payment of compensation for unlawful detention and it was therefore necessary for them to lodge the present application. The Court does not consider that there is any reason of principle why, since the applicants have requested it to examine the lawfulness of their detention, the Government should not now have the chance to raise all the arguments open to them to defend the proceedings, even if this involves calling into question the conclusion of their own supreme court.

159. The Court therefore dismisses the applicants' two preliminary objections.

2. *Admissibility*

160. The Court considers that the applicants' complaints under Article 5 § 1 of the Convention raise complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

3. *The merits*

161. The Court must first ascertain whether the applicants' detention was permissible under Article 5 § 1(f), because if that subparagraph does provide a defence to the complaints under Article 5 § 1, it will not be necessary to determine whether or not the derogation was valid (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 191, Series A no. 25).

(a) whether the applicants were lawfully detained in accordance with Article 5 § 1(f) of the Convention

162. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (*Aksoy v. Turkey*, judgment of 18 December 1996, § 76, *Reports* 1996-VI). The text of Article 5 makes it clear that the guarantees it contains apply to “everyone”.
163. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (*Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in an immigration context (*idem.*, § 64). The Government contend that the applicants' detention was justified under the second limb of that subparagraph and that they were lawfully detained as persons “against whom action is being taken with a view to deportation or extradition”.
164. Article 5 § 1(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f) (*Chahal*, cited above, § 113). The deprivation of liberty must also be “lawful”. Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (*Saadi v. the United Kingdom*, cited above, § 67). To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see, *mutatis mutandis*, *Saadi v. the United Kingdom*, cited above, § 74).
165. The first, third, and sixth applicants were taken into detention under the 2001 Act on 19 December 2001; the seventh applicant was detained on 9 February 2002; the eighth applicant, on 23 October 2002; the ninth applicant, on 22 April 2002; the tenth applicant, on 14 January 2003; and the eleventh applicant, on 2 October 2003. None of these applicants was released until 10-11 March 2005. The fifth applicant was detained between 19 December 2001 and 22 April 2004, when he was released on bail subject to stringent conditions. The second and fourth applicants were also detained on 19 December 2001 but the second applicant was released on 22 December 2001, following his decision to return to Morocco, and the fourth applicant was released on 13 March 2002, following his decision to go to France. The applicants were held throughout in high security conditions at either Belmarsh or Woodhill Prisons or Broadmoor Hospital. It cannot, therefore, be disputed that they were deprived of their liberty within the meaning of Article 5 § 1 (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22).
166. The applicants were foreign nationals whom the Government would have deported from the United Kingdom had it been possible to find a State to receive them where they would not face a real risk of being subjected to treatment contrary to Article 3 of the Convention (*Saadi v. Italy* [GC], no. 37201/06, § § 125 and 127, ECHR 2008). Although the respondent State's obligations under Article 3 prevented the removal of the applicants from the United Kingdom, the Secretary of State nonetheless considered it necessary to detain them for security reasons, because he believed that their presence in the country was a risk to national security and suspected that they were or had been concerned in the commission, preparation or instigation of acts of international terrorism and were members of, belonged to or had links with an international terrorist group. Such detention would have been unlawful under domestic law prior to the passing of Part 4 of the 2001 Act, since the 1984 judgment in *Hardial Singh* entailed that the power of

detention could not be exercised unless the person subject to the deportation order could be deported within a reasonable time (see paragraph 87 above). Thus, it was stated in the derogation notice lodged under Article 15 of the Convention that extended powers were required to arrest and detain a foreign national “where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers” (see paragraph 11 above).

167. One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants was, therefore, that they could not be removed or deported “for the time being” (see paragraphs 11 and 90 above). There is no evidence that during the period of the applicants’ detention there was, except in respect of the second and fourth applicants, any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment contrary to Article 3. Indeed, the first applicant is stateless and the Government have not produced any evidence to suggest that there was another State willing to accept him. It does not appear that the Government entered into negotiations with Algeria or Jordan, with a view to seeking assurances that the applicants who were nationals of those States would not be ill-treated if returned, until the end of 2003 and no such assurance was received until August 2005 (see paragraph 86 above). In these circumstances, the Court does not consider that the respondent Government’s policy of keeping the possibility of deporting the applicants “under active review” was sufficiently certain or determinative to amount to “action ... being taken with a view to deportation”.

168. The exceptions to this conclusion were the second applicant, who was detained for only three days prior to his return to Morocco, and the fourth applicant, who left the United Kingdom for France on 13 March 2002, having been detained for just under three months (see paragraphs 35 and 41 above). The Court considers that during these periods of detention it could reasonably be said that action was being taken against these applicants with a view to deportation, in that it appears that the authorities were still at that stage in the course of establishing their nationalities and investigating whether their removal to their countries of origin or to other countries would be possible (see *Gebremedhin [Gaberamadhién] v. France*,

no. 25389/05, § 74, 26 April 2007). Accordingly, there has been no violation of Article 5 § 1 of the Convention in respect of the second and fourth applicants.

169. It is true that even the applicants who were detained the longest were not held for as long as the applicant in *Chahal* (cited above), where the Court found no violation of Article 5 § 1 despite his imprisonment for over six years. However, in the *Chahal* case, throughout the entire period of the detention, proceedings were being actively and diligently pursued, before the domestic authorities and the Court, in order to determine whether it would be lawful and compatible with Article 3 of the Convention to proceed with the applicant’s deportation to India. The same cannot be said in the present case, where the proceedings have, instead, been primarily concerned with the legality of the detention.

170. In the circumstances of the present case it cannot be said that the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants were persons “against whom action [was] being taken with a view to deportation or extradition”. Their detention did not, therefore, fall within the exception to the right to liberty set out in paragraph 5 § 1(f) of the Convention. This is a conclusion which was also, expressly or impliedly, reached by a majority of the members of the House of Lords (see paragraph 17 above).

171. It is, instead, clear from the terms of the derogation notice and Part 4 of the 2001 Act that the applicants were certified and detained because they were suspected of being international terrorists and because it was believed that their presence at liberty in the United Kingdom gave rise to a threat to national security. The Court does not accept the Government’s argument that Article 5 § 1 permits a balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court’s jurisprudence under sub-paragraph (f) but also with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.

172. The Court recalls that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15 (see *Lawless v. Ireland (No. 3)*, judgment of 1 July 1961, § § 13 and 14, Series A no. 3; *Ireland v. the United Kingdom*, cited above, § § 194-196 and 212-213). It must now, therefore, consider whether the United Kingdom's derogation was valid.

(b) Whether the United Kingdom validly derogated from its obligations under Article 5 § 1 of the Convention

i *The Court's approach*

173. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (*Ireland v. the United Kingdom*, cited above, § 207; *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, § 43, Series A no. 258; *Aksoy*, cited above, § 68).

174. The object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court

exercising a supervisory role subject to the principle of subsidiarity (*Z. and Others v. the United Kingdom*, no. 29392/95, § 103, ECHR 2001-V). Moreover, the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.

ii *Whether there was a "public emergency threatening the life of the nation"*

175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established.

176. The Court recalls that in *Lawless*, cited above, § 28, it held that in the context of Article 15 the natural and customary meaning of the words "other public emergency threatening the life of the nation" was sufficiently clear and that they referred to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed". In the *Greek Case* (1969) 12 YB 1, § 153, the Commission held that, in order to justify a derogation, the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate. In *Ireland v. United Kingdom*, cited above, § § 205 and 212, the parties were agreed, as were

the Commission and the Court, that the Article 15 test was satisfied, since terrorism had for a number of years represented “a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province’s inhabitants”. The Court reached similar conclusions as regards the continuing security situation in Northern Ireland in *Brannigan and McBride*, cited above, and *Marshall v. the United Kingdom* (dec.), no. 41571/98, 10 July 2001. In *Aksoy*, cited above, it accepted that Kurdish separatist violence had given rise to a “public emergency” in Turkey.

177. Before the domestic courts, the Secretary of State adduced evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence was adduced before SIAC. All the national judges accepted that the danger was credible (with the exception of Lord Hoffmann, who did not consider that it was of a nature to constitute “a threat to the life of the nation”: see paragraph 18 above). Although when the derogation was made no al/Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was “imminent”, in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently (see, *mutatis mutandis*, *Vilvarajah and others v. the United Kingdom*, judgment of 30 October 1991, § 107(2), Series A no. 215).
178. While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the ICCPR must be of “an exceptional and temporary nature” (see paragraph 109 above), the Court’s case-law has never, to date, explicitly incorporated the re-

quirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a “public emergency” within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al/Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not “temporary”.

179. The applicants’ argument that the life of the nation was not threatened is principally founded on the dissenting opinion of Lord Hoffman, who interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life. It had, in his view, to threaten “our institutions of government or our existence as a civil community” (see paragraph 18 above). However, the Court has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the “nation” and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman.
180. As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al/Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom’s executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.
181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation.

- iii *Whether the measures were strictly required by the exigencies of the situation*
182. Article 15 provides that the State may take measures derogating from its obligations under the Convention only "to the extent strictly required by the exigencies of the situation". As previously stated, the Court considers that it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention, unless it can be shown that the national court misinterpreted the Convention or the Court's case-law or reached a conclusion which was manifestly unreasonable. It will consider the Government's challenges to the House of Lords' judgment against this background.
183. The Government contended, first, that the majority of the House of Lords should have afforded a much wider margin of appreciation to the executive and Parliament to decide whether the applicants' detention was necessary. A similar argument was advanced before the House of Lords, where the Attorney General submitted that the assessment of what was needed to protect the public was a matter of political rather than judicial judgment (see paragraph 19 above).
184. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were "strictly required". In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse (see, for example, *Brannigan and McBride*, cited above, § § 48-66; *Aksoy*, cited above, § § 71-84; and the principles outlined in paragraph 173 above). The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time. In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament.
185. The Government also submitted that the House of Lords erred in examining the legislation in the abstract rather than considering the applicants' concrete cases. However, in the Court's view, the approach under Article 15 is necessarily focussed on the general situation pertaining in the country concerned, in the sense that the court - whether national or international - is required to examine the measures that have been adopted in derogation of the Convention rights in question and to weigh them against the nature of the threat to the nation posed by the emergency. Where, as here, the measures are found to be disproportionate to that threat and to be discriminatory in their effect, there is no need to go further and examine their application in the concrete case of each applicant.
186. The Government's third ground of challenge to the House of Lords' decision was directed principally at the approach taken towards the comparison between non-national and national suspected terrorists. The Court, however, considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.
187. Finally, the Government advanced two arguments which the applicants claimed had not been relied on before the national courts. Certainly, there does not appear to be any reference to them in the national courts' judgments

or in the open material which has been put before the Court. In these circumstances, even assuming that the principle of subsidiarity does not prevent the Court from examining new grounds, it would require persuasive evidence in support of them.

188. The first of the allegedly new arguments was that it was legitimate for the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government has not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. In this respect the Court notes that the system of control orders, put in place by the Prevention of Terrorism Act 2005, does not discriminate between national and non-national suspects.

189. The second allegedly new ground relied on by the Government was that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, the Court notes that the national courts, including SIAC, which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

190. In conclusion, therefore, the Court, like the House of Lords, and contrary to the Government's contention, finds that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows there has been a violation of Article 5 § 1 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 TAKEN IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

191. The applicants complained that it was discriminatory, and in breach of Article 14 of the Convention, to detain them when United King-

dom nationals suspected of involvement with al'Qaeda were left at liberty.

Article 14 provides:

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

192. In the light of its above reasoning and conclusion in relation to Article 5 § 1 taken alone, the Court does not consider it necessary to examine these complaints separately.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

193. The applicants contended that the procedure before the domestic courts to challenge their detention did not comply with the requirements of Article 5 § 4, which states:

"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."

The Government denied that there had been a violation of Article 5 § 4.

A. The parties' submissions

1. *The applicants*

194. The applicants advanced two main arguments under Article 5 § 4. First, they emphasised that although it was open to them to argue before SIAC, the Court of Appeal and the House of Lords that their detention under Part 4 of the 2001 Act was unlawful under the Convention, the only remedy which they were able to obtain was a declaration of incompatibility under the 1998 Act. This had no binding effect on the Government and the detention remained lawful until legislative change was effected by Parliament. There was thus no court with power to order their release, in breach of Article 5 § 4.

195. Secondly, the applicants complained about the procedure before SIAC for appeals under section 25 of the 2001 Act (see paragraph 91 above) and in particular the lack of disclosure of material evidence except to special advocates with whom the detained person was not

permitted to consult. In their submission, Article 5 § 4 imported the fair trial guarantees of Article 6 § 1 commensurate with the gravity of the issue at stake. While in certain circumstances it might be permissible for a court to sanction non-disclosure of relevant evidence to an individual on grounds of national security, it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond. In all the applicants' appeals, except that of the tenth applicant, SIAC relied on closed material and recognised that the applicants were thereby put at a disadvantage.

2. The Government

196. The Government contended that Article 5 § 4 should be read in the light of the Court's established jurisprudence under Article 13, of which it was the *lex specialis* as regards detention, that there was no right to challenge binding primary legislation before a national court. This principle, together with the system of declarations of incompatibility under the Human Rights Act, reflected the democratic value of the supremacy of the elected Parliament.

197. On the applicants' second point, the Government submitted that there were valid public interest grounds for withholding the closed material. The right to disclosure of evidence, under Article 6 and also under Article 5 § 4, was not absolute. The Court's case-law from *Chahal* (cited above) onwards had indicated some support for a special advocate procedure in particularly sensitive fields. Moreover, in each applicant's case, the open material gave sufficient notice of the allegations against him to enable him to mount an effective defence.

3. The third party, Justice

198. Justice (see paragraph 6 above) informed the Court that at the time SIAC was created by the Special Immigration Appeals Commission Act 1997, the use of closed material and special advocates in the procedure before it was believed to be based on a similar procedure in Canada, applied in cases before the Security Intelligence Review Committee ("SIRC"), which considered whether a Minister's decision to remove a permanently resident foreign national on national security grounds was well-founded. However, although the SIRC procedure in-

involved an in-house counsel with access to the classified material taking part in *ex parte* and *in camera* hearings to represent the appellant's interests, it differed substantially from the SIAC model, particularly in that it allowed the special advocate to maintain contact with the appellant and his lawyers throughout the process and even after the special advocate was fully apprised of the secret information against the appellant.

199. In contrast, the SIAC procedures involving closed material and special advocates had attracted considerable criticism, including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights. Following the judgment of the House of Lords in December 2004, declaring Part 4 of the 2001 Act incompatible with Articles 5 and 14 of the Convention, the House of Commons Constitutional Affairs Committee commenced an inquiry into the operation of SIAC and its use of special advocates. Among the evidence received by the Committee was a submission from nine of the thirteen serving special advocates. In the submission, the special advocates highlighted the serious difficulties they faced in representing appellants in closed proceedings due to the prohibition on communication concerning the closed material. In particular, the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented.

B. The Court's assessment

1. Admissibility

200. The Court notes that Article 5 § 4 guarantees a right to "everyone who is deprived of his liberty by arrest or detention" to bring proceedings to test the legality of the detention and to obtain release if the detention is found to be unlawful. Since the second and fourth applicants were already at liberty, having elected to travel to Morocco and France respectively, by the time the various proceedings to determine the lawfulness of the detention under the 2001 Act were commenced, it follows that these two applicants' complaints under Article 5 § 4 are manifestly ill-founded within the meaning of Article 35 § 3 of the Convention (see *Fox, Campbell and Hartley v. the United Kingdom*,

judgment of 30 August 1990, § 45, Series A no. 182) and must be declared inadmissible.

201. The Court considers that the other applicants' complaints under this provision raise complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

2. The merits

(a) The principles arising from the case-law

202. Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Chahal*, cited above, § 126). It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (*E. v. Norway*, judgment of 29 August 1990, § 50, Series A no. 181). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (*Ireland v. the United Kingdom*, cited above, § 200; *Weeks v. the United Kingdom* judgment of 2 March 1987, § 61, Series A no. 114; *Chahal*, cited above, § 130).

203. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guar-

antees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see, for example, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, § 57, Series A no. 33; *Bouamar v. Belgium*, judgment of 29 February 1988, § § 57 and 60, Series A no. 129; *Wloch v. Poland*, no. 27785/95, § 125, ECHR 2000-XI; *Reinprecht v. Austria*, no. 67175/01 67175/01, § 31, ECHR 2005).

204. Thus, the proceedings must be adversarial and must always ensure "equality of arms" between the parties (*Reinprecht*, § 31). An oral hearing may be necessary, for example in cases of detention on remand (*Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II). Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him (*Becciev v. Moldova*, no. 9190/03, § § 68-72, 4 October 2005). This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention (*Becciev*, cited above, § § 72-76; *Turcan and Turcan v. Moldova*, no. 39835/05, § § 67-70, 23 October 2007). It may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him (*Wloch*, cited above, § 127; *Nikolova*, cited above, § 58; *Lamy v. Belgium*, judgment of 30 March 1989, § 29, Series A no. 151; *Fodale v. Italy*, no. 70148/01, 1 June 2006).

205. The Court has held nonetheless that, even in proceedings under Article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, § 70, Reports 1996-II; *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, § 58, Reports

1997-III; *Jasper v. the United Kingdom* [GC], no. 27052/95, § 51-53, ECHR 2000-II; *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V; *Botmeh and Alami v. the United Kingdom*, no. 15187/03, judgment of 7 June 2007, § 37).

206. Thus, while the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused, the Court has held that it might sometimes be necessary to withhold certain evidence from the defence on public interest grounds. In *Jasper*, cited above, § 51-53, it found that the limitation on the rights of the defence had been sufficiently counterbalanced where evidence which was relevant to the issues at trial, but on which the prosecution did not intend to rely, was examined *ex parte* by the trial judge, who decided that it should not be disclosed because the public interest in keeping it secret outweighed the utility to the defence of disclosure. In finding that there had been no violation of Article 6, the Court considered it significant that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise and that steps had been taken to ensure that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing the material which the prosecution sought to keep secret (*ibid.*, § 55-56). In contrast, in *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46-48, ECHR 2004-X, the Court found that an *ex parte* procedure before the trial judge was not sufficient to secure a fair trial where the undisclosed material related, or may have related, to an issue of fact which formed part of the prosecution case, which the trial judge, rather than the jury, had to determine and which might have been of decisive importance to the outcome of the applicants' trials.
207. In a number of other cases where the competing public interest entailed restrictions on the rights of the defendant in relation to adverse evidence, relied on by the prosecutor, the Court has assessed the extent to which counterbalancing measures can remedy the lack of a full adversarial procedure. For example, in *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II, it held that it would not necessarily be incompatible with Article 6 § 1 for the prosecution to refer at trial to depositions made during the investigative stage, in particular where a witness refused to repeat his deposition in public owing to fears for his safety, if the defendant had been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage. It emphasised, however, that where a conviction was based solely or to a decisive degree on depositions that had been made by a person whom the accused had had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence would be restricted to an extent incompatible with the guarantees provided by Article 6.
208. Similarly, in *Doorson*, cited above, § 68-76, the Court found that there was no breach of Article 6 where the identity of certain witnesses was concealed from the defendant, on the ground that they feared reprisals. The fact that the defence counsel, in the absence of the defendant, was able to put questions to the anonymous witnesses at the appeal stage and to attempt to cast doubt on their reliability and that the Court of Appeal stated in its judgment that it had treated the evidence of the anonymous witnesses with caution was sufficient to counterbalance the disadvantage caused to the defence. The Court emphasised that a conviction should not be based either solely or to a decisive extent on anonymous statements (and see also *Van Mechelen*, cited above, § 55). In each case, the Court emphasised that its role was to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (*Doorson*, cited above, § 67).
209. The Court has referred on several occasions to the possibility of using special advocates to counterbalance procedural unfairness caused by lack of full disclosure in national security cases, but it has never been required to decide whether or not such a procedure would be compatible with either Article 5 § 4 or Article 6 of the Convention.
210. In *Chahal*, cited above, the applicant was detained under Article 5 § 1(f) pending deportation on national security grounds and the Secretary of State opposed his applications for bail and *habeas corpus*, also for reasons of national security. The Court recognised (§ 130-131) that the use of confidential material might be unavoidable where national security was at stake but held that this did not mean that the executive could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved. The Court found a viola-

tion of Article 5 § 4 in the light of the fact that the High Court, which determined the *habeas corpus* application, did not have access to the full material on which the Secretary of State had based his decision. Although there was the safeguard of an advisory panel, chaired by a Court of Appeal judge, which had full sight of the national security evidence, the Court held that the panel could not be considered as a “court” within the meaning of Article 5 § 4 because the applicant was not entitled to legal representation before it and was given only an outline of the national security case against him and because the panel had no power of decision and its advice to the Home Secretary was not binding and was not disclosed. The Court made reference (§§ 131 and 144) to the submissions of the third parties (Amnesty International, Liberty, the AIRE Centre and the Joint Council for the Welfare of Immigrants; and see the submissions of Justice in the present case, paragraph 198 above) in connection with a procedure applied in national security deportation cases in Canada, whereby the judge held an *in camera* hearing of all the evidence, at which the proposed deportee was provided with a statement summarising, as far as possible, the case against him and had the right to be represented and to call evidence. The confidentiality of the security material was maintained by requiring such evidence to be examined in the absence of both the deportee and his representative. However, in these circumstances, their place was taken by a security-cleared counsel instructed by the court, who cross-examined the witnesses and generally assisted the court to test the strength of the State’s case. A summary of the evidence obtained by this procedure, with necessary deletions, was given to the deportee. The Court commented that it:

“attaches significance to the fact that, as the intervenors pointed out in connection with Article 13, ... in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice”.

211. In *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, § 78, Reports 1998-IV and in *Al-Nashif v. Bulgaria*, no. 50963/99, judgment

of 20 June 2002, §§ 93-97 and 137, the Court made reference to its comments in *Chahal* about the special advocate procedure but without expressing any opinion as to whether such a procedure would be in conformity with the Convention rights at issue.

(b) Application to the facts of the present case

212. Before the domestic courts, there were two aspects to the applicants’ challenge to the lawfulness of their detention. First, they brought proceedings under section 30 of the 2001 Act to contest the validity of the derogation under Article 15 of the Convention and thus the compatibility with the Convention of the entire detention scheme. Secondly, each applicant also brought an appeal under section 25 of the 2001 Act, contending that the detention was unlawful under domestic law because there were no reasonable grounds for a belief that his presence in the United Kingdom was a risk to national security or for a suspicion that he was a terrorist.
213. The Court does not consider it necessary to reach a separate finding under Article 5 § 4 in connection with the applicants’ complaints that the House of Lords was unable to make a binding order for their release, since it has already found a violation of Article 5 § 1 arising from the provisions of domestic law.
214. The applicants’ second ground of complaint under Article 5 § 4 concerns the fairness of the procedure before SIAC under section 25 of the 2001 Act to determine whether the Secretary of State was reasonable in believing each applicant’s presence in the United Kingdom to be a risk to national security and in suspecting him of being a terrorist. This is a separate and distinct question, which cannot be said to be absorbed in the finding of a violation of Article 5 § 1, and which the Court must therefore examine.
215. The Court recalls that although the judges sitting as SIAC were able to consider both the “open” and “closed” material, neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. During the closed sessions before SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point

- at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC issued both an open and a closed judgment.
216. The Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a "public emergency threatening the life of the nation". It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5 § 4, a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (see also, in this connection, *Fox, Campbell and Hartley*, cited above, § 39).
217. Balanced against these important public interests, however, was the applicants' right under Article 5 § 4 to procedural fairness. Although the Court has found that, with the exception of the second and fourth applicants, the applicants' detention did not fall within any of the categories listed in subparagraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a *sine qua non* (see paragraph 204 above). Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect (*García Alva v. Germany*, no. 23541/94, § 39, 13 February 2001 and see also see *Chahal*, cited above, § § 130-131).
218. Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.
219. The Court considers that SIAC, which was a fully independent court (see paragraph 91 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.
220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where,

however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

221. The Court must, therefore, assess the certification proceedings in respect of each of the detained applicants in the light of these criteria.

222. It notes that the open material against the sixth, seventh, eighth, ninth and eleventh applicants included detailed allegations about, for example, the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places. It considers that these allegations were sufficiently detailed to permit the applicants effectively to challenge them. It does not, therefore, find a violation of Article 5 § 4 in respect of the sixth, seventh, eighth, ninth and eleventh applicants.

223. The principal allegations against the first and tenth applicants were that they had been involved in fund-raising for terrorist groups linked to al'Qaeda. In the first applicant's case there was open evidence of large sums of money moving through his bank account and in respect of the tenth applicant there was open evidence that he had been involved in raising money through fraud. However, in each case the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to either applicant. In these circumstances, the Court does not consider that these applicants were in a position effectively to challenge the allegations against them. There has therefore been a violation of Article 5 § 4 in respect of the first and tenth applicants.

224. The open allegations in respect of the third and fifth applicants were of a general nature, principally that they were members of named extremist Islamist groups linked to al'Qaeda. SIAC observed in its judgments dismissing each of these applicants' appeals that the open evidence was insubstantial and that the evidence on which it relied against them was largely to be found in the closed material. Again, the Court does not consider that these applicants were in a position effectively to challenge the allegations against them. There has therefore been a violation of Article 5 § 4 in respect of the third and fifth applicants.

V. ALLEGED VIOLATION OF ARTICLE 5 § 1 IN CONJUNCTION WITH ARTICLE 13

225. The applicants argued in the alternative that the matters complained of in relation to Article 5 § 4 also gave rise to a violation of Article 13. In the light of its findings above, the Court does not consider it necessary to examine these complaints separately.

VI. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

226. Finally, the applicants complained that, despite having been unlawfully detained in breach of Article 5 § 1 and 4, they had no enforceable right to compensation, in breach of Article 5 § 5, which provides:

“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.”

227. The Government reasoned that there had been no breach of Article 5 in this case, so Article 5 § 5 did not apply. In the event that the Court did find a violation of Article 5, Article 5 § 5 required “an enforceable right to compensation”, but not that compensation be awarded in every case. Since the Secretary of State was found by the national courts reasonably to suspect that the applicants were “international terrorists”, as a matter of principle they were not entitled to compensation from the national courts.

A. Admissibility

228. The Court notes that it has found a violation of Article 5 § 1 in respect of all the applicants except the second and fourth applicants, and that it has found a violation of Article 5 § 4 in respect of the first, third, fifth and tenth applicants. It follows that the second and fourth applicants' complaints under Article 5 § 5 are inadmissible, but that the other applicants' complaints are admissible.

B. The merits

229. The Court notes that the above violations could not give rise to an enforceable claim for compensation by the applicants before the national courts. It follows that there has been a violation of Article 5 § 5 in respect of all the applicants save the second and fourth applicants (see *Brogan and Others v. the United Kingdom*,

judgment of 29 November 1988, § 67, Series A no. 145-B and *Fox, Campbell and Hartley*, cited above, § 46).

VII. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

230. The applicants argued in the alternative that the procedure before SIAC was not compatible with Article 6 §§ 1 and 2 of the Convention, which provide:

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

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

231. The applicants contended that Article 6 was the *lex specialis* of the fair trial guarantee. The regime under consideration represented the most serious form of executive measure against terrorist suspects adopted within the Member States of the Council of Europe in the post-2001 period. It was adopted to enable the United Kingdom to take proceedings against individuals on the basis of reasonable suspicion alone, deriving from evidence which could not be deployed in the ordinary courts. That alone warranted an analysis under Article 6. The proceedings were for the determination of a criminal charge, within the autonomous meaning adopted under Article 6 § 1, and also for the determination of civil rights and obligations. The use of closed material gave rise to a breach of Article 6.

232. In the Government's submission, Article 5 § 4 was the *lex specialis* concerning detention and the issues should be considered under that provision. In any event, Article 6 did not apply, because SIAC's decision on the question whether there should be detention related to “special measures of immigration control” and thus determined neither a criminal charge nor

any civil right or obligation. Even if Article 6 § 1 did apply, there was no violation, for the reasons set out above in respect of Article 5 § 4.

233. Without coming to any conclusion as to whether the proceedings before SIAC fell within the scope of Article 6, the Court declares these complaints admissible. It observes, however, that it has examined the issues relating to the use of special advocates, closed hearings and lack of full disclosure in the proceedings before SIAC above, in connection with the applicants' complaints under Article 5 § 4. In the light of this full examination, it does not consider it necessary to examine the complaints under Article 6 § 1.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

234. The applicants sought compensation for the pecuniary and non-pecuniary damage sustained as a result of the violations, together with costs and expenses, under Article 41 of the Convention, which provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

The Government contended that an award of just satisfaction would be neither necessary nor appropriate in the present case.

A. Damage

1. The applicants' claims

235. The applicants submitted that monetary just satisfaction was necessary and appropriate. When assessing quantum, guidance could be obtained from domestic court awards in respect of unlawful detention and also from awards made by the Court in past cases (they referred, *inter alia*, to *Perks and Others v. the United Kingdom*, nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95 and 28456/95, judgment of 12 October 1999, where GBP 5,500 was awarded in respect of six days' unlawful imprisonment, and *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1995, Reports 1997-III, where the applicants were awarded the equivalent of 17,890 pounds sterling (GBP) and GBP 16,330, respectively, in relation to periods of 13 and 12

months' imprisonment for refusing to perform military service).

236. The first applicant claimed compensation for his loss of liberty between 19 December 2001 and 11 March 2005, a period of three years and 83 days, and the consequent mental suffering, including mental illness. He submitted that the award should in addition take account of the suffering experienced by his wife and family as a result of the separation and the negative publicity. He proposed an award of GBP 234,000 to cover non-pecuniary damage. In addition he claimed approximately GBP 7,500 in pecuniary damages to cover the costs of his family's visits to him in detention and other expenses.
237. The third applicant claimed compensation for his loss of liberty between 19 December 2001 and 11 March 2005 and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children. He proposed a figure of GBP 230,000 for non-pecuniary damages, together with pecuniary damages of GBP 200 travel costs, incurred by his wife, and a sum to cover his lost opportunity to establish himself in business in the United Kingdom.
238. The fifth applicant claimed compensation for his detention between 19 December 2001 and 22 April 2004, his subsequent house arrest until 11 March 2005 and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children. He proposed a figure of GBP 240,000 for non-pecuniary damages, together with pecuniary damages of GBP 5,500, including travel and child-minding costs incurred by his wife and money sent by her to the applicant in prison.
239. The sixth applicant claimed compensation for his detention between 19 December 2001 and 11 March 2005 and the consequent mental suffering, together with the distress caused to his wife and children. He proposed a figure of GBP 217,000 for non-pecuniary damages, together with pecuniary damages of GBP 51,410, including his loss of earnings as a self-employed courier and travel costs incurred by his wife.
240. The seventh applicant claimed compensation for his detention between 8 February 2002 and 11 March 2005 and the consequent mental suffering, including mental illness. He proposed a figure of GBP 197,000 for non-pecuniary damages. He did not make any claim in respect of pecuniary damage.

241. The eighth applicant claimed compensation for his loss of liberty between 23 October 2002 and 11 March 2005 and the consequent mental suffering, together with the distress caused to his wife and children. He proposed a figure of GBP 170,000 for non-pecuniary damages, together with pecuniary damages of GBP 4,570, including money sent to him in prison by his wife and her costs of moving house to avoid unwanted media attention.

242. The ninth applicant claimed compensation for his loss of liberty between 22 April 2002 and 11 March 2005, and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children. He proposed a figure of GBP 215,000 for non-pecuniary damages, together with pecuniary damages of GBP 7,725, including money he had to borrow to assist his wife with household expenses, money sent to him in prison by his wife and her travel expenses to visit him. He also asked for a sum to cover his lost opportunity to establish himself in business in the United Kingdom.

243. The tenth applicant claimed compensation for his loss of liberty between 14 January 2003 and 11 March 2005 and the consequent mental suffering, including mental illness. He proposed a figure of GBP 144,000 for non-pecuniary damages, together with pecuniary damages of GBP 2,751, including the loss of a weekly payment of GBP 37 he was receiving from the National Asylum Support Service prior to his detention and the cost of telephone calls to his legal representatives.

244. The eleventh applicant claimed compensation for his loss of liberty between 2 October 2003 and 11 March 2005 and the consequent mental suffering. He proposed a figure of GBP 95,000 for non-pecuniary damages but did not claim any pecuniary damages.

2. *The Government's submissions*

245. The Government, relying on the Court's judgment in *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 219, Series A no. 324, contended that, as a matter of principle, the applicants were not entitled to receive any form of financial compensation because they were properly suspected, on objective and reasonable grounds, of involvement in terrorism and had failed to displace that suspicion.

246. The Government pointed out that Part 4 of the

2001 Act was passed and the derogation made in good faith, in an attempt to deal with what was perceived to be an extremely serious situation amounting to a public emergency threatening the life of the nation. The core problem with the detention scheme under the 2001 Act, as identified by SIAC and the House of Lords, was that it did not apply to United Kingdom as well as foreign nationals. Following the House of Lords' judgment, urgent consideration was given to the question what should be done with the applicants in the light of the public emergency and it was decided that a system of control orders should be put in place. Against this background, it could not be suggested that the Government had acted cynically or in flagrant disregard of the individuals' rights.

247. In addition, the Government submitted that no just satisfaction should be awarded in respect of any procedural violation found by the Court (for example, under Article 5 § 4 or 5), since it was not possible to speculate what would have happened had the breach not occurred (*Kingsley v. the United Kingdom* [GC], no. 35605/97 35605/97, ECHR 2002-IV; *Hood v. the United Kingdom*, no. 27267/95, ECHR 1999-I).
248. In the event that the Court did decide to make a monetary award, it should examine carefully in respect of each head of claim whether there was sufficient supporting evidence, whether the claim was sufficiently closely connected to the violation and whether the claim was reasonable as to quantum.

3. The Court's assessment

249. The Court recalls, first, that it has not found a violation of Article 3 in the present case. It follows that it cannot make any award in respect of mental suffering, including mental illness, allegedly arising from the conditions of detention or the open-ended nature of the detention scheme in Part 4 of the 2001 Act.
250. It has, however, found violations of Article 5 § 1 and 5 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants and a violation of Article 5 § 4 in respect of the first, third, fifth and tenth applicants. In accordance with Article 41, it could, therefore, award these applicants monetary compensation, if it considered such an award to be "necessary". The Court has a wide discretion to determine when an award of damages should be made, and frequently holds that the finding of a violation is sufficient satisfaction without any further monetary award (see,

among many examples, *Nikolova*, cited above, § 76). In exercising its discretion the Court will have regard to all the circumstances of the case including the nature of the violations found as well as any special circumstances pertaining to the context of the case.

251. The Court recalls that in the *McCann and Others* judgment, cited above, § 219, it declined to make any award in respect of pecuniary or non-pecuniary damage arising from the violation of Article 2 of the Convention, having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar. It considers that the present case is distinguishable, since it has not been established that any of the applicants has engaged, or attempted to engage, in any act of terrorist violence.
252. The decision whether to award monetary compensation in this case and, if so, the amount of any such award, must take into account a number of factors. The applicants were detained for long periods, in breach of Article 5 § 1, and the Court has, in the past, awarded large sums in just satisfaction in respect of unlawful detention (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, or the cases cited by the applicants in paragraph 235 above). The present case is, however, very different. In the aftermath of the al'Qaeda attacks on the United States of 11 September 2001, in a situation which the domestic courts and this Court have accepted was a public emergency threatening the life of the nation, the Government were under an obligation to protect the population of the United Kingdom from terrorist violence. The detention scheme in Part 4 of the 2001 Act was devised in good faith, as an attempt to reconcile the need to prevent the commission of acts of terrorism with the obligation under Article 3 of the Convention not to remove or deport any person to a country where he could face a real risk of ill-treatment (see paragraph 166 above). Although the Court, like the House of Lords, has found that the derogating measures were disproportionate, the core part of that finding was that the legislation was discriminatory in targeting non-nationals only. Moreover, following the House of Lords' judgment, the detention scheme under the 2001 Act was replaced by a system of control orders under the Prevention of Terrorism Act 2005. All the applicants in respect of whom the Court has found a violation of Article 5 § 1 became, immediately upon release in March 2005, the subject of control orders. It

cannot therefore be assumed that, even if the violations in the present case had not occurred, the applicants would not have been subjected to some restriction on their liberty.

253. Against this background, the Court finds that the circumstances justify the making of an award substantially lower than that which it has had occasion to make in other cases of unlawful detention. It awards 3,900 euros (EUR) to the first, third and sixth applicants; EUR 3,400 to the fifth applicant; EUR 3,800 to the seventh applicant; EUR 2,800 to the eighth applicant; EUR 3,400 to the ninth applicant; EUR 2,500 to the tenth applicant; and EUR 1,700 to the eleventh applicant, together with any tax that may be chargeable.

B. Costs and expenses

254. The applicants made no claim for costs in respect of the domestic proceedings, since these had been recovered as a result of the order made by the House of Lords. Their total claim for the costs of the proceedings before the Court totalled GBP 144,752.64, inclusive of value added tax ("VAT"). This included 599 hours worked by solicitors at GBP 70 per hour plus VAT, 342.5 hours worked by counsel at GBP 150 per hour plus VAT and 85 hours worked by senior counsel at GBP 200 per hour plus VAT in preparing the application, observations and just satisfaction claim before the Chamber and Grand Chamber, together with disbursements such as experts' reports and the costs of the hearing before the Grand Chamber. They submitted that it had been necessary to instruct a number of different counsel, with different areas of specialism, given the range of issues to be addressed and the evidence involved, concerning events which took place over a ten-year period.

255. The Government submitted that the claim was excessive. In particular, the number of hours spent by solicitors and counsel in preparing the case could not be justified, especially since each of the applicants had been represented throughout the domestic proceedings during which detailed instructions must have been taken and consideration given to virtually all the issues arising in the application to the Court. The hourly rates charged by counsel were, in addition, excessive.

256. The Court recalls that an applicant is entitled to be reimbursed those costs actually and necessarily incurred to prevent or redress a breach of the Convention, to the extent that such costs

are reasonable as to quantum (*Kingsley*, cited above, § 49). While it accepts that the number of applicants must, inevitably, have necessitated additional work on the part of their representatives, it notes that most of the individualised material filed with the Court dealt with the applicants' complaints under Article 3 of the Convention and their claims for just satisfaction arising out of those complaints, which the Court has rejected. In addition, it accepts the Government's argument that a number of the issues, particularly those relating to the derogation under Article 15 of the Convention, had already been aired before the national courts, which should have reduced the time needed for the preparation of this part of the case. Against this background, it considers that the applicants should be awarded a total of EUR 60,000 in respect of costs and expenses, together with any tax that may be chargeable to the applicants.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the second applicant's complaints under Articles 3 and 13 of the Convention inadmissible and the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Articles 3 and 13 admissible (see paragraphs 123-125 of the judgment);
2. Holds that there has been no violation of Article 3 of the Convention, taken alone or in conjunction with Article 13, in respect of the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants (paragraphs 126-136);
3. Dismisses the applicants' preliminary objections that the Government should be precluded from raising a defence under Article 5 § 1(f) of the Convention or challenging the House of Lords' finding that the derogation under Article 15 was invalid (paragraphs 153-159);
4. Declares the applicants' complaints under Article 5 § 1 of the Convention admissible

- (paragraph 160);
5. Holds that there has been no violation of Article 5 § 1 of the Convention in respect of the second and fourth applicants (paragraphs 162-168);
 6. Holds that there has been a violation of Article 5 § 1 of the Convention in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants (paragraphs 162-190);
 7. Holds that it is not necessary to examine the applicants' complaints under Articles 5 § 1 and 14 taken together (paragraph 192);
 8. Declares the second and fourth applicants' complaints under Article 5 § 4 of the Convention inadmissible and the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Article 5 § 4 admissible (paragraphs 200-201);
 9. Holds that it is not necessary to examine the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Articles 5 § 4 that the House of Lords could not make a binding order for their release (paragraph 213);
 10. Holds that there has been a violation of Article 5 § 4 of the Convention in respect of the first, third, fifth and tenth applicants but that there was no violation of Article 5 § 4 in respect of the sixth, seventh, eighth, ninth and eleventh applicants (paragraphs 202-224);
 11. Holds that it is not necessary to examine the applicants' complaints under Articles 5 § 1 and 13 taken together (paragraph 225);
 12. Declares the second and fourth applicants' complaints under Article 5 § 5 of the Convention inadmissible and the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Article 5 § 5 admissible (paragraph 228);
 13. Holds that there has been a violation of Article 5 § 5 of the Convention in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants (paragraph 229);
 14. Declares the applicants' complaints under Article 6 of the Convention admissible (paragraph 233);
 15. Holds that it is not necessary to examine the applicants' complaints under Article 6 of the Convention (paragraph 233);
 16. Holds that the respondent State is to pay, within three months, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
 - (a) in respect of pecuniary and non-pecuniary damage, EUR 3,900 (three thousand nine hundred euros) to the first, third and sixth applicants; EUR 3,400 (three thousand four hundred euros) to the fifth applicant; EUR 3,800 (three thousand eight hundred euros) to the seventh applicant; EUR 2,800 (two thousand eight hundred euros) to the eighth applicant; EUR 3,400 (three thousand four hundred euros) to the ninth applicant; EUR 2,500 (two thousand five hundred euros) to the tenth applicant; and EUR 1,700 (one thousand seven hundred euros) to the eleventh applicant, plus any tax that may be chargeable;
 - (b) to the applicants jointly, in respect of costs and expenses, EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable to the applicants;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points (paragraphs 249-257);
 17. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 2009.

Michael O'Boyle, *Deputy Registrar*
Jean-Paul Costa, *President*

ECHR

ECJ

SECOND SECTION

CASE OF NURAY ŞEN v TURKEY

(Application no. 41478/98)

JUDGMENT

STRASBOURG

17 June 2003

FINAL

17/09/2003

ARTICLE 15, TERRORISM, LIFE OF A NATION, THREAT, PUBLIC INTEREST, PUBLIC SAFETY, SECURITY, RESTRICTING FREEDOMS, DEMOCRACY

IN THE CASE OF NURAY ŞEN V. TURKEY,

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

Mr **J.-P. Costa**, *President*,

Mr **A.B. Baka**,

Mr **K. Jungwiert**,

Mr **V. Butkevych**,

Mrs **W. Thomassen**,

Mr **M. Ugrekhelidze**, *judges*,

Mr **F. Gölcüklü**, *ad hoc judge*,

and Mrs **S. Dollé**, *Section Registrar*,

Having deliberated in private on 27 May 2003,

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

PROCEDURE

- The case originated in an application (no. 41478/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Nuray Şen ("the applicant"), on 25 April 1996.
- The applicant was represented by Mr Tony Fisher, a lawyer practising in Colchester, Mr Philip Leach and Ms Anke Stock of the Kurdish Human Rights Project in London, as well as by Mr Mark Muller, Mr Tim Otty and Ms Jane Gordon, lawyers practising in London. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.
- The applicant complained that she was detained for 11 days and was not brought before a judge within a reasonable time. She invoked Article 5 § 3 of the Convention.
- The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).
- The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).
- By a decision of 30 April 2002 the Court declared the application partly admissible, retaining the applicant's complaint under Article 5 § 3 of the Convention.
- On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.
- The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

- The applicant was born in 1951 and lives in Paris.
- On 10 November 1995 the applicant was arrested on suspicion of PKK membership and brought to the Gendarme Intelligence and Anti-Terrorism Headquarters in Diyarbakır.
- On 21 November 1995 the applicant was brought before the prosecutor at the Diyarbakır State Security Court who ordered her detention on remand. She was taken to Diyarbakır High Security Prison.
- The applicant was released on bail at the first hearing before the Diyarbakır State Security Court on 15 February 1996.

II. RELEVANT DOMESTIC LAW

- Article 19 of the Constitution provides:

"Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with the formalities and conditions prescribed by

law:

...

The arrested or detained person must be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within fifteen days ... These time-limits may be extended during a state of emergency...

...

A person deprived of his liberty for whatever reason shall have the right to take proceedings before a judicial authority which shall give a speedy ruling on his case and order his immediate release if it finds that the deprivation of liberty was unlawful.

Compensation must be paid by the State for damage sustained by persons who have been victims of treatment contrary to the above provisions, as the law shall provide."

14. Under Article 9 of Law no. 3842 of 18 November 1992 on procedure in state security courts, only these courts can try cases involving the offences defined in Articles 125 and 168 of the Criminal Code.
15. At the material time Article 30 of Law no. 3842 provided that, with regard to offences within the jurisdiction of state security courts, any arrested person had to be brought before a judge within 48 hours at the latest, or, in the case of offences committed by more than one person, within 15 days.

A. The notice of derogation of 6 August 1990:

16. On 6 August 1990 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

"1. The Republic of Turkey is exposed to threats to its national security in South East Anatolia which have steadily grown in scope and intensity over the last months so as to [amount] to a threat to the life of the nation in the meaning of Article 15 of the Convention.

During 1989, 136 civilians and 153 members of the security forces have been killed by acts of terrorists, acting partly out of foreign bases. Since the beginning of 1990 only, the numbers are 125 civilians and 96 members of the security forces.

2. The threat to national security is predominantly [occurring] in provinces of South East

Anatolia and partly also in adjacent provinces.

3. Because of the intensity and variety of terrorist actions and in order to cope with such actions, the Government has not only to use its security forces but also take steps appropriate to cope with a campaign of harmful disinformation of the public, partly emerging from other parts of the Republic of Turkey or even from abroad and with abuses of trade-union rights.

4. To this end, the Government of Turkey, acting in conformity with Article 121 of the Turkish Constitution, has promulgated on May 10 1990 the decrees with force of law [nos.] 424 and 425. These decrees may in part result in derogating from rights enshrined in the following provisions of the European Convention [on] Human Rights and Fundamental Freedoms: Articles 5, 6, 8, 10, 11 and 13. A descriptive summary of the new measures is attached hereto..."

According to a note in the notice of derogation, "the threat to national security [was] predominantly occurring" in the provinces of Elazığ, Bingöl, Tunceli, Van, Diyarbakır, Mardin, Siirt, Hakkari, Batman and Şırnak.

On 29 January 2001 Turkey revoked its above-mentioned derogation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

17. The applicant complained of a breach of Article 5 § 3 of the Convention which provides as follows:

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

1. *Submissions to the Court*

18. The applicant complained that she was held in police custody for a period of 11 days before being brought before a judge or other officer authorised by law to exercise judicial power.
19. She referred to the case of *Aksoy v. Turkey* (judgment of 18 December 1996, *Reports of*

Judgments and Decisions 1996-VI, p. 2282, § 78) and maintained that the period she had spent in police custody without judicial intervention amounted to a violation of her right under Article 5 § 3 of the Convention.

20. The Government submitted that the applicant's detention period was lawful under the Turkish law prevailing at the relevant time. They maintained that the 11 days' detention was justified on account of the scale of PKK violence in south-east Turkey at the relevant time.
21. The Government further submitted that, given the situation in south-east Turkey brought about by the violence of the PKK terrorist organisation, there had been no breach of Article 5 § 3 on account of the derogation notified by Turkey under Article 15 of the Convention.

2. *The Court's assessment*

22. The Court recalls that Article 5 of the Convention enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, "one of the fundamental principles of a democratic society..., which is expressly referred to in the Preamble to the Convention" (see *Sakik and Others v. Turkey*, judgment of 26 November 1997, *Reports* 1997-VII, p. 2623, § 44; see also *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, p. 32, § 58).
23. The Court has accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the above-mentioned *Brogan and Others* judgment, p. 33, § 61; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A, p. 27, § 58; the above-mentioned *Aksoy* judgment, p. 2282, § 78; *Demir and Others v. Turkey*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2653, § 41 and *Dikme v. Turkey*, judgment of 11 July 2000, *Reports* 2000-VIII, § 64). This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see the *Murray* judgment, p. 27, § 58).

24. The Court notes that the applicant's detention in police custody lasted eleven days. It recalls that in the *Brogan and Others* case it held that detention in police custody which had lasted four days and six hours without judicial control fell outside the strict constraints as to the time laid down by Article 5 § 3 of the Convention, even though its purpose was to protect the community as a whole against terrorism (see the *Brogan and Others* judgment, p. 33, § 62). The Court must examine whether the length of the period can be justified by the terms of the derogation.

3. *Validity of the derogation notified by Turkey under Article 15*

25. The Court recalls that "it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation" (see the *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A no. 258-B, pp. 49–50, § 43, and the *Aksoy* judgment cited above, p. 2280, § 68).
26. The Court further recalls that in its judgments in the above-mentioned *Aksoy* and *Demir* cases the Court, in assessing the validity of the Turkish derogation, took into account in particular the unquestionably serious problem of terrorism in south-east Turkey and the difficulties faced by the State in taking effective measures. Nevertheless, in those cases it was not persuaded that the situation necessitated holding the applicant in the *Aksoy* case for

fourteen days or more and holding the applicants' in the *Demir* case for between 16 and 23 days in incommunicado detention without access to a judge or other judicial officer (*Aksoy* judgment, pp. 2282 and 2284, § 78 and 84; *Demir* judgment § 57). In the *Aksoy* case it noted in particular that the Government had not adduced any detailed reasons as to why the fight against terrorism in south-east Turkey rendered any judicial intervention impracticable (*ibid.*, § 78).

27. The Court, noting in particular that the Government have not adduced any reasons as to why the situation in south-east Turkey in the present case was different from the situation in the above-mentioned *Aksoy* and *Demir* cases so as to render any judicial intervention impossible, is not persuaded to depart from its conclusions in those two cases.
28. Consequently and notwithstanding the situation created in south-east Turkey by the actions of the PKK and the special features and difficulties of investigating terrorist offences, the Court considers that the applicant's detention for eleven days before being brought before a judge or other judicial officer was not strictly required by the crisis relied on by the Government.
29. There has accordingly been a breach of Article 5 § 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

31. The applicant claimed the sum of GBP 5,000 for non-pecuniary damage in respect of her detention for a period of 11 days before being brought before the public prosecutor. She asked that this sum be specified in the judgment in sterling, to be converted into Turkish lira on the date of payment.
32. The Government submitted that there was no connection between the applicant's detention

and the amount claimed by the applicant. They referred to the case of *McCann and Others v. the United Kingdom* (judgment of 22 September 1995, Series A no. 324) and requested the Court to reject the applicant's claim.

33. The Court considers that the applicant should be awarded compensation for non-pecuniary damage since she must have suffered distress, fear and anxiety considering that she was kept in police custody for eleven days without any judicial intervention. Deciding on an equitable basis, as required by Article 41, it awards her the sum of EUR 3,600 (see *İğdeli v. Turkey*, no. 29296/95, § 41, 20 June 2002, unreported and *Filiz and Kalkan v. Turkey*, no. 34481/97, § 32, 20 June 2002, unreported).

B. Costs and expenses

34. The applicant claimed GBP 6,173.33 in legal costs and expenses. This amount included the legal fees of the applicant's British lawyers (GBP 4,630), translation expenses (GBP 410), administrative costs and expenses such as telephone, postage and photocopying (GBP 150), fees for Mr Kerim Yıldız, the executive director of the Kurdish Human Rights Project in London (GBP 400) and finally fees for a legal intern (GBP 583.33).
35. The Government simply stated that the Court should not award the applicant the amount she had paid to her lawyers.
36. The Court notes that the applicant has only partly succeeded in respect of her complaints under the Convention. Deciding on an equitable basis, it awards her the sum of EUR 1,500 exclusive of any value-added tax that may be chargeable, such sum to be paid into the bank account in the United Kingdom indicated in her just satisfaction claim.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 5 § 3 of the Convention;
2. Holds

- (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
- (i) EUR 3,600 (three thousand six hundred euros) in respect of non-pecuniary damage to be converted into the national currency of the respondent State at the rate applicable at the date of settlement and to be paid into a bank account to be named by the applicant;
 - (ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses plus any taxes that may be applicable, to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into the bank account in the United Kingdom indicated in the applicant's just satisfaction claim;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 June 2003, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

S. Dollé, *Registrar*

J.-P. Costa, *President*

ECHR

ECJ

COURT (PLENARY)

CASE OF BRANNIGAN AND MCBRIDE v THE UNITED KINGDOM

(Application no. 14553/89; 14554/89)

JUDGMENT

STRASBOURG

25 May 1993

ARTICLE 15, TERRORISM, LIFE OF A NATION, THREAT, PUBLIC INTEREST, PUBLIC SAFETY, SECURITY, RESTRICTING FREEDOMS, DEMOCRACY

IN THE CASE OF BRANNIGAN AND MCBRIDE V. THE UNITED KINGDOM,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court and composed of the following judges:

Mr R. Ryssdal, *President*,
 Mr R. Bernhardt,
 Mr Thór Vilhjálmsson,
 Mr F. Gölcüklü,
 Mr F. Matscher,
 Mr L.-E. Pettiti,
 Mr B. Walsh,
 Mr R. Macdonald,
 Mr C. Russo,
 Mr A. Spielmann,
 Mr J. De Meyer,
 Mr N. Valticos,
 Mr S.K. Martens,
 Mrs E. Palm,
 Mr I. Foighel,
 Mr R. Pekkanen,
 Mr A.N. Loizou,
 Mr J.M. Morenilla,
 Mr F. Bigi,
 Sir John Freeland,
 Mr A.B. Baka,
 Mr M.A. Lopes Rocha,
 Mr L. Wildhaber,
 Mr G. Mifsud Bonnici,
 Mr J. Makarczyk,
 Mr D. Gotchev,
 and also of Mr M.-A. Eissen, *Registrar*,
 and Mr H. Petzold, *Deputy Registrar*,

Having deliberated in private on 26 November 1992 and 22 April 1993,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 21 February 1992, within the

three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in two applications against the United Kingdom of Great Britain and Northern Ireland (nos. 14553-14554/89) both lodged with the Commission under Article 25 (art. 25) on 19 January 1989 by Irish citizens, Mr Peter Brannigan and Mr Patrick McBride. Mr McBride subsequently died in 1992 (see paragraph 11 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the United Kingdom of its obligations under Article 5 paras. 3 and 5 and Article 13 (art. 5-3, art. 5-5, art. 13), in the light of the United Kingdom's derogation under Article 15 (art. 15).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr Brannigan and Mrs McBride - Mr McBride's mother and personal representative (see paragraph 11 below) - stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30). For reasons of convenience Mr McBride will continue to be referred to in this judgment as the applicant.

The Irish Government, having been informed by the Registrar of its right to intervene in the proceedings (Article 48, sub-paragraph (b), of the Convention and Rule 33 para. 3 (b)) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included, ex officio, Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr B. Walsh, Mr S.K. Martens, Mr R. Pekkanen and Mr L. Wildhaber (Article 43 in fine of the Convention* and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government of the United Kingdom ("the Govern-

- ment"), the Delegate of the Commission and the representatives of the applicants on the organisation of the proceedings (Rules 37 para. 1 and 38). In accordance with the President's orders and directions, the Registrar received, on 17 July 1992, the memorial of the Government. The applicants' memorial was filed out-of-time on 31 August 1992. However, on 28 October 1992, the Chamber decided that it should be regarded as part of the case file (Rule 37 para. 1 in fine). The Secretary to the Commission had previously informed the Registrar that the Delegate would submit his observations at the hearing.
5. On 27 March, the President had granted, under Rule 37 para. 2, leave to the Northern Ireland Standing Advisory Commission on Human Rights to submit written comments on specific aspects of the case. Leave was also granted on 27 May, subject to certain conditions, to Amnesty International and three organisations which had made a joint request, namely Liberty, Interights and the Committee on the Administration of Justice. The respective comments were received on 22 June, 7 and 19 August 1992.
 6. On 28 October 1992 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.
 7. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 November 1992.

There appeared before the Court:

(a) for the Government

Mrs **A. Glover**, Legal Counsellor, Foreign and Commonwealth Office, *Agent*,

Mr **N. Bratza**, Q.C.,

Mr **R. Weatherup**, *Counsel*;

(b) for the Commission

Mr **H. Danelius**, *Delegate*;

(c) for the applicants

Mr **R. Weir**, Q.C.,

Mr **S. Treacy**, Barrister-at-law, *Counsel*,

Mr **P. Madden**, Solicitor.

The Court heard addresses by Mr Bratza for the Government, by Mr Danelius for the Commission and by Mr Weir for the applicants, as well

as replies to questions put by two of its members individually.

8. Prior to the hearing the Government were granted permission by the President to file comments on certain aspects of the observations made by the amici curiae. The applicants' written comments on these submissions were received on 18 December 1992. The Government's observations on the applicants' Article 50 (art. 50) claims were submitted on 17 January 1993.
9. Mr B. Repik, who had attended the hearing and taken part in the deliberations of 26 November 1992, was unable to sit in the present case after 31 December 1992, his term of office having come to an end owing to the dissolution of the Czech and Slovak Federal Republic (Articles 38 and 65 para. 3 of the Convention) (art. 38, art. 65-3).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. Peter Brannigan

10. The first applicant, Mr Peter Brannigan, was born in 1964. He is a labourer and lives in Downpatrick, Northern Ireland.

He was arrested at his home by police officers on 9 January 1989 at 6.30 a.m. pursuant to section 12 (1) (b) of the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 Act"). He was then removed to the Interrogation Centre at Gough Barracks, Armagh, where he was served with a copy of the "Notice to Persons in Police Custody" which informs the prisoner of his legal rights (see paragraph 24 below). A two-day extension of his detention was granted by the Secretary of State on 10 January 1989 at 7.30 p.m., and a further three-day extension was granted on 12 January 1989 at 9.32 p.m. He was released at 9 p.m. on 15 January 1989. He was therefore detained for a total period of six days, fourteen hours and thirty minutes.

During his detention he was interrogated on forty-three occasions and denied access to books, newspapers and writing materials as well radio and television. He was not allowed to associate with other prisoners.

Although access to a solicitor was at first delayed for forty-eight hours because it was believed by the police that such a visit would interfere with the investigation, the first applicant was subsequently visited by his solicitor on 11 January 1989. He was seen by a medical practitioner on seventeen occasions during police custody.

B. Patrick McBride

11. The second applicant, Mr Patrick McBride, was born in 1951.

He was arrested at his home by police officers on 5 January 1989 at 5.05 a.m. pursuant to section 12 (1) (b) of the 1984 Act. He was then removed to Castlereagh Interrogation Centre where he was served with a copy of the "Notice to Persons in Police Custody". A three-day extension of his period of detention was granted by the Secretary of State at 5.10 p.m. on 6 January 1989. He was released at 11.30 a.m. on Monday 9 January 1989. He was therefore detained for a total period of four days, six hours and twenty-five minutes.

During his detention he was interrogated on twenty-two occasions and was subject to the same regime as Mr Brannigan (see paragraph 10 above).

He received two visits from his solicitor on 5 and 7 January 1989 and was seen by a medical practitioner on eight occasions during police custody.

Mr McBride was shot dead on 4 February 1992 by a policeman who had run amok and attacked Sinn Fein Headquarters in Belfast.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Introduction

12. The emergency situation in Northern Ireland in the early 1970s and the attendant level of terrorist activity form the background to the introduction of the Prevention of Terrorism (Temporary Provisions) Act 1974 ("the 1974 Act"). Between 1972 and 1992, over three thousand deaths were attributable to terrorism in Northern Ireland. In the mid 1980s, the number of deaths was significantly lower than in the early 1970s but organised terrorism has continued to grow.

Since the commencement of the terrorist cam-

paign there have been 35,104 people injured in Northern Ireland as a result of terrorist acts. Many of these injuries involved loss of limbs and permanent physical disability. In the same period there have been a total of 41,859 terrorist shooting or bombing incidents. Other parts of the United Kingdom have also been subjected to a considerable scale of terrorist violence.

13. The 1974 Act came into force on 29 November 1974. The Act proscribed the Irish Republican Army ("IRA") and made it an offence to display support in public of that organisation in Great Britain. The IRA was already a proscribed organisation in Northern Ireland. The Act also conferred special powers of arrest and detention on the police so that they could deal more effectively with the threat of terrorism (see paragraphs 16-17 below).

This Act was subject to renewal every six months by Parliament so that, inter alia, the need for the continued use of the special powers could be monitored. The Act was thus renewed until March 1976, when it was re-enacted with certain amendments.

Under section 17 of the 1976 Act, the special powers were subject to parliamentary renewal every twelve months. The 1976 Act was in turn renewed annually until 1984, when it was re-enacted with certain amendments. The 1984 Act, which came into force in March 1984, proscribed the Irish National Liberation Army as well as the IRA. It was renewed every year until replaced by the 1989 Act which came into force on 27 March 1989. Section 14 of the 1989 Act contains provisions similar to those contained in section 12 of the 1984 Act.

14. The 1976 Act was reviewed by Lord Shackleton in a report published in July 1978 and subsequently by Lord Jellicoe in a report published in January 1983. Annual reports on the 1984 Act have been presented to Parliament by Sir Cyril Philips (for 1984 and 1985) and Viscount Colville (from 1986-1991). A wider-scale review of the operation of the 1984 Act was also carried out by Viscount Colville in 1987.
15. These reviews were commissioned by the Government and presented to Parliament to assist consideration of the continued need for the legislation. The authors of these reports concluded in particular that in view of the problems inherent in the prevention and investigation of terrorism, the continued use of the special powers of arrest and detention was indispensable. The suggestion that deci-

sions extending detention should be taken by the courts was rejected, notably because the information grounding those decisions was highly sensitive and could not be disclosed to the persons in detention or their legal advisers. For various reasons, the decisions were considered to fall properly within the sphere of the executive.

In his 1987 report reviewing the provisions of section 12, Viscount Colville considered that good reasons existed for extending detention in certain cases beyond forty-eight hours and up to seven days. He noted in this regard that the police in Northern Ireland were frequently confronted by a situation where they had good intelligence to connect persons with a terrorist incident but the persons concerned, if detained, made no statements, and witnesses were afraid to come forward, certainly in court: in these circumstances, it was concluded, the reliance on forensic evidence by the prosecution was increasing, and detective work had assumed a higher degree of importance. He also set out the reasons which individually or, as often, in combination constituted good grounds for extending the various periods within which otherwise persons suspected of involvement in terrorism would have to be charged or taken to court. These included checking of fingerprints; forensic tests; checking the detainee's replies against intelligence; new lines of inquiry; information obtained from one or more than one other detainee in the same case; finding and consulting other witnesses (Command Paper 264, paragraphs 5.1.5-5.1.7, December 1987).

B. Power to arrest without warrant under the 1984 and other Acts

16. The relevant provisions of section 12 of the 1984 Act, substantially the same as those of the 1974 and 1976 Acts, are as follows:

"12. (1) [A] constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be

...

(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;

...

(3) The acts of terrorism to which this Part of this Act applies are

(a) acts of terrorism connected with the affairs

of Northern Ireland;

...

(4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty-eight hours by a period or periods specified by him.

(5) Any such further period or periods shall not exceed five days in all.

(6) The following provisions (requirement to bring accused person before the court after his arrest) shall not apply to a person detained in right of the arrest

...

(d) Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981;

...

(8) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section."

17. According to the definition given in section 14 (1) of the 1984 Act, "terrorism means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear". An identical definition of terrorism in the Northern Ireland (Emergency Provisions) Act 1978 was held to be "in wide terms" by the House of Lords, which rejected an interpretation of the word "terrorist" that would have been "in narrower terms than popular usage of the word 'terrorist' might connote to a police officer or a layman" (McKee v. Chief Constable for Northern Ireland [1985] 1 All England Law Reports 1 at 3-4, per Lord Roskill).

C. Detention under the ordinary criminal law

18. Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981, declared inapplicable in cases of suspected terrorism by section 12(6) (d) of the 1984 Act (see paragraph 16 above), provided that where a person arrested without warrant was not released from custody within twenty-four hours, he had to be brought before a Magistrates' Court as soon as practicable thereafter but not later than forty-eight hours after his arrest.
19. Article 131 was repealed by the Police and Criminal Evidence (Northern Ireland) Order 1989 (Statutory Instrument 1989/1341 (Northern Ireland) 12). Under the provisions of the

1989 Order (which corresponds directly with the Police and Criminal Evidence Act 1984 in force in England and Wales) a person arrested on suspicion of his involvement in an offence may initially not be kept in police detention for more than twenty-four hours without being charged (Article 42(1)). On the authority of a police officer of the rank of Superintendent or above, the detention may be extended for a period not exceeding thirty-six hours from the time of arrest, or arrival at a police station after arrest, when the officer concerned:

"... has reasonable grounds for believing that -

(a) the detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;

(b) an offence for which he is under arrest is a serious arrestable offence;

(c) the investigation is being conducted diligently and expeditiously." (Article 43(1))

By Article 44(1) of the Order a Magistrates' Court is empowered, on a complaint in writing by a constable, to extend the period of police detention if satisfied that there are reasonable grounds for believing that the further detention of that person is justified. Detention is only justified for these purposes if the conditions set out in (a)-(c) above are satisfied (Article 44(4)). The person to whom the complaint relates must be furnished with a copy of the complaint and brought before the court for the hearing (Article 44(2)) and is entitled to be legally represented at the hearing (Article 44(3)). The period of further detention authorised by the warrant may not exceed thirty-six hours (Article 44(12)). By Article 45 a Magistrates' Court may, on a complaint in writing by a constable, extend the period of detention for such period as the court thinks fit, having regard to the evidence before it (Article 45(1), (2)). This additional extension may not exceed thirty-six hours and may not end later than ninety-six hours after the time of arrest or arrival at the police station after arrest (Article 45(3)).

D. Exercise of the power to make an arrest under section 12(1)(b) of the 1984 Act

20. In order to make a lawful arrest under section 12(1)(b) of the 1984 Act, the arresting officer must have a reasonable suspicion that the person being arrested is or has been concerned in the commission, preparation or instigation of

acts of terrorism. In addition, an arrest without warrant is subject to the applicable common law rules laid down by the House of Lords in the case of *Christie v. Leachinsky* [1947] Appeal Cases 573 at 587 and 600. The person being arrested must in ordinary circumstances be informed of the true ground of his arrest at the time he is taken into custody or, if special circumstances exist which excuse this, as soon thereafter as it is reasonably practicable to inform him. This does not require technical or precise language to be used provided the person being arrested knows in substance why.

In the case of *Ex parte Lynch* [1980] Northern Ireland Reports 126 at 131, in which the arrested person sought a writ of habeas corpus, the High Court of Northern Ireland discussed section 12(1)(b). The arresting officer had told the applicant that he was arresting him under section 12 of the 1976 Act as he suspected him of being involved in terrorist activities. Accordingly, the High Court found that the lawfulness of the arrest could not be impugned in this respect.

21. The arresting officer's suspicion must be reasonable in the circumstances and to decide this the court must be told something about the sources and grounds of the suspicion (per *Higgins J. in Van Hout v. Chief Constable of the RUC and the Northern Ireland Office*, decision of Northern Ireland High Court, 28 June 1984).

E. Purpose of arrest and detention under section 12 of the 1984 Act

22. Under ordinary law, there is no power to arrest and detain a person merely to make enquiries about him. The questioning of a suspect on the ground of a reasonable suspicion that he has committed an arrestable offence is a legitimate cause for arrest and detention without warrant where the purpose of such questioning is to dispel or confirm such a reasonable suspicion, provided he is brought before a court as soon as practicable (*R. v. Houghton* [1979] 68 Criminal Appeal Reports 197 at 205, and *Holgate-Mohammed v. Duke* [1984] 1 All England Law Reports 1054 at 1059).

On the other hand, Lord Lowry LCJ held in the case of *Ex parte Lynch* (loc. cit. at 131) that under the 1984 Act no specific crime need be suspected to ground a proper arrest under section 12(1)(b). He added (*ibid.*):

"... [I]t is further to be noted that an arrest under section 12(1) leads ... to a permitted pe-

riod of detention without preferring a charge. No charge may follow at all; thus an arrest is not necessarily ... the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially investigated."

F. Extension of period of detention

23. In Northern Ireland, applications for extended detention beyond the initial forty-eight-hour period are processed at senior police level in Belfast and then forwarded to the Secretary of State for Northern Ireland for approval by him or, if he is not available, a junior minister.

There are no criteria in the 1984 Act (or its predecessors) governing decisions to extend the initial period of detention, though strict criteria that have been developed in practice are listed in the reports and reviews referred to above (see paragraphs 14 and 15 above).

According to statistics submitted by the Government a total number of 1,549 persons were arrested under the Prevention of Terrorism (Temporary Provisions) Act in 1990 of whom approximately 333 were eventually charged. Of these, 1,140 were detained for two days or less, 17% of whom were charged. However, of the 365 persons detained for more than two days and less than five days 39% were charged. In addition, of the 45 persons detained for more than five days some 67% were charged, many with serious offences including murder, attempted murder and causing explosions. In each of these cases the evidence which formed the basis of the charges only became available or was revealed in the latest stages of the detention of the person concerned.

G. Rights during detention

24. A person detained under section 12 of the 1984 Act (now section 14 of the 1989 Act) has the rights, if he so requests, to have a friend, relative or other person informed of the fact and place of his detention and to consult a solicitor privately; he must be informed of these rights as soon as practicable. Any such requests must be complied with as soon as practicable. This may, however, be delayed for up to forty-eight hours in certain specified circumstances (sections 44 and 45 of the Northern Ireland (Emergency Provisions) Act 1991 - formerly sections 14 and 15 of the 1987 Act).

A decision to deny access to a solicitor within the first forty-eight hours is subject to judicial review. Cases decided by the High Court in

Northern Ireland establish that under section 45 of the Northern Ireland (Emergency Provisions) Act 1991 the power to delay access can only be used if the officer concerned has reasonable grounds for believing that the exercise of the right would have one or more of the specific consequences set out in subsection 8 of section 45. There is a burden on the officer concerned to show to the satisfaction of the court that he had reasonable grounds for his belief. In the absence of evidence to establish such reasonable grounds the court will order the immediate grant of access to a solicitor (decisions of the Northern Ireland High Court in applications for judicial review by Patrick Duffy (20 September 1991), Dermot and Deirdre McKenna (10 February 1992), Francis Maher and Others (25 March 1992)).

Since 1979, the practice has been that a detainee is not interviewed until he has been examined by a forensic medical officer. Thereafter, arrangements are made for the detainee to have access to a medical officer including his own doctor. There is provision for consultation with a forensic medical officer at a pre-arranged time each day.

The above rights are briefly set out in a "Notice to Persons in Police Custody" which is served on persons arrested under section 12 when they are detained.

H. Judicial involvement in terrorist investigations

25. Under paragraph 2 of Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989 a justice of the peace may grant a warrant authorising a constable involved in a terrorist investigation to search premises and seize and retain anything found there if he has reasonable grounds for believing *inter alia* that it is likely to be of substantial value to the investigation. Paragraphs 5(1) and (4) of Schedule 7 confer a similar power on a circuit judge and on a county court judge in Northern Ireland.

However, paragraph 8(2) provides that the Secretary of State may give to any constable in Northern Ireland the authority which may be given by a search warrant under paragraphs 2 and 5 if *inter alia* it appears to him that the disclosure of information that would be necessary for an application under those provisions "would be likely to prejudice the capability of members of the Royal Ulster Constabulary in relation to the investigation of offences ... or otherwise prejudice the safety of, or of persons

in, Northern Ireland".

III. REMEDIES

26. The principal remedies available to persons detained under the 1984 Act are an application for a writ of habeas corpus and a civil action claiming damages for false imprisonment.

1. Habeas Corpus

27. Under the 1984 Act, a person may be arrested and detained in right of arrest for a total period of seven days (section 12(4) and (5) - see paragraph 16 above). Paragraph 5(2) of Schedule 3 to the 1984 Act provides that a person detained pursuant to an arrest under section 12 of the Act "shall be deemed to be in legal custody when he is so detained". However, the remedy of habeas corpus is not precluded by paragraph 5(2) cited above. If the initial arrest is unlawful, so also is the detention grounded upon that arrest (per Higgins J. in the Van Hout case, loc. cit. at 18).
28. Habeas Corpus is a procedure whereby a detained person may make an urgent application for release from custody on the basis that his detention is unlawful.

The court hearing the application does not sit as a court of appeal to consider the merits of the detention: it is confined to a review of the lawfulness of the detention. The scope of this review is not uniform and depends on the context of the particular case and, where appropriate, the terms of the relevant statute under which the power of detention is exercised. The review will encompass compliance with the technical requirements of such a statute and may extend, *inter alia*, to an inquiry into the reasonableness of the suspicion grounding the arrest (*Ex parte Lynch*, loc. cit., and *Van Hout*, loc. cit.). A detention that is technically legal may also be reviewed on the basis of an alleged misuse of power in that the authorities may have acted in bad faith, capriciously or for an unlawful purpose (*R. v. Governor of Brixton Prison*, *ex parte Sarno* [1916] 2 King's Bench Reports 742, and *R. v. Brixton Prison (Governor)*, *ex parte Soblen* [1962] 3 All England Law Reports 641).

The burden of proof is on the respondent authorities which must justify the legality of the decision to detain, provided that the person applying for a writ of habeas corpus has first established a *prima facie* case (*Khawaja v. Sec-*

retary of State [1983] 1 All England Law Reports 765).

2. False imprisonment

29. A person claiming that he has been unlawfully arrested and detained may in addition bring an action seeking damages for false imprisonment. Where the lawfulness of the arrest depends upon reasonable cause for suspicion, it is for the defendant authority to prove the existence of such reasonable cause (*Dallison v. Caffrey* [1965] 1 Queen's Bench Reports 348 and *Van Hout*, loc. cit. at 15). In false imprisonment proceedings, the reasonableness of an arrest may be examined on the basis of the well-established principles of judicial review of the exercise of executive discretion (see *Holgate-Mohammed v. Duke*, loc. cit.).

IV. III. THE UNITED KINGDOM DEROGATION

30. Issues akin to those arising in the present case were examined by the Court in its *Brogan and Others* judgment of 29 November 1988 (Series A no. 145-B) where it held that there had been a violation of Article 5 para. 3 (art. 5-3) of the Convention in respect of each of the applicants, all of whom had been detained under section 12 of the 1984 Act. The Court held that even the shortest of the four periods of detention concerned, namely four days and six hours, fell outside the constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). In addition, the Court held that there had been a violation of Article 5 para. 5 (art. 5-5) in the case of each applicant (*Series A no. 145-B*, pp. 30-35, paras. 55-62 and 66-67).

Following that judgment, the Secretary of State for the Home Department made a statement in the House of Commons on 22 December 1988 in which he explained the difficulties of judicial control over decisions to arrest and detain suspected terrorists. He stated *inter alia* as follows:

"We must pay proper regard to the tremendous pressures that are already faced by the judiciary, especially in Northern Ireland, where most cases have to be considered. We are also concerned that information about terrorist intentions, which often forms part of the case for an extension of detention, does not find its way back to the terrorists as a consequence of judicial procedures, which at least in the United Kingdom legal tradition generally require someone accused and his legal advisers to know the information alleged against him.

...

In the meantime, the position cannot be left as it stands. I have already made clear to the House that we shall ensure that the police continue to have the powers they need to counter terrorism, and they continue to need to be able to detain suspects for up to seven days in some cases. To ensure that there can be no doubt about the ability of the police to deal effectively with such cases, the Government are today taking steps to give notice of derogation under Article 15 (art. 15) of the European Convention of Human Rights, and Article 4 of the International Covenant on Civil and Political Rights. There is a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom ..."

31. On 23 December 1988 the United Kingdom informed the Secretary General of the Council of Europe that the Government had availed itself of the right of derogation conferred by Article 15 para. 1 (art. 15-1) to the extent that the exercise of powers under section 12 of the 1984 Act might be inconsistent with the obligations imposed by Article 5 para. 3 (art. 5-3) of the Convention. Part of that declaration reads as follows:

"... Following [the Brogan and Others judgment], the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view. Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed

in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government have availed themselves of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice ..."

32. The Government have reviewed whether the powers of extended detention could be conferred on the normal courts but have concluded that it would not be appropriate to involve courts in such decisions for the reasons given in a Written Answer in Parliament by the Secretary of State, Mr David Waddington, on 14 November 1989:

"Decisions to authorise the detention of terrorist suspects for periods beyond 48 hours may be, and often are, taken on the basis of information, the nature and source of which could not be revealed to a suspect or his legal adviser without serious risk to individuals assisting the police or the prospect of further valuable intelligence being lost. Any new procedure which avoided those dangers by allowing a court to make a decision on information not presented to the detainee or his legal adviser would represent a radical departure from the principles which govern judicial proceedings in this country and could seriously affect public trust and confidence in the independence of the judiciary. The Government would be most reluctant to introduce any new procedure which could have this effect". (Official Report, 14 November 1989, col. 210)

In a further notice dated 12 December 1989 the United Kingdom informed the Secretary General that a satisfactory procedure for the review of detention of terrorist suspects involving the judiciary had not been identified and that the derogation would therefore remain in place for as long as circumstances require.

PROCEEDINGS BEFORE THE COMMISSION

33. The applicants applied to the Commission on 19 January 1989 (applications nos. 14553/89 and 14554/89). They complained that they were not brought promptly before a judge, in breach of Article 5 para. 3 (art. 5-3). They also alleged that they did not have an enforceable right to compensation in breach of Article 5 para. 5 (art. 5-5) and that there was no effective remedy in respect of their complaints contrary

to Article 13 (art. 13).

They subsequently withdrew other complaints that they had made under Articles 3, 5 paras. 1 and 4, 8, 9 and 10 (art. 3, art. 5-1, art. 5-4, art. 8, art. 9, art. 10) of the Convention.

34. On 5 October 1990 the Commission ordered the joinder of the applications and on 28 February 1991 declared the case admissible. In its report of 3 December 1991 (Article 31) (art. 31) the Commission expressed the opinion:

(a) by eight votes to five, that there had been no violation of Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) of the Convention in view of the United Kingdom's derogation of 23 December 1988 under Article 15 (art. 15) of the Convention;

(b) unanimously, that no separate issue arose under Article 13 (art. 13) .

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

35. The Government requested the Court to find that there has been no violation of Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) in view of the United Kingdom's derogation of 23 December 1988 under Article 15 (art. 15) of the Convention and that there has been no violation of Article 13 (art. 13) or alternatively that no separate issue arises under this provision.

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 (ART. 5)

36. The applicants, Mr Brannigan and Mr McBride, were detained under section 12 (1) (b) of the 1984 Act in early January 1989 very shortly after the Government's derogation of 23 December 1988 under Article 15 (art. 15) of the Convention, which itself was made soon after the Court's judgment of 29 November 1988 in the case of Brogan and Others (judgment of 29 November 1988, Series A no. 145-B).

Their detention lasted for periods of six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes respectively (see paragraphs 10-11 above). They complained of violations of Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) of the Convention. The relevant parts of Article 5 (art. 5) are as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...

...

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

37. The Government, noting that both of the applicants were detained for longer periods than the shortest period found by the Court to be in breach of Article 5 para. 3 (art. 5-3) in the case of Brogan and Others, conceded that the requirement of promptness had not been respected in the present cases (see paragraph 30 above). They further accepted that, in the absence of an enforceable right to compensation in respect of the breach of Article 5 para. 3 (art. 5-3), Article 5 para. 5 (art. 5-5) had not been complied with.

Having regard to its judgment in the case of Brogan and Others, the Court finds that Article 5 paras. 3 and 5 (art. 5-3, art. 5-5) have not been respected (*loc. cit.*, pp. 30-35, paras. 55-62 and 66-67).

38. However, the Government further submitted that the failure to observe these requirements of Article 5 (art. 5) had been met by their derogation of 23 December 1988 under Article 15 (art. 15) of the Convention.

The Court must therefore examine the validity of the Government's derogation in the light of

this provision. It recalls at the outset that the question whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 (art. 15) by reason of the terrorist campaign in Northern Ireland was specifically left open by the Court in the Brogan and Others case (loc. cit., pp. 27-28, para. 48).

Validity of the United Kingdom's derogation under Article 15 (art. 15)

39. The applicants maintained that the derogation under Article 15 (art. 15) was invalid. This was disputed by both the Government and the Commission.

40. Article 15 (art. 15) provides:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 (art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 (art. 3, art. 4-1, art. 7) shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

1. *The Court's approach to the matter*

41. The applicants argued that it would be inconsistent with Article 15 para. 2 (art. 15-2) if, in derogating from safeguards recognised as essential for the protection of non-derogable rights such as Articles 2 and 3 (art. 2, art. 3), the national authorities were to be afforded a wide margin of appreciation. This was especially so where the emergency was of a quasi-permanent nature such as that existing in Northern Ireland. To do so would also be inconsistent with the Brogan and Others judgment where the Court had regarded judicial control as one of the fundamental principles of a democratic society and had already - they claimed - extended to the Government a margin of appre-

ciation by taking into account in paragraph 58 (p. 32) the context of terrorism in Northern Ireland (loc. cit.).

42. In their written submissions, Amnesty International maintained that strict scrutiny was required by the Court when examining derogation from fundamental procedural guarantees which were essential for the protection of detainees at all times, but particularly in times of emergency. Liberty, Interights and the Committee on the Administration of Justice ("Liberty and Others") submitted for their part that, if States are to be allowed a margin of appreciation at all, it should be narrower the more permanent the emergency becomes.

43. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207).

Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision (ibid.). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.

2. *Existence of a public emergency threatening the life of the nation*

44. Although the applicants did not dispute that there existed a public emergency "threatening the life of the nation", they submitted that the burden rested on the Government to satisfy the Court that such an emergency really existed.

45. It was, however, suggested by Liberty and Oth-

ers in their written submissions that at the relevant time there was no longer any evidence of an exceptional situation of crisis. They maintained that reconsideration of the position could only properly have led to a further derogation if there was a demonstrable deterioration in the situation since August 1984 when the Government withdrew their previous derogation. For the Standing Advisory Commission on Human Rights, on the other hand, there was a public emergency in Northern Ireland at the relevant time of a sufficient magnitude to entitle the Government to derogate.

46. Both the Government and the Commission, referring to the existence of public disturbance in Northern Ireland, maintained that there was such an emergency.
47. Recalling its case-law in *Lawless v. Ireland* (judgment of 1 July 1961, Series A no. 3, p. 56, para. 28) and *Ireland v. the United Kingdom* (loc. cit., Series A no. 25, p. 78, para. 205) and making its own assessment, in the light of all the material before it as to the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom (see paragraph 12 above), the Court considers there can be no doubt that such a public emergency existed at the relevant time.

It does not judge it necessary to compare the situation which obtained in 1984 with that which prevailed in December 1988 since a decision to withdraw a derogation is, in principle, a matter within the discretion of the State and since it is clear that the Government believed that the legislation in question was in fact compatible with the Convention (see paragraphs 49-51 below).

3. *Were the measures strictly required by the exigencies of the situation?*

(a) **General considerations**

48. The Court recalls that judicial control of interferences by the executive with the individual's right to liberty provided for by Article 5 (art. 5) is implied by one of the fundamental principles of a democratic society, namely the rule of law (see the above-mentioned *Brogan and Others* judgment, Series A no. 145-B, p. 32, para. 58). It further observes that the notice of derogation invoked in the present case was lodged by the respondent Government soon after the judgment in the above-mentioned *Brogan and Others* case where the Court had found the Government to be in breach of their obli-

gations under Article 5 para. 3 (art. 5-3) by not bringing the applicants "promptly" before a court.

The Court must scrutinise the derogation against this background and taking into account that the power of arrest and detention in question has been in force since 1974. However, it must be observed that the central issue in the present case is not the existence of the power to detain suspected terrorists for up to seven days - indeed a complaint under Article 5 para. 1 (art. 5-1) was withdrawn by the applicants (see paragraph 33 above) - but rather the exercise of this power without judicial intervention.

(b) **Was the derogation a genuine response to an emergency situation?**

49. For the applicants, the purported derogation was not a necessary response to any new or altered state of affairs but was the Government's reaction to the decision in *Brogan and Others* and was lodged merely to circumvent the consequences of this judgment.
50. The Government and the Commission maintained that, while it was true that this judgment triggered off the derogation, the exigencies of the situation have at all times since 1974 required the powers of extended detention conferred by the Prevention of Terrorism legislation. It was the view of successive Governments that these powers were consistent with Article 5 para. 3 (art. 5-3) and that no derogation was necessary. However, both the measures and the derogation were direct responses to the emergency with which the United Kingdom was and continues to be confronted.
51. The Court first observes that the power of arrest and extended detention has been considered necessary by the Government since 1974 in dealing with the threat of terrorism. Following the *Brogan and Others* judgment the Government were then faced with the option of either introducing judicial control of the decision to detain under section 12 of the 1984 Act or lodging a derogation from their Convention obligations in this respect. The adoption of the view by the Government that judicial control compatible with Article 5 para. 3 (art. 5-3) was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable. Accordingly, the power of extended detention without such judicial control and the derogation of 23 December 1988 being clearly

linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response.

(c) Was the derogation premature?

52. The applicants maintained that derogation was an interim measure which Article 15 (art. 15) did not provide for since it appeared from the notice of derogation communicated to the Secretary General of the Council of Europe on 23 December 1988 that the Government had not reached a "firm or final view" on the need to derogate from Article 5 para. 3 (art. 5-3) and required a further period of reflection and consultation. Following this period the Secretary of State for the Home Department confirmed the derogation in a statement to Parliament on 14 November 1989 (see paragraph 32 above). Prior to this concluded view Article 15 (art. 15) did not permit derogation. Furthermore, even at this date the Government had not properly examined whether the obligation in Article 5 para. 3 (art. 5-3) could be satisfied by an "officer authorised by law to exercise judicial power".
53. The Government contended that the validity of the derogation was not affected by their examination of the possibility of judicial control of extended detention since, as the Commission had pointed out, it was consistent with the requirements of Article 15 para. 3 (art. 15-3) to keep derogation measures under constant review.
54. The Court does not accept the applicants' argument that the derogation was premature.

While it is true that Article 15 (art. 15) does not envisage an interim suspension of Convention guarantees pending consideration of the necessity to derogate, it is clear from the notice of derogation that "against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced". However it remained the Government's wish "to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer" (see paragraph 31 above).

The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations. Indeed, such a process of continued re-

flection is not only in keeping with Article 15 para. 3 (art. 15-3) which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality.

(d) Was the absence of judicial control of extended detention justified?

55. The applicants further considered that there was no basis for the Government's assertion that control of extended detention by a judge or other officer authorised by law to exercise judicial power was not possible or that a period of seven days' detention was necessary. They did not accept that the material required to satisfy a court of the justification for extended detention could be more sensitive than that needed in proceedings for habeas corpus. They and the Standing Advisory Commission on Human Rights also pointed out that the courts in Northern Ireland were frequently called on to deal with submissions based on confidential information - for example, in bail applications - and that there were sufficient procedural and evidential safeguards to protect confidentiality. Procedures also existed where judges were required to act on the basis of material which would not be disclosed either to the legal adviser or to his client. This was the case, for example, with claims by the executive to public interest immunity or application by the police to extend detention under the Police and Criminal Evidence (Northern Ireland) Order 1989 (see paragraph 19 above).
56. On this point the Government responded that none of the above procedures involved both the non-disclosure of material to the detainee or his legal adviser and an executive act of the court. The only exception appeared in Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989 where inter alia the court may make an order in relation to the production of, and search for, special material relevant to terrorist investigations. However, paragraph 8 of Schedule 7 provides that, where the disclosure of information to the court would be too sensitive or would prejudice the investigation, the power to make the order is conferred on the Secretary of State and not the court (see paragraph 25 above).

It was also emphasised that the Government had reluctantly concluded that, within the framework of the common-law system, it was not feasible to introduce a system which would be compatible with Article 5 para. 3 (art. 5-3)

but would not weaken the effectiveness of the response to the terrorist threat. Decisions to prolong detention were taken on the basis of information the nature and source of which could not be revealed to a suspect or his legal adviser without risk to individuals assisting the police or the prospect of further valuable intelligence being lost. Moreover, involving the judiciary in the process of granting or approving extensions of detention created a real risk of undermining their independence as they would inevitably be seen as part of the investigation and prosecution process.

In addition, the Government did not accept that the comparison with habeas corpus was a valid one since judicial involvement in the grant or approval of extension would require the disclosure of a considerable amount of additional sensitive information which it would not be necessary to produce in habeas corpus proceedings. In particular, a court would have to be provided with details of the nature and extent of police inquiries following the arrest, including details of witnesses interviewed and information obtained from other sources as well as information about the future course of the police investigation.

Finally, Lords Shackleton and Jellicoe and Viscount Colville in their reports had concluded that arrest and extended detention were indispensable powers in combating terrorism. These reports also found that the training of terrorists in remaining silent under police questioning hampered and protracted the investigation of terrorist offences. In consequence, the police were required to undertake extensive checks and inquiries and to rely to a greater degree than usual on painstaking detective work and forensic examination (see paragraph 15 above).

57. The Commission was of the opinion that the Government had not overstepped their margin of appreciation in this regard.
58. The Court notes the opinions expressed in the various reports reviewing the operation of the Prevention of Terrorism legislation that the difficulties of investigating and prosecuting terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control (see paragraph 15 above). Moreover, these special difficulties were recognised in its above-mentioned Brogan and Others judgment (see Series A no. 145-B, p. 33, para. 61).

It further observes that it remains the view of the respondent Government that it is essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or approval of extensions.

The Court also notes that the introduction of a "judge or other officer authorised by law to exercise judicial power" into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5 para. 3 (art. 5-3). That provision - like Article 5 para. 4 (art. 5-4) - must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required (see, among other authorities, the following judgments: as regards Article 5 para. 3 (art. 5-3) *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, p. 13, para. 30 and *Huber v. Switzerland* of 23 October 1990, Series A no. 188, p. 18, paras. 42-43; as regards Article 5 para. 4 (art. 5-4), *De Wilde, Ooms and Versyp v. Belgium* of 18 June 1971, Series A no. 12, p. 41, para. 78, *Sanchez-Reisse v. Switzerland* of 21 October 1986, Series A no. 107, p. 19, para. 51, and *Lamy v. Belgium* of 30 March 1989, Series A no. 151, pp. 15-16, para. 28).

59. It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 82, para. 214, and the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, para. 49). In the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attach great importance.
60. In the light of these considerations it cannot be said that the Government have exceeded their margin of appreciation in deciding, in the pre-

vailing circumstances, against judicial control.

(e) Safeguards against abuse

61. The applicants, Amnesty International and Liberty and Others maintained that the safeguards against abuse of the detention power were negligible and that during the period of detention the detainee was completely cut off from the outside world and not permitted access to newspapers, radios or his family. Amnesty International, in particular, stressed that international standards such as the 1988 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173 of 9 December 1988) ruled out incommunicado detention by requiring access to lawyers and members of the family. Amnesty submitted that being brought promptly before a judicial authority was especially important since in Northern Ireland habeas corpus has been shown to be ineffective in practice. In their view Article 5 para. 4 (art. 5-4) should be considered non-derogable in times of public emergency.

In addition, it was contended that a decision to extend detention cannot in practical terms be challenged by habeas corpus or judicial review since it is taken completely in secret and, in nearly all cases, is granted. This is evident from the fact that, despite the thousands of extended detention orders, a challenge to such a decision has never been attempted.

62. Although submissions have been made by the applicants and the organisations concerning the absence of effective safeguards, the Court is satisfied that such safeguards do in fact exist and provide an important measure of protection against arbitrary behaviour and incommunicado detention.
63. In the first place, the remedy of habeas corpus is available to test the lawfulness of the original arrest and detention. There is no dispute that this remedy was open to the applicants had they or their legal advisers chosen to avail themselves of it and that it provides an important measure of protection against arbitrary detention (see the above-mentioned Brogan and Others judgment, Series A no. 145-B, pp. 34-35, paras. 63-65). The Court recalls, in this context, that the applicants withdrew their complaint of a breach of Article 5 para. 4 (art. 5-4) of the Convention (see paragraph 33 above).
64. In the second place, detainees have an abso-

lute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. Both of the applicants were, in fact, free to consult a solicitor after this period (see paragraphs 10 and 11 above).

Moreover, within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear from judgments of the High Court in Northern Ireland that the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld (see paragraph 24 above).

It is also not disputed that detainees are entitled to inform a relative or friend about their detention and to have access to a doctor.

65. In addition to the above basic safeguards the operation of the legislation in question has been kept under regular independent review and, until 1989, it was subject to regular renewal.

(f) Conclusion

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

4. Other obligations under international law

67. The Court recalls that under Article 15 para. 1 (art. 15-1) measures taken by the State derogating from Convention obligations must not be "inconsistent with its other obligations under international law" (see paragraph 40 above).
68. In this respect, before the Court the applicants contended for the first time that it was an essential requirement for a valid derogation under Article 4 of the 1966 United Nations International Covenant on Civil and Political Rights ("the Covenant"), to which the United Kingdom is a Party, that a public emergency must have been "officially proclaimed". Since such proclamation had never taken place the derogation was inconsistent with the United Kingdom's other obligations under international law. In

their view this requirement involved a formal proclamation and not a mere statement in Parliament.

69. For the Government, it was open to question whether an official proclamation was necessary for the purposes of Article 4 of the Covenant, since the emergency existed prior to the ratification of the Covenant by the United Kingdom and has continued to the present day. In any event, the existence of the emergency and the fact of derogation were publicly and formally announced by the Secretary of State for the Home Department to the House of Commons on 22 December 1988. Moreover there had been no suggestion by the United Nations Human Rights Committee that the derogation did not satisfy the formal requirements of Article 4.
70. The Delegate of the Commission considered the Government's argument to be tenable.
71. The relevant part of Article 4 of the Covenant states:
- "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ..."
72. The Court observes that it is not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in Article 4 of the Covenant. Nevertheless it must examine whether there is any plausible basis for the applicant's argument in this respect.
73. In his statement of 22 December 1988 to the House of Commons the Secretary of State for the Home Department explained in detail the reasons underlying the Government's decision to derogate and announced that steps were being taken to give notice of derogation under both Article 15 (art. 15) of the European Convention and Article 4 of the Covenant. He added that there was "a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom ..." (see paragraph 30 above).

In the Court's view the above statement, which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation. It therefore considers that there is no basis for the applicants' arguments in this regard.

5. Summary

74. In the light of the above examination, the Court concludes that the derogation lodged by the United Kingdom satisfies the requirements of Article 15 (art. 15) and that therefore the applicants cannot validly complain of a violation of Article 5 para. 3 (art. 5-3). It follows that there was no obligation under Article 5 para. 5 (art. 5-5) to provide the applicants with an enforceable right to compensation.

II. ALLEGED VIOLATION OF ARTICLE 13 (ART. 13)

75. In the proceedings before the Commission the applicants complained that they had no effective domestic remedy at their disposal in respect of their Article 5 (art. 5) claims. They requested the Court to uphold this claim but made no submissions in support of it.

Article 13 (art. 13) provides as follows:

"Everyone whose rights and freedoms as set forth in [the] 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."

76. The Court recalls that it was open to the applicants to challenge the lawfulness of their detention by way of proceedings for habeas corpus and that the Court in its Brogan and Others judgment of 29 November 1988 found that this remedy satisfied Article 5 para. 4 (art. 5-4) of the Convention (Series A no. 145-B, pp. 34-35, paras. 63-65). Since the requirements of Article 13 (art. 13) are less strict than those of Article 5 para. 4 (art. 5-4), which must be regarded as the *lex specialis* in respect of complaints under Article 5 (art. 5), there has been no breach of this provision (see the *de Jong, Baljet and van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, p. 27, para. 60).

FOR THESE REASONS, THE COURT

1. Holds by twenty-two votes to four that the United Kingdom's derogation satisfies the requirements of Article 15 (art. 15) and that therefore the applicants cannot validly complain of a violation of Article 5 para. 3 (art. 5-3);
2. Holds by twenty-two votes to four that there has been no violation of Article 5 para. 5 (art.

5-5);

3. Holds by twenty-two votes to four that there has been no violation of Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 May 1993.

Rolv RYSSDAL, *President*

Marc-André EISSEN, *Registrar*

A statement by Mr Thór Vilhjálmsson and, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- concurring opinion of Mr Matscher, joined by Mr Morenilla;
- dissenting opinion of Mr Pettiti;
- dissenting opinion of Mr Walsh;
- concurring opinion of Mr Russo;
- dissenting opinion of Mr De Meyer;
- concurring opinion of Mr Martens;
- dissenting opinion of Mr Makarczyk.

DECLARATION BY JUDGE THÓR VILHJÁLMSOON

In my opinion the second sub-paragraph of paragraph 37 of the judgment should be deleted.

CONCURRING OPINION OF JUDGE MATSCHER, JOINED BY JUDGE MORENILLA

(Translation)

In the final analysis I subscribe to the conclusion reached by the majority of the Court, namely that the applicants cannot validly complain of a violation of Article 5 para. 3 (art. 5-3) and that there had been no violation of Articles 5 para. 5 and 13 (art. 5-5, art. 13) of the Convention.

Nevertheless - and particularly from the point of

view of method - I should like to stress the following:

Correctly - and for reasons with which I entirely agree - the Court found that the derogation - in substance from the first sentence of Article 5 para. 3 (art. 5-3) - notified by the United Kingdom by virtue of Article 15 (art. 15) satisfied the requirements of that provision. Accordingly, during the period of validity of that derogation, Article 5 para. 3 (art. 5-3) is quite simply inapplicable in the United Kingdom. It follows that any discussion of whether it has been complied with is redundant (see paragraph 37 of the judgment). I would add that the inapplicability of Article 5 para. 3 (art. 5-3) necessarily entails that of Article 5 para. 5 (art. 5-5), as well as that of Article 13 (art. 13) in respect of the first-mentioned provision.

In my view, a derogation pursuant to Article 15 (art. 15) may be classified as a temporary "reservation" (within the meaning of Article 64) (art. 64) as regards its "substantive" effects. The difference between the two devices - reservation and derogation - lies in the fact that, in respect of the former, the Court's power of review is confined to the formal aspects of the validity - within the meaning of Article 64 (art. 64) - of the declaration relating thereto (see the *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, pp. 24 et seq., paras. 50 et seq.), whereas for the latter the Court must also satisfy itself that the substantive conditions for its validity have been met (not only when the derogation is notified, but also subsequently whenever the Government relies on such a derogation). However, as I have just said, the "substantive" effects of a reservation and a declaration of derogation, provided that they are validly made, are exactly the same, in other words quite simply the inapplicability of a specific provision of the Convention.

A different line of reasoning applies with regard to the applicability of Article 14 (art. 14) in conjunction with a provision of the Convention which is the subject of a derogation or a reservation; whereas Article 14 (art. 14) cannot be invoked in relation to a provision which is the subject of a reservation, it remains applicable in respect of a substantive provision of the Convention, notwithstanding the fact that the latter is subject to a derogation. It is, however, unnecessary to go into this question more thoroughly. It is moreover an aspect which I discussed at the Fifth International Colloquy on the Convention (Frankfurt-on-Main 1980, p. 136 of the relevant publication); reference may also be made to my separate opinion on the subject in the *Ireland v. United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 140 et seq.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I parted company with the majority which voted for the non-violation of Article 5 paras. 3 and 5 and Article 13 (art. 5-3, art. 5-5, art. 13) in so far as it took the view that the derogation invoked by the Government of the United Kingdom fulfilled the requirements of Article 15 (art. 15) of the Convention. I consider that those requirements were not satisfied and that there was, on the merits, a violation of Articles 5 and 13 (art. 5, art. 13).

The European Court has jurisdiction to carry out a review of the derogations from the guarantees recognised as essential for the protection of the rights set out in the Convention, certain of which are not even susceptible to derogation (Articles 2, 3 and 7) (art. 2, art. 3, art. 7). It was therefore competent to examine whether the derogation from the guarantees of Article 5 (art. 5), following a judgment of the European Court finding on similar facts a violation of that Article (art. 5) (Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A no. 145-B) was indeed in conformity with Article 15 (art. 15) (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25).

Even if it is accepted that States have a margin of appreciation in determining whether they are threatened by a "public emergency" within the meaning of the *Lawless v. Ireland* judgment (judgment of 1 July 1961, Series A no. 3) and, if they are, in deciding whether to resort to the solution of a derogation, the situation relied on must be examined by the European Court.

The fact of terrorism and its gravity in Northern Ireland is incontestable. It led to the acceptance of an extension of police custody by the 1974 Act and by the 1976 and 1984 Acts.

Following the Brogan and Others judgment of 29 November 1988, the United Kingdom availed itself on 23 December 1988 of its right of derogation under the Convention.

It does not appear from the evidence that the terrorist phenomenon became more serious in Northern Ireland between the period of the arrest of Mr Brogan and the other three applicants and 29 November 1988 and 23 December 1988, which led Mr Brannigan and Mr McBride to maintain that the request for a derogation was a means of circumventing the consequences of the Brogan and Others

judgment.

In any event, the derogation cannot constitute a *carte blanche* accorded to the State for an unlimited duration, without its having to adopt the measures necessary to satisfy its obligations under the Convention.

The Government contended that it was only when the European Court ruled in the Brogan and Others case that it became apparent that the powers conferred on the police by the 1974 Act were incompatible with Article 5 para. 3 (art. 5-3) (excessive duration of police custody).

The Government accepted the Commission's reasoning according to which the derogation remains:

"... consistent with the nature and spirit of Article 15 (art. 15), and in particular paragraph 3 (art. 15-3). Implicit in Article 15 (art. 15) is the requirement that derogation measures should be kept under constant review and, if necessary, modified if they are to meet the strict exigencies of an emergency situation which can recede or otherwise develop. As the Court held in the case of Ireland v. the United Kingdom, the interpretation of Article 15 (art. 15) must leave a place for progressive adaptations (Series A no. 25, p. 83, para. 220)". (Commission's report, paragraph 56)

However, the need for the above-mentioned powers - for the derogation - remains constantly open to scrutiny.

The State was under a duty to implement mechanisms complying with the Brogan and Others judgment and making it possible to conform thereto without resorting to derogation.

The Commission in the Ireland v. the United Kingdom case added, correctly,

"There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified 'to the extent that is strictly required' as provided in Article 15 (art. 15). (This limitation, in the circumstances, may require safeguards against the possible abuse, or excessive use, of emergency measures.) In the present case, it must be shown that the emergency affected the normal functioning of the community and the administration of law" (Series B no. 23-I, p. 119).

The Government argued on the one hand that the introduction of a judicial element into the procedure for authorising the extension of detention

could not render it compatible with Article 5 para. 3 (art. 5-3); on the other hand, that such a reform, even if the State had accepted its principle, would have required a long period of reflection and the elaboration of new legislation.

On the first point, the Government stated that it had ordered

"a full re-examination of the question whether it would be feasible to introduce a judicial element into the procedure for authorising extensions, which would be compatible with the provisions of Article 5 para. 3 (art. 5-3) but which would not weaken the effectiveness of the response to the serious terrorist threat. For the reasons given in the Written Answer of the Home Secretary of 14 November 1989 (see paragraph 2.58 of the Government's observations) the Government reluctantly concluded that no satisfactory alternative procedures could be identified. In particular the view was taken that to involve the judiciary in the process of granting or approving extensions of detention in terrorist cases would create a very real risk of undermining their independence. In the continuing fight against organised terrorism, the judiciary perform a central and vital role. It is on the judiciary that the responsibility rests for upholding the rule of law and for ensuring that those charged with acts of terrorism receive a fair trial. The judiciary - and particularly the judiciary in Northern Ireland - have for very many years been required to perform this role in acutely difficult circumstances. The Northern Ireland judiciary is small in size (there are at present ten High Court judges, thirteen County Court judges and seventeen Resident Magistrates in the whole Province) and on them falls the heavy burden of trying suspected terrorists and doing so without the benefit of a jury. In addition to terrorist attacks (including murders) made on members of the judiciary and on court buildings since 1973, there have been concerted attacks made on the authority of the judiciary by terrorist organisations dedicated to the destruction of the rule of law.

If the judiciary is to continue to play its central role under the common law system in upholding the rule of law, it is crucial that it should not only be rigorously independent of the Executive, including the police, and the prosecuting authority, but that it should be seen to be independent. If the judiciary were to be involved in the process of granting or approving extended detentions on terrorist cases, it could not avoid being perceived as part of the investigation and prosecution process. This perception would only be enhanced if, as

would almost invariably be the case, the judicial officer was required to act on the basis of material which could not be disclosed to the person detained or his legal advisers. As the Home Secretary's Written Answer made clear, it is the Government's judgment that this is a risk, which in the circumstances of the present terrorist threat simply cannot be taken.

It is recognised that some might disagree with this judgment and would consider that the risk of damaging public trust in the judicial system was a risk worth running. While this is doubtless a legitimate point of view" (paragraph 2.34 of the Government's memorial),

It is somewhat surprising considering the British tradition which legitimately places the judge at the summit of the system of guarantees in all the spheres of freedoms.

It is difficult to believe that the independence of a judge would be undermined because he took part in proceedings making it possible to grant or approve an extension of detention.

This system operates in England and in Wales, despite the fact that terrorist acts are perpetrated there. The argument that the appeal to a judge would mean that "the application would have to be made *ex parte*: the judge would be determining the issue in the absence of the detained person or his representatives on the basis of material which could not be disclosed to either" is not persuasive.

The member States of the Council of Europe which went through serious periods of terrorism (for example Italy) confronted such terrorism while retaining judicial involvement in extended police custody. It would be possible to find in comparative law and in criminal procedure examples of judicial mechanisms protecting the use by the police of "informers" who have to remain anonymous. In camera hearings can be envisaged. The British system too has recourse to the principle of immunity which makes it possible for the public prosecutor not to disclose certain prosecution evidence. It is thus possible to avoid the disadvantages of the ordinary procedural rules applicable at this stage (see the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B). Is there not, on the part of the police, a desire to conceal from the courts some of their practices?

The two dissenting members of the Commission, Mr Frowein and Mr Loucaides, who was joined by Mrs Thune and Mr Rozakis, noted that the Government had neither provided any evidence nor put forward any convincing arguments as to the reasons for which they had not chosen to proceed

otherwise than by using the derogation, namely by the introduction of judicial review of the extension of detention from four to seven days.

The means of protecting information concerning State security exist even in proceedings subject to judicial review, if necessary by a mechanism imposing a temporary restriction on communication. It is difficult to see the difference of approach which would in these circumstances render powerless or less independent the judge responsible for reviewing extension, or responsible for reviewing the Minister's decision, in relation to a judge called upon to rule on a habeas corpus application.

If, on the other hand, other means might be adopted, as has been suggested by some legal writers, they could surely have been adopted between 29 November 1988 and 23 December 1988; this would mean that even if the Court were to take as its basis for the decision the date on which the derogation came into force or the date on which Mr Brannigan's application was lodged, i.e. 19 January 1989 rather than the date of the judgment in 1993, it could have found a violation, because such a reform could have been adopted, in view of the urgency, within a relatively short period.

The *quid pro quo* for a derogation based on a public emergency threatening a State must be the implementation by the State of means enabling it to overcome the obstacles, in particular when a decision of the European Court has found a violation of Article 5 (art. 5), and therefore to re-examine in an appropriately short time the reality of the emergency and the persistence of the threat.

The argument based on recourse to habeas corpus does not appear convincing. The experience of the years 1974 to 1993 establishes that habeas corpus in respect of the extension of detention is not an effective remedy for the purposes of the Court's case-law. Even if Article 13 (art. 13) does not require the incorporation of the Convention into domestic law, it does require an effective remedy to ensure that that instrument is complied with.

From that point of view the conditions of the incommunicado detention were contrary to Article 5 (art. 5).

At paragraph 20 of its comments of 21 August 1992 Amnesty observed as follows:

"Experience has shown that incommunicado detention of any period can put detainees at risk. This is not only Amnesty International's experience as noted above, but also that of the United Nations. The Special Rapporteur on torture of the United Nations Commission on

Human Rights, Mr Peter Kooijmans, Professor of International Law at the University of Leiden, has drawn attention to the connection between incommunicado detention and torture in every annual report he has submitted to the Commission. Since 1988 he has routinely called on States to declare such detention illegal. Amnesty International would be deeply concerned if States were to be allowed to impose periods of incommunicado detention, or deny access to judicial redress and/or medical attention, especially during states of emergency. In the context of its ruling in this case, Amnesty International urges the Court to declare that certain minimum guarantees are inherent in the non-derogable rights and as such can never be the subject of derogation. It also urges that any restriction to judicial redress should be carefully scrutinised. A wide margin of appreciation is inappropriate in such cases."

In my view, the standards and rules of international law prohibit extended "incommunicado detention" (Principle 37 of the Body of Principles cited by Amnesty); this is particularly the case where "the person detained is not brought before a judicial or other authority provided by law promptly after his arrest".

In the Brannigan and McBride case, in my opinion, the Government's action fell outside the margin of appreciation which the Court is able to recognise. The fundamental principle which must prevail and which is consistent with British and European tradition is that detention cannot be extended from four days to seven days without the involvement of a judge, who is the guarantor of individual freedoms and fundamental rights.

DISSENTING OPINION OF JUDGE WALSH

1. Under the terms of the derogation the Government of the United Kingdom claims to be no longer answerable to the Convention organs for failure to comply with Article 5 para. 3 (art. 5-3) of the Convention in respect of the arrest of persons anywhere in the United Kingdom under the provisions of the Prevention of Terrorism Act 1984 in relation to the affairs of Northern Ireland.
2. The terms of Article 15 para. 1 (art. 15-1) of the Convention have been invoked as a justification for this step, namely that there is a "time of war or other public emergency threatening the life of the nation". In the present case "the na-

- tion" is presumed to be the entire United Kingdom. While there is ample evidence of political violence in Northern Ireland which could be described as threatening the life of that region of the United Kingdom there is no evidence that the life of the rest of the United Kingdom, viz. the island of Great Britain, is threatened by "the war or public emergency in Northern Ireland", which is separated by sea from Great Britain and of which it does not form a part.
3. Furthermore there is no evidence that the operation of the courts in either Northern Ireland or Great Britain has been restricted or affected by "the war or public emergency" in Northern Ireland. It is the United Kingdom Government which wishes to restrict the operation of the courts by being unwilling to allow arrested persons to be brought before a judge as prescribed by Article 5 para. 3 (art. 5-3) of the Convention. The exigency of the situation relied on is the unwillingness of the Government to allow a judge to become aware of the grounds of the police's "reasonable suspicion" that the arrested person has "committed an offence ..." (see Article 5 para. 1 (c)) (art. 5-1-c), but who has not been charged with any offence and who has been arrested because the arresting officer "... has reasonable grounds" for suspecting that the person has been "concerned ..." in acts of "terrorism" that is to say "the use of violence for political ends" or "any use of violence for the purpose of putting the public or any section of the public in fear" provided the matters suspected are concerned with the affairs of Northern Ireland, or any other such acts of "terrorism", except acts concerned solely with the affairs of any part of the United Kingdom other than Northern Ireland. The legislation in force does not create any offence of "terrorism" and no such offence is known to the law in any part of the United Kingdom. Judicial interpretation of section 12 (1)(b) of the Act of 1984 has been to the effect that no specific crime need be suspected to ground a lawful arrest under that section.
 4. Until some specific crime or crimes can reasonably be suspected it is clear that no charge can be brought. Therefore, Article 5 para. 2 (art. 5-2) of the Convention cannot be observed so far as a charge is concerned. But there still remains the obligation under Article 5 para. 2 (art. 5-2) to inform every arrested person of the reasons for his arrest. That has not been a subject of the derogation. It remains to be seen whether the Convention requirement can be satisfied in a case where no specific crime is suspected.
 5. A reason put forward by the Government for being unwilling to bring an arrested person before a judge "promptly" after arrest (or not at all until it is decided to charge him) is the possible embarrassment to the judges in knowing what was in the mind of the arresting officer. The reality is the question of the concealment of secret sources of information. The concealment of sources and the names of informants, is a matter that arises in many areas in the prosecution of offences. Rarely, if ever, does a court in the United Kingdom press for such sources and a police claim of privilege against disclosure is invariably upheld. It is quite wrong to suggest that the adversary procedure of the common law requires such disclosure, particularly on first appearance in court.
 6. One of the suggested remedies for arrested persons in the present case is the ancient writ of habeas corpus. This remedy can only be obtained if there is a proven breach of the national law. A breach of the Convention cannot ground such relief unless it is also a breach of the national law. It is unfortunate that the Court has been allowed to believe otherwise, as is evidenced by the portion of the judgment relating to Article 13 (art. 13). Yet in the present case the Government suggests that in habeas corpus proceedings the genuineness of the "reasonable belief" may be tested (though I doubt if the secret sources would be required to be disclosed in any court) although that remedy, which fits into Article 5 para. 4 (art. 5-4) of the Convention, has not been sought to be excluded by the terms of the derogation. A habeas corpus writ can, in theory, be sought within an hour or so after an arrest; in other words well within the period encompassed in the expression "promptly" in Article 5 para. 3 (art. 5-3). That procedure, if it is possible to avail of it, could thus impart the disadvantage to the police secrecy which the respondent Government claims it is entitled to avoid; yet the Government has not sought to explain this inconsistency.
 7. It appears to me to be an inescapable inference that the Government does not wish any such arrested person to be brought before a judge at any time unless and until they are in a position to and desire to prefer a charge. The real target might appear to be Article 5 para. 1 (c) (art. 5-1-c). The admitted purpose of the arrest is to interrogate the arrested person in the hope or expectation that he will incriminate himself. Article 5 (art. 5) makes it quite clear that no arrest can be justified under the

Convention if the sole justification for it is the desire to interrogate the arrested person. If an arresting officer has a "reasonable belief" that is coupled to the knowledge or intention that the grounds will never be revealed to a judge, and that the arrested person must be released if no revealable evidence is forthcoming, such arrest ought not to be regarded as an arrest in good faith for the purposes of Article 5 para. 1 (c) (art. 5-1-c) of the Convention.

8. The grounds relied upon by the Government to qualify as "exigencies of the situation" are really procedural devices which could equally be put forward in cases of suspected thefts, robberies, or drug dealings where the police are in possession of information from secret informants whose existence they don't wish to disclose or indicate. For example, the former Attorney General of England and Northern Ireland, Sir Michael Havers, (later Lord Chancellor) informed the Court in the Malone case (Series B no. 67, p. 230) that where the only evidence to connect a person with a crime was a police telephone "tap" he would be allowed to go free rather than disclose the existence of the telephone interception by the police.
9. Article 5 para. 3 (art. 5-3) of the Convention is an essential safeguard against arbitrary executive arrest or detention, failure to observe which could easily give rise to complaints under Article 3 (art. 3) of the Convention which cannot be the subject of derogation. Prolonged and sustained interrogation over periods of days, particularly without a judicial intervention, could well fall into the category of inhuman or degrading treatment in particular cases. In the present case, the applicant Brannigan, during hundred and fifty-eight hours of detention, was interrogated forty-three times which means he was interrogated on average every two and a half hours over that period, assuming he was allowed the regulation period of eight hours free from interrogation every twenty-four hours. The applicant McBride on the same basis was interrogated on average every three hours over his period of detention of ninety-six hours. The object of these interrogations was to gain "sufficient admissions" to sustain a charge, or charges.
10. The Government's plea that it is motivated by a wish to preserve public confidence in the independence of the judiciary is, in effect, to say that such confidence is to be maintained or achieved by not permitting them to have a role in the protection of the personal liberty

of the arrested persons. One would think that such a role was one which the public would expect the judges to have. It is also to be noted that neither Parliament nor the Government appears to have made any serious effort to rearrange the judicial procedure or jurisdiction, in spite of being advised to do so by the persons appointed to review the system, to cater for the requirement of Article 5 para. 3 (art. 5-3) in cases of the type now under review. It is the function of national authorities so to arrange their affairs as not to clash with the requirements of the Convention. The Convention is not to be remoulded to assume the shape of national procedures.

11. In my opinion the Government has not convincingly shown, in a situation where the courts operate normally, why an arrested person cannot be treated in accordance with Article 5 para. 3 (art. 5-3). The fact that out of 1,549 persons arrested in 1990 only 30 were subsequently charged, indicates a paucity of proof rather than any deficiency in the operation of the judicial function. It is commonplace in the courts of the United Kingdom that persons facing criminal charges are brought before a judge who is almost invariably asked by the prosecution, in non-summary cases, for an adjournment or a remand to permit of further inquiries by the police. In Northern Ireland, in proceedings under the Prevention of Terrorism Acts, court remands in custody have been known to last for up to two years. In such cases no evidence of any secret sources of information or evidence has ever been revealed. A judge remanding such cases is performing a judicial function and is not performing an executive act. In those cases a specific charge or charges were laid. What is sought in the present case is to remove from scrutiny by the Convention organs cases where no charge is preferred. It should not be beyond the ability of Parliament to legislate for a situation where the arrested person could be brought before a judge with liberty to grant an adjournment for up to a period of five or seven days before the expiration of which the arrested person must be released or charged where the arresting officer is prepared to swear that he has reasonable grounds for suspecting that the arrested person has been involved in or engaged in "acts of terrorism" within the meaning of the relevant legislation. He would not be required, in such event, to reveal the sources of his belief. It is quite erroneous to believe that the adversary system creates an obligation to reveal

them.

12. The Court, in paragraphs 62 to 67 inclusive of its judgment, overlooks the information before it to the effect that the so-called safeguards are, in practice, illusory as their availability within the first forty-eight hours of detention is solely dependent upon police willingness. In the result the arrested person is secretly detained for that period and is held incommunicado and without legal assistance, of if he receives it, he may expect to have it overheard by the police, a clear breach of the spirit of the Court's decision in *S. v. Switzerland* (judgment of 28 November 1991, Series A no. 220). Even the great historic remedy of habeas corpus, theoretically available almost instantly, can be put out of the reach of the arrested person by reason of non-access to the world outside the detention centre.
13. In my opinion there has been a breach of Article 5 para. 3 (art. 5-3) of the Convention in respect of the detention of each of the applicants.
14. Article 13 (art. 13) of the Convention requires that an effective remedy shall be available before a national authority for everyone whose rights and freedoms as set forth in the Convention are violated. The application of Article 13 (art. 13) does not depend upon a violation being proved. No such authority is or was available in the United Kingdom and the Convention has not been incorporated in the national law. It is not correct to suggest that the remedy of habeas corpus satisfies the requirements of Article 13 (art. 13). That remedy depends upon showing a breach of the national laws. It is not available for a claim that the detention is illegal by reason only of a breach of the Convention.
15. In my opinion there has also been a breach of Article 13 (art. 13).

CONCURRING OPINION OF JUDGE RUSSO

(Translation)

I share the view of the majority of my colleagues that the derogation notified by the United Kingdom satisfies the requirements of Article 15 (art. 15) and that the applicants cannot therefore validly complain of a violation of Article 5 para. 3 (art. 5-3).

As is noted at paragraph 51 of the judgment the derogation of 23 December 1988 is clearly linked to

the persistence of the emergency situation. This, in my opinion, means that its validity must be strictly limited to the time necessary for the Government to find a means of ensuring greater conformity with Convention obligations (see paragraph 54, third sub-paragraph, of the judgment).

The finding of a non-violation thus refers to the case in issue and to the situation which existed when the applicants were arrested. If the derogation were to be extended and to become almost permanent, I would consider it to be incompatible with the guarantees which the Convention affords in respect of liberty of the person and which are of fundamental importance in a democratic society. It is therefore "in principle" only that "the decision to withdraw a derogation is ... a matter within the discretion of the State (see paragraph 47, second sub-paragraph, of the judgment); they do not enjoy complete freedom in this area.

DISSENTING OPINION OF JUDGE DE MEYER

Certainly the situation in relation to terrorism connected with the affairs of Northern Ireland has for a long time been very serious and it still remains so at the present time. One can thus understand that for this reason the Government of the United Kingdom have, since 1957, repeatedly felt it appropriate to avail themselves of their right of derogation under Article 15 (art. 15) of the Convention.

In 1984 they had come to the conclusion that this was no longer necessary.

We have been told that one of their reasons for doing so was their belief that detaining for up to seven days a person suspected of terrorism without bringing that person before a judge or other judicial officer was not inconsistent with their obligations under the Convention*.

In our *Brogan and Others v. the United Kingdom* judgment of 29 November 1988 we held that this assumption was wrong, and we strongly emphasised the importance of the fundamental human right to liberty and the need for judicial control of interferences therewith**.

The Government of the United Kingdom have tried to escape the consequences of that judgment by lodging once again a notice of derogation under Article 15 (art. 15) in order to continue the practice concerned***.

In my view, this is not permissible: they failed to convince me that such a far-reaching departure

from the rule of respect for individual liberty could, either after or before the end of 1988, be "strictly required by the exigencies of the situation".

Even in circumstances as difficult as those which have existed in respect of Northern Ireland for many years it is not acceptable that a person suspected of terrorism can be detained for up to seven days without any form of judicial control.

This was, in fact, what we had already decided in the Brogan and Others case**** and there was no valid reason for deciding otherwise in the present one.

CONCURRING OPINION OF JUDGE MARTENS

1. The position I have taken in the case of Brogan and Others (Series A no. 145-B) - a position which I still maintain - explains why I have voted for finding that the derogation lodged by the United Kingdom satisfies the requirements of Article 15 (art. 15) of the Convention: in this respect I would compare what I have said in paragraph 12 of my dissenting opinion in the case of Brogan and Others with paragraphs 60-67 of the present judgment.

I would add, however, that I have voted in this way only after considerable hesitations. I was impressed by Amnesty International's argument that under a derogation regular judicial review of extended detention is an essential guarantee to protect the detainee from unacceptable treatment - a risk which is all the greater where there is the possibility of incommunicado detention - even if the procedure to be followed does not meet fully the requirements implied in Article 5 para. 3 (art. 5-3). I trust that the United Kingdom Government, in the course of the process of continued reflection referred to in paragraph 54 of the Court's judgment, will once more consider the advice submitted by their own Standing Advisory Commission on Human Rights stressing the possibility of introducing some form of judicial review of extended detention.

2. I disagree with the Court's decision in paragraph 43 of the present judgment according to which a wide margin of appreciation should be left to the national authorities of the derogating State with respect both to the question whether there is a "time of war or other public emergency threatening the life of the nation" and whether the derogation is "to the extent

strictly required by the exigencies of the situation".

3. For my part, I found Amnesty International's arguments against so deciding persuasive, especially where Amnesty emphasised developments in international standards and practice in answer to world-wide human rights abuses under cover of derogation and underlined the importance of the present ruling in other parts of the world. Consequently, I regret that the Court's only refutation of those arguments is its reference to a precedent which is fifteen years old.

Since 1978 "present day conditions" have considerably changed. Apart from the developments to which the arguments of Amnesty refer, the situation within the Council of Europe has changed dramatically. It is therefore by no means self-evident that standards which may have been acceptable in 1978 are still so. The 1978 view of the Court as to the margin of appreciation under Article 15 (art. 15) was, presumably, influenced by the view that the majority of the then member States of the Council of Europe might be assumed to be societies which (as I put it in my aforementioned dissenting opinion) had been democracies for a long time and, as such, were fully aware both of the importance of the individual right to liberty and of the inherent danger of giving too wide a power of detention to the executive. Since the accession of eastern and central European States that assumption has lost its pertinence.

4. However that may be, the old formula was also criticised as unsatisfactory per se both by Amnesty International and Liberty, Interights and the Committee on the Administration of Justice, the latter referring to the 1990 Queensland Guidelines of the ILA (International Law Association). I agree with these criticisms. The Court's formula is already unfortunate in that it uses the same yardstick with regards to two questions which are of a different nature and should be answered separately.

The first question is whether there is an objective ground for derogating which meets the requirements laid down in the opening words of Article 15 (art. 15). Inevitably, in this context, a certain margin of appreciation should be left to the national authorities. There is, however, no justification for leaving them a wide margin of appreciation because the Court, being the "last-resort" protector of the fundamental rights and freedoms guaranteed under the

Convention, is called upon to strictly scrutinise every derogation by a High Contracting Party from its obligations.

The second question is whether the derogation is to "the extent strictly required by the exigencies of the situation". The wording underlined clearly calls for a closer scrutiny than the words "necessary in a democratic society" which appear in the second paragraph of Articles 8-11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2). Consequently, with respect to this second question there is, if at all, certainly no room for a wide margin of appreciation.

DISSENTING OPINION OF JUDGE MAKARCZYK

I regret that I am unable to share the position of the majority of the Court in the present case. This is for three main reasons: the general consequences of the judgment; the question of a time-limit for the derogation and the reasons for the derogation as put forward by the respondent Government.

1. The principle that a judgment of the Court deals with a specific case and solves a particular problem does not, in my opinion, apply to cases concerning the validity of a derogation made by a State under Article 15 (art. 15) of the Convention. A derogation made by any State affects not only the position of that State, but also the integrity of the Convention system of protection as a whole. It is relevant for other member States - old and new - and even for States aspiring to become Parties which are in the process of adapting their legal systems to the standards of the Convention. For the new Contracting Parties, the fact of being admitted, often after long periods of preparation and negotiation, means not only the acceptance of Convention obligations, but also recognition by the community of European States of their equal standing as regards the democratic system and the rule of law. In other words, what is considered by the old democracies as a natural state of affairs, is seen as a privilege by the newcomers which is not to be disposed of lightly. A derogation made by a new Contracting Party from Eastern and Central Europe would call into question this new legitimacy and is, in my opinion, quite improbable. Any decision of the Court concerning Article 15 (art. 15) should encourage and confirm this philosophy. In any event it should not reinforce the views of those in the new member States for whom European

standards clash with interests which they have inherited from the past. I am not convinced that the reasoning adopted by the majority fulfils these requirements. This is especially so as the derogation concerns a provision of the Convention which, for some, should not be the subject of any derogation at all.

2. I fully recognise the difficulties, and even the impossibility, for the Court in setting a precise time-limit for the derogation as a precondition of its validity under Article 15 (art. 15). However, I believe that the judgment should very clearly and unequivocally indicate that the Court accepts the derogation only as a strictly temporary measure. After all, it recognises the non-observance of Article 5 para. 3 (art. 5-3) of the Convention (paragraph 37 of the judgment), a basic provision of which the applicants cannot avail themselves of because of the derogation. The Court also considers the time factor as essential when speaking of its supervisory role in respect of the margin of appreciation (paragraph 43 of the judgment). It is true that the Court emphasises the obligation of the derogating State to review the situation on a regular basis (paragraph 54 of the judgment). But this obligation clearly results from the third paragraph of Article 15 (art. 15-3) and the emphasis does not contribute to reassure the international community that the Court is doing all that is legally possible for the full applicability of the Convention to be restored as soon as practicable. On the contrary, the present wording of the judgment tends rather to perpetuate the status quo and opens, for the derogating State, an unlimited possibility of applying extended administrative detention for an uncertain period of time, to the detriment of the integrity of the Convention system and, I firmly believe, of the derogating State itself.
3. This leads me to the third reason for my dissent which I consider to be of vital importance.

The main point that, in my opinion, the United Kingdom Government should attempt to prove before the Court is that extended administrative detention does in fact contribute to eliminate the reasons for which the extraordinary measures needed to be introduced - in other words the prevention and combating of terrorism. But, as far as I can see, no such attempt has been made either in the Government's memorial and the attached documents, or in the pleading before the Court. Instead, the Government's main arguments have centred on the alleged detrimental effects on the

judiciary of control by a judge of extended detention without the normal judicial procedure.

I will not enlarge on this last argument, which has been skilfully called into question by dissenters both in the Commission and in the Court. I can only add that any form of judicial control could be beneficial for all concerned. If the Government had been able to provide valid arguments that extended detention without any form of judicial control does in fact contribute both to the punishment and prevention of the crime of terrorism, I would be ready to accept the legality of the derogation, notwithstanding the first two reasons of my dissent.

ECHR

ECJ

COURT (CHAMBER)

CASE OF LAWLESS v IRELAND (NO. 3)

(Application no 332/57)

JUDGMENT

STRASBOURG

1 July 1961

ARTICLE 15, TERRORISM, LIFE OF A NATION, THREAT, PUBLIC INTEREST, PUBLIC SAFETY, SECURITY, RESTRICTING FREEDOMS, DEMOCRACY

IN THE "LAWLESS" CASE,

The European Court of Human Rights, sitting, in accordance with the provisions of Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and of Rules 21 and 22 of Rules of the Court, as a Chamber composed of:

Mr. R. CASSIN, *President*

and **MM. G. MARIDAKIS**

E. RODENBOURG

R. MCGONIGAL, *ex officio member*

G. BALLADORE PALLIERI

E. ARNALDS

K.F. ARIK, *Judges*

P. MODINOS, *Registrar*,

delivers the following judgment:

AS TO PROCEDURE

1. The present case was referred to the Court on 13th April 1960 by the European Commission of Human Rights (hereinafter called "the Commission") dated 12th April 1960. Attached to the request was the Report drawn up by the Commission in accordance with Article 31 (art. 31) of the Convention. The case relates to the Application submitted to the Commission under Article 25 (art. 25) of the Convention by G. R. Lawless, a national of the Republic of Ireland, against the Government of that State.
2. Preliminary objections and questions of procedure were raised in the present case by both the Commission and the Irish Government, Party to the case. The Court ruled on these questions in its Judgment of 14th November 1960.

The procedure followed up to that date is set forth in the Judgment.

3. Following that Judgment, the President of the Chamber, by an Order of 14th November 1960, set 16th December 1960 as the latest date by

which the delegates of the Commission were to submit their Memorial and 5th February 1961 as the latest date for submission of the Irish Government's Counter-Memorial.

Pursuant to that Order, the Commission on 16th December 1960 submitted a "Statement with respect to the Counter-Memorial (merits of the case)", which was communicated to the Irish Government, Party to the case, on 19th December 1960. On 3rd February 1961, i.e. before the expiry of the allotted period, the Irish Government submitted a document entitled "Observations by the Government of Ireland on the Statement of the European Commission of Human Rights filed on 16th December 1960." That document was communicated to the delegates of the Commission on 7th February 1961, whereupon the case was ready for examination of the merits.

Before the opening of the oral proceedings, the Principal Delegate of the Commission notified the Court, by letter to the Registrar dated 14th March 1961, of the views of the Delegates of the Commission on some of the questions raised by the Irish Government in their document of 3rd February 1961. The letter of 14th March 1961, a copy of which was sent to the Irish Government, was likewise added to the file on the case.

4. Public hearings were held at Strasbourg on 7th, 8th, 10th and 11th April 1961, at which there appeared:

(a) for the Commission:

Sir **Humphrey Waldock**, President of the Commission, *Principal Delegate*,

Mr. **C. Th. Eustathiades**, Vice-President,

Mr. **S. Petren**, Member of the Commission, *Assistant Delegates*,

(b) for the Irish Government, Party to the case :

Mr. **A. O'Keefe**, Attorney-General of Ireland, acting as *Agent*, assisted by:

Mr. **S. Morrissey**, Barrister-at-law, Legal Adviser, Department of External Affairs,

Mr. **A. J. Hederman**, Barrister-at-law, *Counsel*, and by:

MM. **D. O'Donovan**, Chief State Solicitor, P. Berry, Assistant Secretary-General, Department of Justice.

5. Before entering upon the merits of the case, Sir

Humphrey Waldock, Principal Delegate of the Commission, brought up certain questions of procedure made the following submission:

"May it please the Court to rule that the Delegates of the Commission are entitled:

(a) to consider as part of the proceedings in the case those written observations of the Applicant on the Commission's Report contained in paragraphs 31 to 49 of the Commission's statement of 16th December 1960, as indicated on page 15 of the Court's judgment of 14th November 1960;

(b) to make known to the Court the Applicant's point of view on any specific points arising in the course of the debates, as indicated on page 15 of the Court's judgment of 14th November 1960;

(c) to consider the person nominated by the Applicant to be a person available to give such assistance to the Delegates as they may think fit to request in order to make known to the Court the Applicant's point of view on any specific points arising in the course of the debates."

Mr. A. O'Keefe, acting as Agent of the Irish Government, said he would leave the matter to the discretion of the Court.

6. On this point of procedure the Court gave the following judgment on 7th April 1961:

"The Court,

Having regard to the conclusions presented by the Delegates of the European Commission of Human Rights at the hearing on 7th April 1961;

Taking note of the fact that the Agent of the Irish Government does not intend to submit conclusions on the matter in question;

Whereas in its judgment of 14th November 1960 the Court declared that there was no reason at this stage to authorise the Commission to transmit to it the written observations of the Applicant on the Commission's Report;

Whereas in the said judgment, of which the French text only is authentic, the Court has recognised the Commission's right to take into account ("de faire état") the Applicant's views on its own authority, as a proper way of enlightening the Court;

Whereas this latitude enjoyed by the Commission extends to any other views the Commission may have obtained from the Applicant in the course of the proceedings before the

Court;

Whereas, on the other hand, the Commission is entirely free to decide by what means it wishes to establish contact with the Applicant and give him an opportunity to make known his views to the Commission; whereas in particular it is free to ask the Applicant to nominate a person to be available to the Commission's delegates; whereas it does not follow that the person in question has any *locus standi in judicio*;

For these reasons,

Decides unanimously:

With regard to the conclusions under (a), that at the present stage the written observations of the Applicant, as reproduced in paragraphs 31 to 49 of the Commission's statement of 16th December 1960, are not to be considered as part of the proceedings in the case;

With regard to (b) that the Commission has all latitude, in the course of debates and in so far as it believes they may be useful to enlighten the Court, to take into account the views of the Applicant concerning either the Report or any other specific point which may have arisen since the lodging of the Report;

With regard to (c), that it was for the Commission, when it considered it desirable to do so, to invite the Applicant to place some person at its disposal, subject to the reservations indicated above."

7. The Court then heard statements, replies and submissions on matters of fact and of law relating to the merits of the case, for the Commission: from Sir Humphrey Waldock, Principal Delegate; for the Irish Government: from Mr. A. O'Keefe, Attorney-General, acting as Agent.

AS TO THE FACTS

I.

8. The purpose of the Commission's request - to which is appended the Report drawn up by the Commission in accordance with the provisions of Article 31 (art. 31) of the Convention - is to submit the case of G.R. Lawless to the Court so that it may decide whether or not the facts of the case disclose that the Irish Government has failed in its obligations under the Convention.

As appears from the Commission's request and from its Memorial, G.R. Lawless alleges in his

Application that, in his case, the Convention has been violated by the authorities of the Republic of Ireland, inasmuch as, in pursuance of an Order made by the Minister of Justice under section 4 of Act No. 2 of 1940 amending the Offences against the State Act, 1939, he was detained without trial, between 13th July and 11th December 1957, in a military detention camp situated in the territory of the Republic of Ireland.

9. The facts of the case, as they appear from the Report of the Commission, the memorials, evidence and documents laid before the Court and the statements made by the Commission and by the Irish Government during the oral hearings before the Court, are in substance as follows:
10. G.R. Lawless is a builder's labourer, born in 1936. He is ordinarily resident in Dublin (Ireland).
11. G.R. Lawless admitted before the Commission that he had become a member of the IRA ("Irish Republican Army") in January 1956. According to his own statements, he left the IRA in June 1956 and a splinter group of the IRA in December 1956.

II.

12. Under the Treaty establishing the Irish Free State, signed on 6th December 1921 between the United Kingdom and the Irish Free State, six counties situated in the North of the Island of Ireland remained under British sovereignty.
13. On several occasions since the foundation of the Irish Free State, armed groups, calling themselves the "Irish Republican Army" (IRA), have been formed, for the avowed purpose of carrying out acts of violence to put an end to British sovereignty in Northern Ireland. At times the activities of these groups have been such that effective repression by the ordinary process of law was not possible. From time to time, the legislature has, therefore, conferred upon the Government special powers deal with the situation created by these unlawful activities; and such powers have sometimes included the power of detention without trial.

On 29th December 1937 the Constitution at present in force in the Irish Republic was promulgated. In May 1938 all persons detained for political offences were released.

When the political situation in Europe foreshadowed war, the IRA resumed its activities

and committed fresh acts of violence.

At the beginning of 1939 the IRA published documents described by it as a "declaration of war on Great Britain". Following that declaration, the IRA, operating from territory of the Republic of Ireland, intensified its acts of violence on British territory.

14. In order to meet the situation created by the activities of the IRA, the Parliament of the Republic of Ireland passed the Offences against the State Act, 1939, which came into force on 14th June 1939.

III.

15. Part II of the 1939 Act defines the "activities prejudicial to the preservation of public peace and order or to the security of the State". Part III contains provisions relating to organisations whose activities come under the Act and any which may therefore be declared an "unlawful organisation" by order of the Government. Section 21 of the 1939 Act provides as follows:

Section 21:

"(1) It shall not be lawful for any person to be a member of an unlawful organisation;

(2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section and shall:

(a) on summary conviction thereof, be liable to a fine not exceeding fifty pounds, or at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment; or

(b) on conviction thereof on indictment, be liable to imprisonment for a term not exceeding two years."

Part IV of the 1939 Act contains various provisions relating to the repression of unlawful activities, including, in section 30, the following provision relating to the arrest and detention of persons suspected of being concerned in unlawful activities:

Section 30:

"(1) A member of the *Gárda Síochána* (if he is not in uniform on production of his identity card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having

committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act, or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid.

(2) Any member of the *Gárda Síochána* (if he is not in uniform on production of his identity card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a *Gárda Síochána* station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the *Gárda Síochána* not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.

(4) A person detained under the next preceding sub-section of this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence, or be released by direction of an officer of the *Gárda Síochána*, and shall, if not so charged or released, be released at the expiration of the detention authorised by the said sub-section.

(5) A member of the *Gárda Síochána* may do all or any of the following things in respect of a person detained under this section, that is to say:

- (a) demand of such person his name and address;
- (b) search such person or cause him to be searched;
- (c) photograph such person or cause him to be photographed;
- (d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the *Gárda Síochána* of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to

any such demand, a name or an address which is false or misleading shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months."

Part V of the 1939 Act is concerned with the establishment of "Special Criminal Courts" to try persons charged with offences under the Act.

Lastly, Part VI of the 1939 Act contained provisions authorising any

Minister of State - once the Government had brought that Part of the Act into force - to order, in certain circumstances, the arrest and detention of any person whom he was satisfied was engaged in activities declared unlawful by the Act.

16. On 23rd June 1939, i.e. nine days after the entry into force of the Offences Against the State Act, the Government made an order under section 19 of the Act that the IRA, declared an "unlawful organisation", be dissolved.
17. About 70 persons were subsequently arrested and detained under Part VI of the Act. One of those persons brought an action in the High Court of Ireland, challenging the validity of his detention. The High Court declared the detention illegal and ordered the release of the person concerned by writ of habeas corpus.

The Government had all the persons detained under the same clauses released forthwith.

18. Taking note of the High Court's judgment, the Government tabled in Parliament a Bill to amend Part VI of the Offences against the State Act, 1939. The Bill, after being declared constitutional by the Supreme Court, was passed by Parliament on 9th February 1940, becoming the Offences against the State (Amendment) Act, 1940 (No. 2 of 1940).

This Act No. 2 of 1940 confers on Ministers of State special powers of detention without trial, "if and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this Part of this Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act should come into force immediately" (section 3, sub-section (2) of the Act).

Under section 3, sub-section (4) of the Act, however, a Government proclamation bringing into force the special powers of detention

may be annulled at any time by a simple resolution of the Lower House of the Irish Parliament.

Moreover, under section 9 of the Act both Houses of Parliament must be kept fully informed, at regular intervals, of the manner in which the powers of detention have been exercised.

19. The powers of detention referred to in the Act are vested in Ministers of State. Section 4 of the Act provides as follows:

"(1) Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section.

(2) Any member of the *Gárda Síochána* may arrest without warrant any person in respect of whom a warrant has been issued by a Minister of State under the foregoing sub-section of this section.

(3) Every person arrested under the next preceding sub-section of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens.

(4) Whenever a person is detained under this section, there shall be furnished to such person, as soon as may be after he arrives at a prison or other place of detention prescribed in that behalf by regulations made under this Part of this Act, a copy of the warrant issued under this section in relation to such person and of the provisions of section 8 of this Act".

20. Under section 8 of the Offences against the State (Amendment) Act, 1940, the Government is required to set up, as soon as conveniently may be after the entry into force of the powers of detention without trial, a Commission (hereinafter referred to as "Detention Commission") to which any person arrested or detained under the Act may apply, through the Government, to have his case considered. The Commission is to consist of three persons, appointed by the Government, one to be a commissioned officer of the Defence Forces with not less than seven years' service and each of the others to be a barrister or solicitor of not less than seven

years' standing or a judge or former judge of one of the ordinary courts. Lastly, section 8 of the Act provides that, if the Commission reports that no reasonable grounds exist for the continued detention of the person concerned, such person shall, with all convenient speed, be released.

IV.

21. After several years during which there was very little IRA activity, there was a renewed outbreak in 1954 and again in the second half of 1956.

In the second half of December 1956 armed attacks were made on a number of Northern Ireland police barracks and at the end of the month a policeman was killed. In the same month a police patrol on border roads was fired on, trees were felled across roads and telephone wires cut, etc. In January 1957 there were more incidents of the same kind. At the beginning of the month there was an armed attack on Brookeborough Police Barracks during which two of the assailants were killed; both of them came from the 26-county area. Twelve others, of whom four were wounded, fled across the border and were arrested by the police of the Republic of Ireland. Thereupon, the Prime Minister of the Republic of Ireland, in a public broadcast address on 6th January 1957, made a pressing appeal to the public to put an end to these attacks.

Six days after this broadcast, namely, on 12th January 1957, the IRA carried out an armed raid on an explosives store in the territory of the Republic of Ireland, situated at Moortown, County Dublin, for the purpose of stealing explosives. On 6th May 1957, armed groups entered an explosives store at Swan Laois, held up the watchman and stole a quantity of explosives.

On 18th April 1957, the main railway line from Dublin to Belfast was closed by an explosion which caused extensive damage to the railway bridge at Ayalogue in County Armagh, about 5 miles on the northern side of the border.

During the night of 25th-26th April, three explosions between Lurgan and Portadown, in Northern Ireland, also damaged the same railway line.

On the night of 3rd/4th July a Northern Ireland police patrol on duty a short distance from the border was ambushed. One policeman was shot dead and another injured. At the scene of

the ambush 87 sticks of gelignite were found to have been placed on the road and covered with stones, with wires leading to a detonator.

This incident occurred only eight days before the annual Orange Processions which are widespread throughout Northern Ireland on 12th July. In the past, this date has been particularly critical for the maintenance of peace and public order.

V.

22. The special powers of arrest and detention conferred upon the Ministers of State by the 1940 (Amendment) Act were brought into force on 8th July 1957 by a Proclamation of the Irish Government published in the Official Gazette on 5th July 1957.

On 16th July 1957, the Government set up the Detention Commission provided for in section 8 of that Act and appointed as members of that Commission an officer of Defence Forces, a judge and a district Justice.

23. The Proclamation by which the Irish Government brought into force on 8th July 1957 the special powers of detention provided for in Part II of the 1940 Act (No. 2) read as follows:

"The Government, in exercise of the powers conferred on them by sub-section (2) of section 3 of the Offences against the State (Amendment) Act, 1940, (No. 2 of 1940), hereby declare that the powers conferred by Part II of the said Act are necessary to secure the preservation of public peace and order and that it is expedient that the said part of the said Act should come into force immediately."

24. By letter of 20th July 1957 the Irish Minister for External Affairs informed the Secretary-General of the Council of Europe that Part II of the Offences against the State Act, 1940 (No. 2) had come into force on 8th July 1957.

Paragraph 2 of that letter read as follows:

"... Insofar as the bringing into operation of Part II of the Act, which confers special powers of arrest and detention, may involve any derogation from the obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms, I have the honour to request you to be good enough to regard this letter as informing you accordingly, in compliance with Article 15 (3) (art. 15-3) of the Convention."

The letter pointed out that the detention of

persons under the Act was considered necessary "to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution."

The Secretary-General's attention was called to section 8 of the Act which provides for the establishment of a Commission to which any detained person can appeal. This Commission was set up on 16th July 1957.

25. Soon after the publication of the Proclamation of 5th July 1957 bringing into force the powers of detention provided for under the 1940 Act, the Prime Minister of the Government of the Republic of Ireland announced that the Government would release any person held under that Act who undertook "to respect the Constitution and the laws of Ireland" and "to refrain from being a member of or assisting any organisation declared unlawful under the Offences against the State Act, 1939".

VI.

26. G.R. Lawless was first arrested with three other men on 21st September 1956 in a disused barn at Keshcarrigan, County Leitrim. The police discovered in the barn a Thompson machine-gun, six army rifles, six sporting guns, a revolver, an automatic pistol and 400 magazines. Lawless admitted that he was a member of the IRA and that he had taken part in an armed raid when guns and revolvers had been stolen. He was subsequently charged on 18th October with unlawful possession of firearms under the Firearms Act, 1935 and under Section 21 of the Offences against the State Act, 1939.

G.R. Lawless, together with the other accused, was sent forward for trial to the Dublin Circuit Criminal Court. On 23rd November 1956, they were acquitted of the charge of unlawful possession of arms. The trial judge had directed the jury that the requirements for proving the accused's guilt had not been satisfied in that it not been conclusively shown that no competent authority had issued a firearm certificate authorising him to be in possession of the arms concerned.

At the hearing before this Court on 26th October, the District Justice asked one of the accused, Sean Geraghty, whether he wished to put any questions to any of the policemen present. Sean Geraghty replied as follows:

"As a soldier of the Irish Republican Army and as leader of these men, I do not wish to have any part in proceedings in this Court."

When asked by the Justice whether he pleaded guilty or not guilty to the charge, he again said:

"On behalf of my comrades and myself I wish to state that any arms and ammunition found on us were to be used against the British Forces of occupation to bring about the re-unification of our country and no Irishman or woman of any political persuasion had anything to fear from us. We hold that it is legal to possess arms and also believe it is the duty of every Irishman to bear arms in defence of his country."

Subsequently, G.R. Lawless in reply to a question by the Justice said: "Sean Geraghty spoke for me."

Lawless was again arrested in Dublin on 14th May 1957 under section 30 of the 1939 Act, on suspicion of engaging in unlawful activities. A sketch map for an attack of certain frontier posts between the Irish Republic and Northern Ireland was found on him bearing the inscription "Infiltrate, annihilate and destroy."

On the same day his house was searched by the police who found a manuscript document on guerrilla warfare containing, inter alia, the following statements:

"The resistance movement is the armed vanguard of the Irish people fighting for the freedom of Ireland. The strength of the movement consists in the popular patriotic character of the movement. The basic mission of local resistance units are the destruction of enemy installations and establishments that is TA halls, special huts, BA recruiting offices, border huts, depots, etc.

Attacks against enemy aerodromes and the destruction of aircraft hangars, depots of bombs and fuel, the killing of key flying personnel and mechanics, the killing or capture of high-ranking enemy officers and high officials of the enemy's colonial Government and traitors to our country in their pay, that is, British officers, police agents, touts, judges, high members of the Quisling party, etc."

After being arrested, G.R. Lawless was charged:

- (c) with possession of incriminating documents contrary to section 12 of the 1939 Act;
- (d) with membership of an unlawful organisation, the IRA, contrary to section 21 of the

1939 Act.

On 16th May 1957, G.R. Lawless was brought before the Dublin District Court together with three other men who were also charged with similar offences under the 1939 Act. The Court convicted Lawless on the first charge and sentenced him to one month's imprisonment; it acquitted him on the second charge. The Court record showed that the second charge was dismissed "on the merits" of the case but no official report of the proceedings appears to be available. The reasons for this acquittal were not clearly established. G.R. Lawless was released on about 16th June 1957, after having served his sentence in Mountjoy Prison, Dublin.

- 27. G.R. Lawless was re-arrested on 11th July 1957 at Dun Laoghaire by Security Officer Connor when about to embark on a ship for England. He was detained for 24 hours at Bridewell Police Station in Dublin under section 30 of the 1939 Act, as being a suspected member of an unlawful organisation, namely the IRA.

Detective-Inspector McMahon told the Applicant on the same day that he would be released provided that he signed an undertaking in regard to his future conduct. No written form of the undertaking proposed was put to G.R. Lawless and its exact terms are in dispute.

On 12th July 1957, the Chief Superintendent of Police, acting under section 30, sub-section 3 of the 1939 Act, made an order that G.R. Lawless be detained for a further period of 24 hours expiring at 7.45 p.m. on 13th July 1957.

At 6 a.m. on 13th July 1957, however, before Lawless' detention under section 30 of the 1939 Act had expired, he was removed from the Bridewell Police Station and transferred to the military prison in the Curragh, Co. Kildare (known as the "Glass House"). He arrived there at 8 a.m. on the same day and was detained from that time under an order made on 12th July 1957 by the Minister for Justice under section 4 of the 1940 Act. Upon his arrival at the "Glass House", he was handed a copy of the above-mentioned detention order in which the Minister for Justice declared that G.R. Lawless was, in his opinion, engaged in activities prejudicial to the security of the State and he ordered his arrest and detention under section 40 of the 1940 Act.

From the "Glass House", G.R. Lawless was transferred on 17th July 1957 to a camp known as the "Curragh Internment Camp", which forms

part of the Curragh Military Camp and Barracks in County Kildare, and together with some 120 other persons, was detained there without charge or trial until 11th December 1957 when he was released.

28. On 16th August 1957 G.R. Lawless was informed that he would be released provided he gave an undertaking in writing "to respect the Constitution and laws of Ireland" and not to "be a member of or assist any organisation which is an unlawful organisation under the Offences against the State Act, 1939." G.R. Lawless declined to give this undertaking.
29. On 8th September 1957 G.R. Lawless exercised the right, conferred upon him by section 8 of the 1940 Act, to apply to have the continuation of his detention considered by the Detention Commission set up under the same section of that Act. He appeared before that Commission on 17th September 1957 and was represented by counsel and solicitors. The Detention Commission, sitting for the first time, adopted certain rules of procedure and adjourned until 20th September.
30. On 18th September 1957, however, G.R. Lawless' counsel also made an application to the Irish High Court, under Article 40 of the Irish Constitution, for a Conditional Order of habeas corpus ad subjiciendum. The object of the application was that the Court should order the Commandant of the detention camp to bring G.R. Lawless before the Court in order that it might examine and decide upon the validity of detention. A Conditional Order of habeas corpus would have the effect of requiring the Commandant to "show cause" to the High Court why he should not comply with that Order.

The Conditional Order was granted on the same date and was served on the Commandant giving him a period of four days to "show cause". It was also served upon the Detention Commission. The Detention Commission sat on 20th September 1957, and decided to adjourn the hearing sine die pending the outcome of the habeas corpus application.

31. G.R. Lawless then applied, by a motion to the High Court, to have the Conditional Order made "absolute", notwithstanding the fact that the Commandant of the Detention Camp had in the meantime "shown cause" opposing this application. The Commandant had, in this connection, relied upon the order for the Applicant's detention which had been made by

the Minister for Justice.

The High Court sat from 8th to 11th October 1957 and heard full legal submissions by counsel for both parties. On 11th October it gave judgment allowing the "cause shown" by the camp Commandant to justify detention. The habeas corpus application was therefore dismissed.

32. On 14th October 1957 G.R. Lawless appealed to the Supreme Court, invoking not only the Constitution and laws of Ireland but also the European Convention of Human Rights. On 6th November the Supreme Court dismissed G.R. Lawless' appeal. It gave its reasoned judgment on 3rd December 1957.

The main grounds of the Supreme Court's judgment were as follows:

- (a) The 1940 Act, when in draft form as a Bill, had been referred to the Supreme Court for decision as to whether it was repugnant to the Irish Constitution. The Supreme Court had decided that it was not repugnant and Article 34 (3) 3 of the Constitution declared that no court had competence to question the constitutional validity of a law which had been approved as a Bill by the Supreme Court.
- (b) The Oireachtas (i.e. the Parliament) which was the sole legislative authority had not introduced legislation to make the Convention of Human Rights part of the municipal law of Ireland. The Supreme Court could not, therefore, give effect to the Convention if it should appear to grant rights other than, or supplementary to, those provided under Irish municipal law.
- (c) The appellant's period of detention under section 30 of the 1939 Act was due to expire at 7.45 p.m. on 13th July 1957. At that time he was already being detained under another warrant issued by the Minister for Justice and his detention without release was quite properly continued under the second warrant.
- (d) The appellant had not established a prima facie case in regard to his allegation that he had not been told the reason for his arrest under the Minister's warrant. An invalidity in the arrest, even if established, would not, however, have rendered his subsequent detention unlawful whatever rights it might otherwise have given the appellant under

Irish law.

- (e) The Court had already decided, when considering the 1940 Act as a Bill, that it had no power to question the opinion of a Minister who issued a warrant for detention under section 4 of that Act.
 - (f) The appellant in the habeas corpus proceedings before the High Court had challenged the legality of the constitution of the Detention Commission. Even if it was shown that the Commission's rulings on various procedural matters were wrong, that would not make the appellant's detention unlawful nor would it provide a basis for an application for habeas corpus. Section 8 of the 1940 Act showed that the Commission was not a court and an application before it was not a form of proceedings but no more than an enquiry of an administrative character.
33. Meanwhile, on 8th November 1957 - that is two days after the announcement of the Supreme Court's rejection of his appeal - G.R. Lawless had introduced his Application before the European Commission of Human Rights, alleging that his arrest and detention under the 1940 Act, without charge or trial, violated the Convention and he claimed:
- (a) immediate release from detention;
 - (b) payment of compensation and damages for his detention;
- and
- (c) payment of all the costs and expenses of, and incidental to the proceedings instituted by him in the Irish courts and before the Commission to secure his release.
34. Shortly afterwards the Detention Commission resumed its consideration of the case of G.R. Lawless under section 8 of the 1940 Act and held hearings for that purpose on 6th and 10th December 1957. On the latter date, at the invitation of the Attorney-General, G.R. Lawless in person before the Detention Commission gave a verbal undertaking that he would not "engage in any illegal activities under the Offences against the State Acts, 1939 and 1940", and on the following day an order was made by the Minister for Justice, under section 6 of the 1940 Act, releasing the Applicant from detention.
35. The release of G.R. Lawless from detention was notified to the European Commission of Hu-

man Rights by his solicitor in a letter dated 16th December 1957. The letter at the same time stated that G.R. Lawless intended to continue the proceedings before the Commission with regard to (a) the claim for compensation and damages for his detention and (b) the claim for reimbursement of all costs and expenses in connection with the proceedings undertaken to obtain his release.

VII.

36. At the written and oral proceedings before the Court, the European Commission of Human Rights and the Irish Government made the following submissions:

The Commission, in its Memorial of 27th June 1960:

"May it please the Court to take into consideration the findings of the Commission in its Report on the case of Gerard Richard Lawless and

(1) to decide:

(a) whether or not the detention of the Applicant without trial from 13th July to 11th December 1957 under section 4 of the Offences against the State (Amendment) Act, 1940, was in conflict with the obligations of the Respondent Government under Articles 5 and 6 (art. 5, art. 6) of the Convention;

(b) whether or not such detention was in conflict with the obligations of the Respondent Government under Article 7 (art. 7) of the Convention;

(2) if such detention was in conflict with the obligations of the Respondent Government under Articles 5 and 6 (art. 5, art. 6) of the Convention, to decide:

(a) whether or not the Government's letter to the Secretary-General of 20th July 1957 was a sufficient communication for the purposes of Article 15, paragraph (3) (art. 15-3) of the Convention;

(b) whether or not, from 13th July to 11th December 1957, there existed a public emergency threatening the life of the nation, within the meaning of Article 15, paragraph (1) (art. 15-1) of the Convention;

(c) if such an emergency did exist during that period, whether or not the measure of detaining persons without trial under section 4 of the 1940 Act, as it was applied by the Government, was a measure strictly required by the exigencies of the situation;

(3) to decide whether or not the Applicant is, in any event, precluded by Article 17 (art. 17) of the Convention from invoking the provisions of Articles 5, 6 and 7 (art. 5, art. 6, art. 7);

(4) in the light of its decisions on the questions in paragraphs 1-3 of these submissions, to adjudge and declare:

(a) whether or not the facts disclose any breach by the Respondent Government of its obligations under the Convention;

(b) if so, what compensation, if any, is due to the Applicant in respect of the breach."

37. The Agent of the Irish Government, at the public hearing on 10th April 1961:

"May it please the Court to decide and declare that the answers to the questions contained in paragraph 58 of the Commission's Memorial of 27th June 1960 are as follows:

1.

(a) That the detention of the Applicant was not in conflict with the obligations of the Government under Articles 5 and 6 (art. 5, art. 6) of the Convention.

(b) That such detention was not in conflict with the obligations of the Government under Article 7 (art. 7) of the Convention.

2.

(a) That the Government's letter of 20th July 1957 was a sufficient communication for the purposes of paragraph (3) of Article 15 (art. 15-3) of the Convention or, alternatively, that in the present case, the Government are not by any of the provisions of the said paragraph (3) (art. 15-3) deprived from relying on paragraph (1) of Article 15 (art. 15-1).

(b) That from 13th July 1957 to 11th December 1957 there did exist a public emergency threatening the life of the nation, within the meaning of Article 15, paragraph (1) (art. 15-1), of the Convention.

(c) That the measure of detaining persons without trial, as it was applied by the Government, was a measure strictly required by the exigencies of the situation.

3. That the Applicant is in any event precluded by Article 17 (art. 17) of the Convention from invoking the provisions of Articles 5, 6 and 7 (art. 5, art. 6, art. 7) of the Convention.

4.

(a) That the facts do not disclose any breach by the Government of their obligations under

the Convention.

(b) That, by reason of the foregoing, no question of compensation arises."

THE LAW

38. Whereas it has been established that G.R. Lawless was arrested by the Irish authorities on 11th July 1957 under sections 21 and 30 of the Offences against the State Act (1939) No. 13; that on 13th July 1957, before the expiry for the order for arrest made under Act No. 13 of 1939, G.R. Lawless was handed a copy of a detention order made on 12th July 1957 by the Minister of Justice under section 4 of the Offences against the State (Amendment) Act 1940; and that he was subsequently detained, first in the military prison in the Curragh and then in the Curragh Internment Camp, until his release on 11th December 1957 without having been brought before a judge during that period;

39. Whereas the Court is not called upon to decide on the arrest of G.R. Lawless on 11th July 1957, but only, in the light of the submissions put forward both by the Commission and by the Irish Government, whether or not the detention of G.R. Lawless from 13th July to 11th December 1957 under section 4 of the Offences against the State (Amendment) Act, 1940, complied with the stipulations of the Convention;

40. Whereas, in this connection the Irish Government has put in against the Application of G.R. Lawless a plea in bar as to the merits derived from Article 17 (art. 17) of the Convention; whereas this plea in bar should be examined first;

As to the plea in bar derived from Article 17 (art. 17) of the Convention.

41. Whereas Article 17 (art. 17) of the Convention provides as follows:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

42. Whereas the Irish Government submitted to the Commission and reaffirmed before the Court (i) that G.R. Lawless, at the time of his arrest in July 1957, was engaged in IRA activities; (ii) that the Commission, in paragraph 138 of its

Report, had already observed that his conduct was "such as to draw upon the Applicant the gravest suspicion that, whether or not he was any longer a member, he was still concerned with the activities of the IRA at the time of his arrest in July 1957"; (iii) that the IRA was banned on account of its activity aimed at the destruction of the rights and freedoms set forth in the Convention; that, in July 1957, G.R. Lawless was thus concerned in activities falling within the terms of Article 17 (art. 17) of the Convention; that he therefore no longer had a right to rely on Articles 5, 6, 7 (art. 5, art. 6, art. 7) or any other Article of the Convention; that no State, group or person engaged in activities falling within the terms of Article 17 (art. 17) of the Convention may rely on any of the provisions of the Convention; that this construction was supported by the Commission's decision on the admissibility of the Application submitted to it in 1957 by the German Communist Party; that, however, where Article 17 (art. 17) is applied, a Government is not released from its obligation towards other Contracting Parties to ensure that its conduct continues to comply with the provisions of the Convention;

43. Whereas the Commission, in the Report and in the course of the written pleadings and oral hearings before the Court, expressed the view that Article 17 (art. 17) is not applicable in the present case; whereas the submissions of the Commission on this point may be summarised as follows: that the general purpose of Article 17 (art. 17) is to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention; but that to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed in the Convention from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms; that Article 17 (art. 17) covers essentially those rights which, if invoked, would facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of "any of the rights and freedoms set forth in the Convention"; that the decision on the admissibility of the Application submitted by the German Communist Party (Application No. 250/57) was perfectly consistent with this construction of Article 17 (art. 17); that there could be no question, in connection with that Application, of the rights set forth in Articles 9, 10 and 11 (art. 9, art. 10, art. 11) of the Convention, since those rights, if extended to the Communist Party, would have enabled it to engage

in the very activities referred to in Article 17 (art. 17);

Whereas, in the present case, the Commission was of the opinion that, even if G. R. Lawless was personally engaged in IRA activities at the time of his arrest, Article 17 (art. 17) did not preclude him from claiming the protection of Articles 5 and 6 (art. 5, art. 6) of the Convention nor absolve the Irish Government from observing the provisions of those Articles, which protect every person against arbitrary arrest and detention without trial;

44. Whereas in the opinion of the Court the purpose of Article 17 (art. 17), insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; whereas this provision which is negative in scope cannot be construed a contrario as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 (art. 5, art. 6) of the Convention; whereas, in the present instance G.R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein but has complained of having been deprived of the guarantees granted in Articles 5 and 6 (art. 5, art. 6) of the Convention; whereas, accordingly, the Court cannot, on this ground, accept the submissions of the Irish Government.

As to whether the detention of G.R. Lawless without trial from 13th July to 11th December 1957 under Section 4 of the Offences against the State (Amendment) Act 1940, conflicted with the Irish Government's obligations under Articles 5 and 6 (art. 5, art. 6) of the Convention.

45. Whereas Article 5 (art. 5) of the Convention reads as follows:

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any

obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision of his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

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

46. Whereas the Commission, in its Report, expressed the opinion that the detention of G.R. Lawless did not fall within any of the categories of cases listed in Article 5, paragraph 1 (art. 5-1) of the Convention and hence was not a measure deprivative of liberty which was authorised by the said clause; whereas it is stated in that opinion that under Article 5, paragraph 1 (art. 5-1), deprivation of liberty is authorised in six separate categories of cases of which

only those referred to in sub-paragraphs (b) (art. 5-1-b) in fine ("in order to secure the fulfilment of any obligation prescribed by law") and (c) (art. 5-1-c) of the said paragraph come into consideration in the present instance, the Irish Government having invoked each of those sub-paragraphs before the Commission as justifying the detention of G.R. Lawless; that, with regard to Article 5, paragraph 1 (b) (art. 5-1-b) in fine, the detention of Lawless by order of a Minister of State on suspicion of being engaged in activities prejudicial to the preservation of public peace and order or to the security of the State cannot be deemed to be a measure taken "in order to secure the fulfilment of any obligation prescribed by law", since that clause does not contemplate arrest or detention for the prevention of offences against public peace and public order or against the security of the State but for securing the execution of specific obligations imposed by law;

That, moreover, according to the Commission, the detention of G. R. Lawless is not covered by Article 5, paragraph 1 (c) (art. 5-1-c), since he was not brought before the competent judicial authority during the period under review; that paragraph 1 (c) (art. 5-1-c) authorises the arrest or detention of a person on suspicion of being engaged in criminal activities only when it is effected for the purpose of bringing him before the competent judicial authority; that the Commission has particularly pointed out in this connexion that both the English and French versions of the said clause make it clear that the words "effected for the purpose of bringing him before the competent judicial authority" apply not only to the case of a person arrested or detained on "reasonable suspicion of having committed an offence" but also to the case of a person arrested or detained "when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"; that, furthermore, the presence of a comma in the French version after the words "s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente" means that this passage qualifies all the categories of arrest and detention mentioned after the comma; that in addition, paragraph 1 (c) of Article 5 (art. 5-1-c) has to be read in conjunction with paragraph 3 of the same Article (art. 5-3) whereby everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of the said Article (art. 5-1-c) shall be brought promptly before a judge; that it is hereby confirmed that Article 5, paragraph 1 (c) (art. 5-1-c),

allows the arrest or detention of a person effected solely for the purpose of bringing him before a judge;

Whereas the Commission has expressed no opinion on whether or not the detention of G.R. Lawless was consistent with the provisions of Article 6 (art. 6) of the Convention;

47. Whereas the Irish Government have contended before the Court:

- that the detention from 13th July to 11th December 1957 of G.R. Lawless whose general conduct together with a number of specific circumstances drew upon him, in the opinion of the Commission itself (paragraph 138 of its Report), "the gravest suspicion that he was concerned with the activities of the IRA" at the time of his arrest in July 1957 - was not a violation of Article 5 or 6 (art. 5, art. 6) of the Convention; whereas the Irish Government have contended that the Convention does not require that a person arrested or detained on preventive grounds shall be brought before a judicial authority; and that, consequently, the detention of G.R. Lawless did not conflict with the stipulations of the Convention; whereas on this point the Irish Government, not relying before the Court, as they had done before the Commission, on paragraph 1 (b) of Article 5 (art. 5-1-b), have made submissions which include the following: that Article 5 paragraph 1 (c) (art. 5-1-c) refers to two entirely separate categories of cases of deprivation of liberty - those where a person is arrested or detained "on reasonable suspicion of having committed an offence" and those where a person is arrested or detained "when it is reasonably considered necessary to prevent his committing an offence, etc."; that it is clear from the wording of the said clause that the obligation to bring the arrested or detained person before the competent judicial authority applies only to the former category of case; that this is the meaning of the clause, particularly in the English version;
- that the preliminary work on Article 5 (art. 5) supports this construction of the said clause; that account must be taken of the fact that the said Article (art. 5) is derived from a proposal submitted to the Committee of Experts by the United Kingdom delegation in March 1950 and that the French version is consequently only a translation

of the original English text; that, as regards paragraph 1 (c) on the Article (art. 5-1-c), the words "or when it is reasonably considered necessary" appeared in the first draft as "or which is reasonably considered to be necessary" and, in the English version, clearly refer to the words "arrest or detention" and not to the phrase "effected for the purpose of bringing him before the competent legal authority"; that this clause subsequently underwent only drafting alterations;

- that Article 5, paragraph 3 (art. 5-3) does not conflict with this construction of paragraph 1 (c) of the same Article (art. 5-1-c); that paragraph 3 (art. 5-3) applies only to the first category of cases mentioned in paragraph 1 (c) (art. 5-1-c) and not to cases of the arrest or detention of a person "when it is reasonably considered necessary to prevent his committing an offence"; that this interpretation is supported by the fact that in Common Law countries a person cannot be put on trial for having intended to commit an offence;
- that Article 5, paragraph 3 (art. 5-3), is also derived from a proposal submitted in March 1950 by the United Kingdom delegation to the "Committee of Experts" convened to prepare the first draft of a Convention; that the British proposal was embodied in the draft produced by the Committee of Experts; that this draft was then examined by a "Conference of Senior Officials" who deleted from paragraph 3 (art. 5-3) the words "or to prevent his committing a crime"; that paragraph 3 (art. 5-3), after amendment by the Senior Officials, accordingly read as follows:

"Anyone arrested or detained on the charge of having committed a crime, in accordance with the provisions of paragraph 1 (c) (art. 5-1-c), shall be brought promptly before a judge or other officer authorised by law.";

- that it follows from the foregoing that the Senior Officials intended to exclude from Article 5, paragraph 3 (art. 5-3), the case of a person arrested to prevent his committing a crime; that this intention on the part of the Senior Officials is further confirmed by the following passage in their Report to the Committee of Ministers (Doc. CM/WP 4 (50) 19, p. 14):

"The Conference considered it useful to point out that where authorised arrest or detention

is effected on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a regime of a Police State. It may, however, be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence. In order to avoid any possible abuses of the right thus conferred on public authorities, Article 13, para. 2 (art. 13-2), will have to be applied strictly.";

- that it is clear from the report of the Senior Officials that they - being aware of the danger of abuse in applying a clause which, as in the case of Article 5, paragraph 1 (c) (art. 5-1-c), allows the arrest or detention of a person when it is reasonably considered necessary to prevent his committing an offence - wished to obviate that danger not by means of a judicial decision but through the strict enforcement of the rule in Article 13, paragraph 2, of the draft, which later became Article 18 (art. 18) of Convention; and that Article 5 (art. 5) subsequently underwent only drafting alterations which, however, did not make the meaning of the text absolutely clear or render it proof against misinterpretation;
 - whereas the Irish Government have contended that Article 6 (art. 6) of the Convention is irrelevant to the present case, since there was no criminal charge against Lawless;
48. Whereas the Commission in its Report and its Principal Delegate at the oral hearing rebutted the construction placed by the Irish Government on Article 5 (art. 5) and based in part on the preparatory work; whereas the Commission contends in the first place that, in accordance with a well-established rule concerning the interpretation of international treaties, it is not permissible to resort to preparatory work when the meaning of the clauses to be construed is clear and unequivocal; and that even reference to the preparatory work can reveal no ground for questioning the Commission's interpretation of Article 5 (art. 5); whereas, in support of its interpretation it has put forward submissions which may be summarised as follows: that it is true that, in the Council of Europe, Article 5 (art. 5) is derived from a proposal made to the Committee of Experts by the United Kingdom delegation in March 1950, but that that proposal was based on a text introduced in the United Nations by a group of States which included not only the United Kingdom but also France; that the United Nations text was prepared in a number of languages, including English and French; that the British delegation, when introducing their proposal in the Committee of Experts of the Council of Europe, put in both the French and the English versions of the text in question; that the English version cannot therefore be regarded as the dominant text; that on the contrary, all the evidence goes to show that the changes made in the English version, particularly in that of Article 5, paragraph 1 (c) (art. 5-1-c), during the preparatory work at the Council of Europe were intended to bring it into line with the French text, which, apart from a few drafting alterations of no importance to the present case, was essentially the same as that finally adopted for Article 5 (art. 5) of the Convention; that this is true even of the comma after the words "autorité judiciaire compétente", which strictly bears out the construction placed by the Commission on Article 5, paragraph 1 (c) (art. 5-1-c); that the preparatory work on Article 5, paragraph 3 (art. 5-3), leaves no room for doubt about the intention of the authors of the Convention to require that everyone arrested or detained in one or other of the circumstances mentioned in paragraph 1 (c) of the same Article (art. 5-1-c) should be brought promptly before a judge; that this text, too, had its origin in the United Nations draft Covenant in both languages; that the words "on the charge of having committed a crime" were in fact deleted on 7th August 1950 by the Committee of Ministers themselves, but only in order to bring the English text into line with the French, which had already been given the following wording by the Conference of Senior Officials: "Toute personne arrêtée ou détenue, dans les conditions prévues au paragraphe 1 (c) (art. 5-1-c) etc. ..."; and that the submissions of the Irish Government therefore receive no support from the preparatory work;
49. Whereas in the first place, the Court must point out that the rules set forth in Article 5, paragraph 1 (b), and Article 6 (art. 5-1-b, art. 6) respectively are irrelevant to the present proceedings, the former because G.R. Lawless was not detained "for non-compliance with the ... order of a court" and the latter because there was no criminal charge against him; whereas, on this point, the Court is required to consider whether or not the detention of G.R. Lawless from 13th July to 11th December 1957 under the 1940 Amendment Act conflicted with the

provisions of Article 5, paragraphs 1 (c) and 3 (art. 5-1-c, art. 5-3);

50. Whereas, in this connection, the question referred to the judgment of the Court is whether or not the provisions of Article 5, paragraphs 1 (c) and 3 (art. 5-1-c, art. 5-3), prescribe that a person arrested or detained "when it is reasonably considered necessary to prevent his committing an offence" shall be brought before a judge, in other words whether, in Article 5, paragraph 1 (c) (art. 5-1-c), the expression "effected for the purpose of bringing him before the competent judicial authority" qualifies only the words "on reasonable suspicion of having committed an offence" or also the words "when it is reasonably considered necessary to prevent his committing an offence";
51. Whereas the wording of Article 5, paragraph 1 (c) (art. 5-1-c), is sufficiently clear to give an answer to this question; whereas it is evident that the expression "effected for purpose of bringing him before the competent legal authority" qualifies every category of cases of arrest or detention referred to in that sub-paragraph (art. 5-1-c); whereas it follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence, or a person whom it reasonably considered necessary to restrain from absconding after having committed an offence;

Whereas, further, paragraph 1 (c) of Article 5 (art. 5-1-c) can be construed only if read in conjunction with paragraph 3 of the same Article (art. 5-3), with which it forms a whole; whereas paragraph 3 (art. 5-3) stipulates categorically that "everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge ..." and "shall be entitled to trial within a reasonable time"; whereas it plainly entails the obligation to bring everyone arrested or detained in any of the circumstances contemplated by the provisions of paragraph 1 (c) (art. 5-1-c) before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits; whereas such is the plain and natural meaning of the wording of both paragraph 1 (c) and paragraph 3 of Article 5 (art. 5-1-c, art. 5-3);

Whereas the meaning thus arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest; whereas it must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention; whereas such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention; whereas therefore, the Court cannot deny Article 5, paragraphs 1 (c) and 3 (art. 5-1-c, art. 5-3), the plain and natural meaning which follows both from the precise words used and from the impression created by their context; whereas, therefore, there is no reason to concur with the Irish Government in their analysis of paragraph 3 (art. 5-3) seeking to show that that clause is applicable only to the first category of cases referred to in Article 5, paragraph 1 (c) (art. 5-1-c), to the exclusion of cases of arrest or detention of a person "when it is reasonably considered necessary to prevent his committing an offence";

Whereas, having ascertained that the text of Article 5, paragraphs 1 (c) and 3, (art. 5-1-c, art. 5-3) is sufficiently clear in itself and means, on the one hand, that every person whom "it is reasonably considered necessary to prevent ... committing an offence" may be arrested or detained only "for the purpose of bringing him before the competent legal authority" and, on the other hand, that once a person is arrested or detained he shall be brought before a judge and "shall be entitled to trial within a reasonable time", and that, having also found that the meaning of this text is in keeping with the purpose of the Convention, the Court cannot, having regard to a generally recognised principle regarding the interpretation of international treaties, resort to the preparatory work;

52. Whereas it has been shown that the detention of G.R. Lawless from 13th July to 11th December 1957 was not "effected for the purpose of bringing him before the competent legal authority" and that during his detention he was not in fact brought before a judge for trial "within a reasonable time"; whereas it follows that his detention under Section 4 of the Irish

1940 Act was contrary to the provisions of Article 5, paras. 1 (c) and 3 (art. 5-1-c, art. 5-3) of the Convention; whereas it will therefore be necessary to examine whether, in the particular circumstances of the case, the detention was justified on other legal grounds;

As to whether the detention of G.R. Lawless from 13th July to 11th December 1957 under Section 4 of the Offences against the State (Amendment) Act, 1940, conflicted with the Irish Government's obligations under Article 7 (art. 7) of the Convention.

53. Whereas the Commission referred before the Court to the renewed allegation of G.R. Lawless that his detention constituted a violation of Article 7 (art. 7) of the Convention; whereas the said Article (art. 7) reads as follows:

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

(2) This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

Whereas the submissions made by G.R. Lawless before the Commission were substantially as follows: that the 1940 Act was brought into force on 8th July 1957 and that he was arrested on 11th July 1957; that it was evident from the proceedings before the Detention Commission - which had to examine cases of detention effected under the 1940 Act - that the Minister of State, in signing the warrant of detention, had taken into consideration matters alleged to have occurred before 8th July 1957; that, if the substance rather than the form of the 1940 Act were considered, detention under that Act would constitute a penalty for having committed an offence; that the offences to which the 1940 Act relates were not punishable before 8th July 1957, when the Act came into force; that, furthermore, if he had been convicted of the alleged offences by an ordinary court, he would in all probability have been sentenced to less severe penalties which would have been subject to review on appeal in due course of law;

54. Whereas the Commission, in its Report, expressed the opinion that Article 7 (art. 7) was not applicable in the present case; that in particular, G.R. Lawless was not detained as a result of a conviction on a criminal charge and that his detention was not a "heavier penalty" within the meaning of Article 7 (art. 7); that, moreover, there was no question of section 4 of the 1940 Act being applied retroactively, since a person was liable to be detained under that clause only if a Minister of State was of the opinion that that person was, after the power of detention conferred by section 4 had come into force, engaged in activities prejudicial to the preservation of public peace and order or the security of the State;

55. Whereas the Irish Government share the Commission's opinion on this point;

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

As to whether, despite Articles 5 and 6 (art. 5, art. 6) of the Convention, the detention of G.R. Lawless was justified by the right of derogation allowed to the High Contracting Parties in certain exceptional circumstances under Article 15 (art. 15) of the Convention.

57. Whereas the Court is called upon to decide whether the detention of G.R. Lawless from 13th July to 11th December 1957 under the Offences against the State (Amendment) Act, 1940, was justified, despite Articles 5 and 6 (art. 5, art. 6) of the Convention, by the right of derogation allowed to the High Contracting Parties in certain exceptional circumstances under Article 15 (art. 15) of the Convention;
58. Whereas Article 15 (art. 15) reads as follows:

"(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures deroga-

gating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2 (art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 (art. 3, art. 4-1, art. 7) shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.";

59. Whereas it follows from these provisions that, without being released from all its undertakings assumed in the Convention, the Government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention other than those named in Article 15, paragraph 2 (art. 15-2), provided that such measures are strictly limited to what is required by the exigencies of the situation and also that they do not conflict with other obligations under international law; whereas it is for the Court to determine whether the conditions laid down in Article 15 (art. 15) for the exercise of the exceptional right of derogation have been fulfilled in the present case;

(a) As to the existence of a public emergency threatening the life of the nation.

60. Whereas the Irish Government, by a Proclamation dated 5th July 1957 and published in the Official Gazette on 8th July 1957, brought into force the extraordinary powers conferred upon it by Part II of the Offences against the State (Amendment) Act, 1940, "to secure the preservation of public peace and order";

61. Whereas, by letter dated 20th July 1957 addressed to the Secretary-General of the Council of Europe, the Irish Government expressly stated that "the detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution";

62. Whereas, in reply to the Application introduced by G.R. Lawless before the Commission, the Irish Government adduced a series of facts from which they inferred the existence, during the period mentioned, of "a public emergency threatening the life of the nation" within the meaning of Article 15 (art. 15);

63. Whereas, before the Commission, G.R. Lawless submitted in support of his application that the aforesaid facts, even if proved to exist, would not have constituted a "public emergency threatening the life of the nation" within the meaning of Article 15 (art. 15); whereas, moreover, he disputed some of the facts adduced by the Irish Government;

64. Whereas the Commission, following the investigation carried out by it in accordance with Article 28 (art. 28) of the Convention, expressed a majority opinion in its Report that in "July 1957 there existed in Ireland a public emergency threatening the life of the nation within the meaning of Article 15, paragraph 1 (art. 15-1), of the Convention";

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

66. Whereas, despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but whereas the homicidal ambush on the night 3rd to 4th July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12th July - a date, which, for historical reasons is particularly critical for the preservation of public peace and order - the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland;
67. Whereas, in conclusion, the Irish Government were justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation and were hence entitled, applying the provisions of Article 15, paragraph 1 (art. 15-1), of Convention for the purposes for which those provisions were made, to take measures derogating from their obligations under the Convention;
- (b) As to whether the measures taken in derogation from obligations under the Convention were "strictly required by the exigencies of the situation".**
68. Whereas Article 15, paragraph 1 (art. 15-1), provides that a High Contracting Party may derogate from its obligations under the Convention only "to the extent strictly required by the exigencies of the situation"; whereas it is therefore necessary, in the present case, to examine whether the bringing into force of Part II of the 1940 Act was a measure strictly required by the emergency existing in 1957;
69. Whereas G.R. Lawless contended before the Commission that even if the situation in 1957 was such as to justify derogation from obligations under the Convention, the bringing into operation and the enforcement of Part II of the Offences against the State (Amendment) Act 1940 were disproportionate to the strict requirements of the situation;
70. Whereas the Irish Government, before both the Commission and the Court, contended that the measures taken under Part II of the 1940 Act were, in the circumstances, strictly required by the exigencies of the situation in accordance with Article 15, paragraph 1 (art. 15-1), of the Convention;
71. Whereas while the majority of the Commission concurred with the Irish Government's submissions on this point, some members of the Commission drew from the facts established different legal conclusions;
72. Whereas it was submitted that in view of the means available to the Irish Government in 1957 for controlling the activities of the IRA and its splinter groups the Irish Government could have taken measure which would have rendered superfluous so grave a measure as detention without trial; whereas, in this connection, mention was made of the application of the ordinary criminal law, the institution of special criminal courts of the type provided for by the Offences against the State Act, 1939, or of military courts; whereas it would have been possible to consider other measures such as the sealing of the border between the Republic of Ireland and Northern Ireland;
73. Whereas, however, considering, in the judgment of the Court, that in 1957 the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland; whereas the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; whereas, in particular, the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population; whereas the fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border was an additional impediment to the gathering of sufficient evidence; whereas the sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency;
- Whereas it follows from the foregoing that none of the above-mentioned means would have made it possible to deal with the situation existing in Ireland in 1957; whereas, therefore, the administrative detention - as instituted under the Act (Amendment) of 1940 - of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances;
74. Whereas, moreover, the Offences against the State (Amendment) Act of 1940, was subject

to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention; whereas the application of the Act was thus subject to constant supervision by Parliament, which not only received precise details of its enforcement at regular intervals but could also at any time, by a Resolution, annul the Government's Proclamation which had brought the Act into force; whereas the Offences against the State (Amendment) Act 1940, provided for the establishment of a "Detention Commission" made up of three members, which the Government did in fact set up, the members being an officer of the Defence Forces and two judges; whereas any person detained under this Act could refer his case to that Commission whose opinion, if favourable to the release of the person concerned, was binding upon the Government; whereas, moreover, the ordinary courts could themselves compel the Detention Commission to carry out its functions;

Whereas, in conclusion, immediately after the Proclamation which brought the power of detention into force, the Government publicly announced that it would release any person detained who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity, and that the wording of this undertaking was later altered to one which merely required that the person detained would undertake to observe the law and refrain from activities contrary to the 1940 Act; whereas the persons arrested were informed immediately after their arrest that they would be released following the undertaking in question; whereas in a democratic country such as Ireland the existence of this guarantee of release given publicly by the Government constituted a legal obligation on the Government to release all persons who gave the undertaking;

Whereas, therefore, it follows from the foregoing that the detention without trial provided for by the 1940 Act, subject to the above-mentioned safeguards, appears to be a measure strictly required by the exigencies of the situation within the meaning of Article 15 (art. 15) of the Convention;

75. Whereas, in the particular case of G.R. Lawless, there is nothing to show that the powers of detention conferred upon the Irish Government by the Offences against the State (Amendment) Act 1940, were employed against him, either within the meaning of Article 18 (art. 18) of the Convention, for a purpose other than that for

which they were granted, or within the meaning of Article 15 (art. 15) of the Convention, by virtue of a measure going beyond what was strictly required by the situation at that time; whereas on the contrary, the Commission, after finding in its Decision of 30th August 1958 on the admissibility of the Application that the Applicant had in fact submitted his Application to it after having exhausted the domestic remedies, observed in its Report that the general conduct of G.R. Lawless, "his association with persons known to be active members of the IRA, his conviction for carrying incriminating documents and other circumstances were such as to draw upon the Applicant the gravest suspicion that, whether or not he was any longer a member, he still was concerned with the activities of the IRA at the time of his arrest in July 1957; whereas the file also shows that, at the beginning of G.R. Lawless's detention under Act No. 2 of 1940, the Irish Government informed him that he would be released if he gave a written undertaking "to respect the Constitution of Ireland and the Laws" and not to "be a member of or assist any organisation that is an unlawful organisation under the Offences against the State Act, 1939"; whereas in December 1957 the Government renewed its offer in a different form, which was accepted by G.R. Lawless, who gave a verbal undertaking before the Detention Commission not to "take part in any activities that are illegal under the Offences against the State Acts 1939 and 1940" and was accordingly immediately released;

(c) As to whether the measures derogating from obligations under the Convention were "inconsistent with ... other obligations under international law".

76. Whereas Article 15, paragraph 1 (art. 15-1), of the Convention authorises a High Contracting Party to take measures derogating from the Convention only provided that they "are not inconsistent with ... other obligations under international law";
77. Whereas, although neither the Commission nor the Irish Government have referred to this provision in the proceedings, the function of the Court, which is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention (Article 19 of the Convention) (art. 19), requires it to determine *proprio motu* whether this condition has been fulfilled in the present case;
78. Whereas no facts have come to the knowledge of the Court which give it cause to hold that the

measure taken by the Irish Government derogating from the Convention may have conflicted with the said Government's other obligations under international law;

As to whether the letter of 20th July 1957 from the Irish Government to the Secretary-General of the Council of Europe was a sufficient notification for the purposes of Article 15, paragraph 3 (art. 15-3), of the Convention.

79. Whereas Article 15, paragraph 3 (art. 15-3), of the Convention provides that a Contracting Party availing itself of the right of derogation under paragraph 1 of the same Article (art. 15-1) shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore and shall also inform him when such measures have ceased to operate;
80. Whereas, in the present case, the Irish Government, on 20th July 1957, sent the Secretary-General of the Council of Europe a letter informing him - as is stated therein: "in compliance with Article 15 (3) (art. 15-3) of the Convention" - that Part II of the Offences against the State (Amendment) Act, 1940, had been brought into force on 8th July 1957; whereas copies of the Irish Government's Proclamation on the subject and of the 1940 Act itself were attached to the said letter; whereas the Irish Government explained in the said letter that the measure in question was "considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution";
81. Whereas G.R. Lawless contested before the Commission the Irish Government's right to rely on the letter of 20th July 1957 as a valid notice of derogation under Article 15, paragraph 3 (art. 15-3), of the Convention; whereas, in substance, he contended before the Commission: that the letter had not the character of a notice of derogation, as the Government had not sent it for the purpose of registering a formal notice of derogation; that even if the letter were to be regarded as constituting such a notice, it did not comply with the strict requirements of Article 15, paragraph 3 (art. 15-3), in that it neither adduced, as a ground for detention without trial, the existence of a time of war or other public emergency threatening the life of the nation nor properly defined the nature of the measure taken by the Government; whereas the Principal Delegate of the Commission, in the proceedings before the Court, made known a third contention of G.R. Lawless to the effect that the derogation, even if it had been duly notified to the Secretary-General on 20th July 1957, could not be enforced against persons within the jurisdiction of the Republic of Ireland in respect of the period before 23rd October 1957, when it was first made public in Ireland;
82. Whereas the Commission expressed the opinion that the Irish Government had not delayed in bringing to the enforcement of the special measures to the attention of the Secretary-General with explicit reference to Article 15, paragraph 3 (art. 15-3), of the Convention; whereas the terms of the letter of 20th July 1957, to which were attached copies of the 1940 Act and of the Proclamation bringing it into force, were sufficient to indicate to the Secretary-General the nature of the measures taken and that consequently, while noting that the letter of 20th July did not contain a detailed account of the reasons which had led the Irish Government to take the measures of derogation, it could not say that in the present case there had not been a sufficient compliance with the provisions of Article 15, paragraph 3 (art. 15-3); whereas, with regard to G.R. Lawless' third contention the Delegates of the Commission added, in the proceedings before the Court, that Article 15, paragraph 3 (art. 15-3), of the Convention required only that the Secretary-General of the Council of Europe be informed of the measures of derogation taken, without obliging the State concerned to promulgate the notice of derogation within the framework of its municipal laws;
83. Whereas the Irish Government, in their final submissions, asked the Court to state, in accordance with the Commission's opinion, that the letter of 20th July 1957 constituted a sufficient notification for the purposes of Article 15, paragraph 3 (art. 15-3), of the Convention or, alternatively, to declare that there is nothing in the said paragraph 3 (art. 15-3) which, in the present case, detracts from the Irish Government's right to rely on paragraph 1 of the said Article 15 (art. 15-1);
84. Whereas the Court is called upon in the first instance, to examine whether, in pursuance of paragraph 3 of Article 15 (art. 15-3) of the Convention, the Secretary-General of the Council of Europe was duly informed both of the measures taken and of the reason therefore; whereas the Court notes that a copy of the

Offences against the State (Amendment) Act, 1940, and a copy of the Proclamation of 5th July, published on 8th July 1957, bringing into force Part II of the aforesaid Act were attached to the letter of 20th July; that it was explained in the letter of 20th July that the measures had been taken in order "to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution"; that the Irish

Government thereby gave the Secretary-General sufficient information of the measures taken and the reasons therefore; that, in the second place, the Irish Government brought this information to the Secretary-General's attention only twelve days after the entry into force of the measures derogating from their obligations under the Convention; and that the notification was therefore made without delay; whereas, in conclusion, the Convention does not contain any special provision to the effect that the Contracting State concerned must promulgate in its territory the notice of derogation addressed to the Secretary-General of the Council of Europe;

Whereas the Court accordingly finds that, in the present case, the Irish Government fulfilled their obligations as Party to the Convention under Article 15, paragraph 3 (art. 15-3), of the Convention;

FOR THESE REASONS THE COURT UNANIMOUSLY,

- (i) **Dismisses the plea in bar derived by the Irish Government from Article 17 (art. 17) of the Convention;**
- (ii) **States that Articles 5 and 6 (art. 5, art. 6) of the Convention provided no legal foundation for the detention without trial of G.R. Lawless from 13th July to 11th December 1957, by virtue of Article 4 of the Offences against the State (Amendment) Act, 1940;**
- (iii) **States that there was no breach of Article 7 (art. 7) of the Convention;**
- (iv) **States that the detention of G.R. Lawless from 13th July to 11th December 1957 was founded on the right of derogation duly exercised by the Irish Government in pursuance of Article 15 (art. 15) of the Convention in July 1957;**

- (v) **States that the communication addressed by the Irish Government to the Secretary-General of the Council of Europe on 20th July 1957 constituted sufficient notification within the meaning of Article 15, paragraph 3 (art. 15-3), of the Convention;**

Decides, accordingly, that in the present case the facts found do not disclose a breach by the Irish Government of their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms;

Decides, therefore, that the question of entitlement by G.R. Lawless to compensation in respect of such a breach does not arise.

Done in French and in English, the French text being authentic, at the Council of Europe, Strasbourg, this first day of July one thousand nine hundred and sixty-one.

R. CASSIN, *President*

P. MODINOS, *Registrar*

Mr. G. MARIDAKIS, Judge, while concurring with the operative part of the judgment, annexed thereto an individual opinion, in accordance with Rule 50, paragraph 2 of the Rules of Court.

INDIVIDUAL OPINION OF MR. G. MARIDAKIS

The Irish Government have not violated the provisions of Article 15 (art. 15) of the Convention.

When the State is engaged in a life and death struggle, no one can demand that it refrain from taking special emergency measures: *salus rei publicae suprema lex est*. Article 15 (art. 15) is founded on that principle.

Postulating this right of defence, the Convention provides in this Article (art. 15) that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention", provided, however, that it does so only "to the extent strictly required by the exigencies of the situation" and "provided that such measures are not inconsistent with its other obligations under international law."

By "public emergency threatening the life of the nation" it is to be understood a quite exceptional

situation which imperils or might imperil the normal operation of public policy established in accordance with the lawfully expressed will of the citizens, in respect alike of the situation inside the country and of relations with foreign Powers.

The Irish Government having determined that in July 1957 the activities of the IRA had assumed the character of a public emergency threatening the life of the nation, in order to meet this emergency, put into effect on 8th July 1957 the 1940 Act amending the Offences against the State Act, 1939.

In compliance with Article 15 (3) (art. 15-3), the Irish Government notified the Secretary-General of the Council of Europe of their intention to bring the 1940 Act legally into force by letter of 20th July 1957, in which it wrote:

"I have the honour also to invite your attention to section 8 of the Act, which provides for the establishment by the Government of Ireland of a Commission to inquire into the grounds of detention of any person who applies to have his detention investigated. The Commission envisaged by the section was established on the 16th July 1957."

The 1940 Act involves derogation from obligations under Article 5 (1) (c) and (3) (art. 5-1-c, art. 5-3) of the Convention, since, in contrast to that Article (art. 5), which imposes the obligation to bring the person concerned before a judge, the 1940 Act gives such person the right to request that the Commission established under the Act inquire into the ground of his detention.

Nevertheless, the derogation does not go beyond the "extent strictly required by the exigencies of the situation." The Government had always been engaged in a struggle with the IRA. If, then, to prevent actions by the IRA calculated to aggravate the public emergency threatening the life of the nation the Government brought in a law authorising the arrest of any person whom they had good reason to suspect of connections with that secret and unlawful organisation, they were acting within the limits imposed on the State by Article 15 (art. 15) of the Convention. The Act, moreover, does not leave an arrested person without safeguards. A special Commission inquires into the grounds for the arrest of such person, who is thus protected against arbitrary arrest.

It follows that the Offences against the State (Amendment) Act, 1940, was a measure which complied with Article 15 (art. 15) of the Convention in that it was "strictly required by the exigencies of the situation."

It remains to consider whether the conditions for arrest laid down in the 1940 Act were fulfilled in the person of the Applicant.

There is no doubt that the Applicant had been a member of the IRA. There is likewise no doubt that the IRA was an unlawful and secret organisation which the Irish Government had never ceased to combat.

The Applicant's arrest in July 1957 fitted into the general campaign launched by the Irish Government to suppress the activities of that unlawful and secret organisation. It is true that in July 1957 IRA activities were on the wane, but that diminution was itself a deliberate policy on the part of the organisation. To appreciate that fact at its true value, it must not be taken in isolation but must be considered in conjunction with the IRA's previous activities, which necessarily offered a precedent for assessing the activities the organisation might engage in later.

Furthermore, since the Applicant was a former IRA member, the Irish Government, suspecting that even if he had ceased to be a member he was always liable to engage in activities fostering the aims of that organisation, applied the 1940 Act to his person legally.

In addition, out of respect for the individual, the Irish Government merely required of the Applicant, as the condition of his release, a simple assurance that he would in future acknowledge "the Constitution of Ireland and the laws". That condition cannot be considered to have been contrary to the Convention.

There is nothing in the condition which offends against personal dignity or which could be considered a breach of the obligations of States under the Convention. It would have to be held repugnant to the Convention, for example, if the State were to assume the power to require the Applicant to repudiate the political beliefs for which he was fighting as a member of the IRA. Such a requirement would certainly be contrary to Article 10 (art. 10), whereby everyone has the right to freedom of expression and freedom to hold opinions and to receive and impart information and ideas. But the text of that Article itself shows that the undertaking required of the Applicant by the Irish Government as the condition of his release, namely an undertaking to respect thenceforth the Constitution of Ireland and the laws, was in keeping with the true spirit of the Convention. This is apparent from the enumeration of cases where, under most of the Articles, the State is authorised to restrict or even prevent the exercise of the individual rights. And these cases are in fact

those involving the preservation of public safety, national security and territorial integrity and the maintenance of order (Articles 2 (2) (c), 4 (3) (c), 5, 6, 8 (2), 9 (2) and 11 (2)) (art. 2-2-c, art. 4-3-c, art. 5, art. 6, art. 8-2, art. 9-2, art. 11-2).

Hence, if each Contracting State secures to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention (Article 1) (art. 1) and moreover undertakes to enforce the said rights and freedoms (Article 13) (art. 13), the individual is bound in return, whatever his private or even his avowed beliefs, to conduct himself loyally towards the State and cannot be regarded as released from that obligation. This is the principle that underlies the aforementioned reservations to and limitations of the rights set forth in the Convention. The same spirit underlies Article 17 (art. 17) of the Convention, and the same general legal principle was stated in the Roman maxim: *nemo ex suo delicto meliorem suam conditionem facere potest* (Dig. 50.17.134 paragraph 4). (*Nemo turpitudinem suam allegans auditur*).

It follows from the foregoing that the Irish Government, in demanding of the Applicant that he give an assurance that he would conduct himself in conformity with the Constitution and the laws of Ireland, were merely reminding him of his duty of loyalty to constituted authority and in no way infringed the rights and freedoms set forth in the Convention, including the freedom of conscience guaranteed by Article 9 (art. 9).

It is true that the Applicant was arrested on 11th July 1957 under the 1940 Act and that on 16th July 1957 he was informed that he would be released provided he gave an undertaking in writing "to respect the Constitution of Ireland and the laws" and not to "be a member of, or assist, any organisation which is an unlawful organisation under the Offences against the State Act, 1939."

Between 16th July and 10th December 1957 the Applicant refused to make the said declaration, presumably because he was awaiting the outcome of the petition he submitted on 8th September 1957, whereby he applied "to have the continuation of his detention considered by a special Commission set up under section 8 of the 1940 Act," and also of the Application he made on 8th September 1957 to the Irish High Court, under Article 40 of the Irish Constitution, for a Conditional Order of *habeas corpus ad subjiciendum*. The High Court and, on appeal, the Supreme Court decided against the Applicant. The Supreme Court gave its reasoned judgment on 3rd December 1957, and the Detention Commission resumed its hearings on 6th and

10th December 1957. The Applicant then gave the Detention Commission a verbal undertaking not to engage in any illegal activities under the Offences against the State Acts, 1939 and 1940.

During the period between his arrest (11th July 1957) and 10th December 1957, the Applicant appealed to the High Court and the Supreme Court and refused, while the matter was sub judice, to give the assurance which the Irish Government made the condition of his release. Having so acted, the Applicant has no ground for complaint of having been deprived of his liberty during that period.

It is apparent from what has been stated above that the 1940 Act amending that of 1939 cannot be criticised as conflicting with Article 15 (art. 15) of the Convention and that the measures prescribed by the Act are derogations in conformity with the reservations formulated in Article 5 (1) (c) and (3) (art. 5-1-c, art. 5-3). It follows that there is no cause to examine the merits of the allegation that the Irish Government violated their obligations under the latter provisions.

On the other hand, the Applicant's Application cannot be declared inadmissible by relying on Article 17 (art. 17) of the Convention, since that Article (art. 17) is designed to preclude any construction of the clauses of the Convention which would pervert the rights and freedoms guaranteed therein and make them serve tendencies or activities repugnant to the spirit of the Convention as defined in its Preamble. The Applicant, however improper his conduct may have been, cannot be held to have engaged in any activity forbidden by Article 17 (art. 17) such as would warrant the rejection of his Application as inadmissible under the terms of that text.

ECHR

ECJ

SECOND SECTION

CASE OF VAJNAI v HUNGARY

(Application no. 33629/06)

JUDGMENT

STRASBOURG

8 July 2008

FINAL

08/10/2008

FREEDOM OF EXPRESSION, DEMOCRACY, ARTICLE 17,
PROHIBITION, BAN, PROHIBITED CONDUCT, PUBLIC
INTEREST

IN THE CASE OF VAJNAI V. HUNGARY,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and **Sally Dollé**, *Section Registrar*,

Having deliberated in private on 17 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 33629/06) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Attila Vajnai ("the applicant"), on 15 May 2006.
2. The applicant was represented by Mr Gy. Magyar, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Hölzl, Agent, Ministry of Justice and Law Enforcement.
3. The applicant alleged that his conviction for having worn the symbol of the international workers' movement constituted an unjustified interference with his right to freedom of expression, in breach of Article 10 of the Convention.
4. On 24 September 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963 and lives in Budapest. The facts of the case, as submitted by the parties, may be summarised as follows.
6. On 21 February 2003 the applicant, at the material time Vice-President of the Workers' Party (*Munkáspárt*) – a registered left-wing political party – was speaker at a lawful demonstration in central Budapest. The demonstration took place at the former location of a statue of Karl Marx, which had been removed by the authorities. On his jacket, the applicant wore a five-pointed red star (hereafter referred to as "the red star"), five centimetres in diameter, as a symbol of the international workers' movement. In application of section 269/B (1) of the Criminal Code, a police patrol which was present called on the applicant to remove the star, which he did.
7. Subsequently, criminal proceedings were instituted against the applicant for having worn a totalitarian symbol in public. He was questioned as a suspect on 10 March 2003.
8. On 11 March 2004 the Pest Central District Court convicted the applicant of the offence of using a totalitarian symbol. It refrained from imposing a sanction for a probationary period of one year.
9. The applicant appealed to the Budapest Regional Court (*Fővárosi Bíróság*).
10. On 24 June 2004 that court decided to stay the proceedings and to refer the case to the Court of Justice of the European Communities (ECJ) for a preliminary ruling under Article 234 of the Treaty establishing the European Community (EC). The reference – received at the ECJ on 28 July 2004 – concerned the interpretation of the principle of non-discrimination as a fundamental principle of Community law.
11. In its order for reference, the Regional Court observed that in several Member States of the European Union (EU), such as the Italian Republic, the symbol of left-wing parties is the red star or the hammer and sickle. Therefore, the question arose whether a provision in one Member State of the EU prohibiting the use of the symbols of the international labour movement on pain of criminal prosecution was dis-

criminary, when such a display in another Member State did not give rise to any sanction.

12. On 6 October 2005 the ECJ declared that it had no jurisdiction to answer the question referred by the Regional Court. The relevant part of the reasoning reads as follows:

“... 11 By its question, the national court asks, essentially, whether the principle of non-discrimination, Article 6 EU, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) or Articles 10, 11 and 12 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the symbol in question in the main proceedings. ...

13 By contrast, the Court has no such jurisdiction with regard to national provisions outside the scope of Community law and when the subject-matter of the dispute is not connected in any way with any of the situations contemplated by the treaties (see Kremzow, paragraphs 15 and 16).

14 It is clear that Mr Vajnai's situation is not connected in any way with any of the situations contemplated by the provisions of the treaties and the Hungarian provisions applied in the main proceedings are outside the scope of Community law.

15 In those circumstances, it must be held, on the basis of Article 92(1) of the Rules of Procedure, that the Court clearly has no jurisdiction to answer the question referred by the Fővárosi Bíróság.”

13. On 16 November 2005 the Budapest Regional Court upheld the applicant's conviction.

II. RELEVANT DOMESTIC LAW

14. The Constitution provides in its relevant part as follows:

Article 2

“(1) The Republic of Hungary is an independent and democratic State under the rule of law...”

(3) No one's activity shall aim at the violent acquisition or exercise of power or at its exclusive possession...”

Article 61

“(1) In the Republic of Hungary everyone has the right to freely express his opinion, and, furthermore, to have access to and distribute information of public interest.”

15. The Criminal Code, as in force at the material time, provided insofar as relevant as follows:

Measures (Az intézkedések)

Probation (Próbára bocsátás)

Section 72

“(1) In case of a misdemeanour (*vétség*) or a felony (*bűntett*) punishable by imprisonment of up to a maximum of three years, the court may postpone the imposition of a sentence for a probationary period if it can be presumed with good reason that the aim of the punishment may be just as well attained in this manner.”

Section 73

“(2) The probation shall be terminated and a punishment shall be imposed if ... the person on probation is convicted of an offence committed during the probationary period ...”

Crimes against the State

Section 139 – Violent change of the constitutional order

“(1) A person who commits an action whose direct objective is to change the constitutional order of the Republic of Hungary by means of violence or by threatening violence – in particular, using armed force – commits a felony...”

Crimes against Public Tranquillity

Section 269 – Incitement against a community

“A person who incites, before a wider public, to hatred against

a) the Hungarian nation, or

b) a national, ethnic, racial or religious community or certain groups of the population

commits a felony ...”

Section 269/B – The use of totalitarian symbols

“(1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and

shall be sentenced to a criminal fine (*pénzbüntetés*).

(2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.

(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force."

16. The Code of Criminal Procedure provides as follows:

Section 406

"(1) Review proceedings may be instituted in favour of the defendant if: ...

b) a human rights institution set up by an international treaty has established that the conduct of the proceedings or the final decision of the court has violated a provision of an international treaty promulgated by an act, provided that the Republic of Hungary has acknowledged the jurisdiction of the international human rights organisation and that the violation can be remedied through review ..."

17. Decision no. 14/2000 (V. 12.) of the Constitutional Court, dealing with the constitutionality of section 269/B of the Criminal Code, contains the following passages:

"[...]ot only do such totalitarian symbols represent the totalitarian regimes known to and suffered by the general public, but it has from the very beginning been reflected in the legislation of the Republic of Hungary that the unlawful acts committed by such regimes should be addressed together...

The Constitutional Court has expressly confirmed in its decisions ... that no constitutional concern may be raised against the equal assessment and joint regulation of such totalitarian regimes...

In the decades before the democratic transformation, only the dissemination of Fascist and arrow-cross symbols had been prosecuted ... At same time, resulting reasonably from the nature of the political regime, the use of symbols representing Communist ideas had not been punished; on the contrary, they were protected by criminal law. In this respect, the Act does, indeed, eliminate the former unjustified distinction made in respect of totalitarian symbols...

The Convention (the practice of the European Court of Human Rights) affords States a wide margin of appreciation in assessing what can

be seen as an interference which is "necessary in a democratic society" (Barfod, 1989; Markt Intern, 1989; Chorherr, 1993; Casado Coca, 1994; Jacobowski, 1994) ...

In several of its early decisions, the Constitutional Court included the historical situation as a relevant factor in the scope of constitutional review...

In its decisions so far, the Constitutional Court has consistently assessed the historical circumstances (most often, the end of the [previous] regime) by acknowledging that such circumstances may necessitate some restriction on fundamental rights, but it has never accepted any derogation from the requirements of constitutionality on the basis of the mere fact that the political regime has been changed...

The Constitutional Court points out that even the practice of the European Court of Human Rights takes into account the specific historical past and present of the respondent State when it assesses the legitimate aim and necessity of restricting freedom of expression.

In the case of *Rekvényi v. Hungary* concerning the restriction of the political activities and the freedom of political debate of police officers, the Court passed its judgment on 20 May 1999 stating that 'the objective that the critical position of the police in society should not be compromised as a result of weakening the political neutrality of its members is an objective that can be accepted in line with democratic principles. This objective has special historical significance in Hungary due to the former totalitarian system of the country where the State relied greatly on the direct commitment of the police forces to the ruling party'...

In the practice of the Constitutional Court, conduct endangering public peace and offending the dignity of communities may be subject to criminal law protection if it is not directed against an expressly defined particular person; theoretically, there is no other – less severe – tool available to achieve the desired objective than criminal sanction...

To be a democracy under the rule of law is closely related to maintaining and operating the constitutional order... The Constitution is not neutral as regards values; [on the contrary,] it has its own set of values. Expressing opinions inconsistent with constitutional values is not protected by Article 61 of the Constitution...

The Constitution belongs to a democratic State under the rule of law and, therefore,

the constitution-making power has considered democracy, pluralism and human dignity constitutional values worth protecting; at the same time, it makes unconstitutional any activity directed at the forcible acquisition or exercise of public power, or at the exclusive possession thereof (Article 2 § 3). Section 269/B orders the punishment of distributing, using in front of a large public gathering and exhibiting in public symbols that were used by political dictatorial regimes; such regimes committed unlawful acts *en masse* and violated fundamental human rights. All of these symbols represent the despotism of the State, symbolise negative political ideas realised throughout the history of Hungary in the 20th century, and are expressly prohibited by Article 2 § 3 of the Constitution, which imposes upon everyone the obligation to resist such activities...

Using the symbols in the way prohibited by section 269/B of the Criminal Code can cause a reasonable feeling of menace or fear based on the concrete experience of people – including their various communities – who suffered injury in the past, as such symbols represent the risk of having such inhuman acts repeated in connection with the totalitarian ideas concerned.

In the opinion of the Constitutional Court, if – in addition to the subject thus protected by criminal law – the protection of other constitutional values cannot be achieved by other means, criminal law protection itself is not considered to be disproportionate, provided that it is necessary to have protection against the use of such symbols. Whether or not it is necessary to have such protection in a democratic society depends on the nature of the restriction, its social and historical context, and its impact on the persons affected.

Based on the above, in the present case, the statute under review serves the purpose of protecting other constitutional values in addition to the protected subject defined in criminal law. Such values are the democratic nature of the State under the rule of law mentioned in Article 2 § 1 of the Constitution, the prohibition defined in Article 2 § 3, as well as the requirement specified in Article 70/A of the Constitution, stating that all people shall be treated by the law as persons of equal dignity...

Allowing an unrestricted, open and public use of the symbols concerned would, in the present historical situation, seriously offend all persons committed to democracy who respect the human dignity of persons and thus

condemn the ideologies of hatred and aggression, and would offend in particular those who were persecuted by Nazism and Communism. In Hungary, the memories of both ideologies represented by the prohibited symbols, as well as the sins committed under these symbols, are still alive in the public knowledge and in the communities of those who have survived persecution; these things are not forgotten. The individuals who suffered severely and their relatives live among us. The use of such symbols recalls the recent past, together with the threats of that time, the inhuman sufferings, the deportations and the deadly ideologies.

In the opinion of the Constitutional Court, it is indeed a measure with a view to the protection of democratic society – and therefore not unconstitutional – if, in the present historical situation, the State prohibits certain conduct contrary to democracy, connected to the use of the particular symbols of totalitarian regimes: their dissemination, their use in front of a large public gathering, and a public exhibition...

The constitutional assessment and evaluation of criminally sanctioning separate violations of the values protected by the law – namely, public peace and the dignity of communities committed to the values of democracy – could possibly result in a different conclusion, however, since the use of totalitarian symbols violates both values jointly and simultaneously, there is a cumulative and synergic effect reinforced by the present-day impact of recent historical events.

The Constitutional Court holds that the historical experience of Hungary and the danger to the constitutional values threatening Hungarian society reflected in the potential publicly to demonstrate activities based on the ideologies of former regimes, convincingly, objectively and reasonably justify the prohibition of such activities and the use of the criminal law to combat them. The restriction on freedom of expression found in section 269/B § 1 of the Criminal Code, in the light of the historical background, is considered to be a response to a pressing social need.

According to the Constitutional Court, in the present historical situation, there is no effective legal tool other than the tools of criminal law and penal sanction (*ultima ratio*) against the use of the symbols specified in section 269/B § 1, because the subjects committing the crime and, in particular, the three specific types of conduct in committing the crime, require restriction for the protection of the aims

represented by the constitutional values. In another country with a similar historical experience, the Criminal Code also deems it an offence, endangering the democratic State under the rule of law, to use the symbols (flags, badges, uniforms, slogans and forms of greeting) of unconstitutional organisations [*Strafgesetzbuch (StGB) vom 15. Mai 1871 (RGBl. S. 127) in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I, 3322) § 86a.*]...

It is not prohibited by the law to produce, acquire, keep, import, export or even use such symbols provided it is not done in front of a large public gathering. There are only three specific types of conduct mentioned in the law as being contrary to the values of the democratic State under the rule of law (distribution, use in front of a large public gathering and public exhibition), because of the tendency of such conduct not only to “insult or cause amazement or anxiety” to the public, but also to create express fear or menace by reflecting an identification with the detested ideologies and an intention to propagate openly such ideologies. Such conduct can offend the whole of democratic society, especially the human dignity of major groups and communities which suffered from the most severe crimes committed in the name of both ideologies represented by the prohibited symbols...

On the basis of the above, in the opinion of the Constitutional Court, the restriction specified in section 269/B § 1 of the Criminal Code is not disproportionate to the weight of the protected objectives, while the scope and the sanction of the restriction is qualified as the least severe potential tool. Therefore, the restriction of the fundamental right defined in the given provision of the Criminal Code is in compliance with the requirement of proportionality...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

18. The applicant complained that the fact that he had been prosecuted for having worn a red star infringed his right to freedom of expression guaranteed by Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart in-

formation and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder ... [or] ... for the protection of the ... rights of others ...”

19. The Government contested that argument.

A. Admissibility

20. The Government asserted that the application was incompatible *ratione materiae* with the provisions of the Convention, in the light of Article 17 which provides:

“Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

21. The Government referred to the case-law of the Convention institutions, including the Court's decision in *Garaudy v. France* (decision of 24 June 2003, no. 65831/01 65831/01, ECHR 2003-IX (extracts)). They recalled that, where the right to freedom of expression had been relied on by applicants to justify the publication of texts that infringed the very spirit of the Convention and the essential values of democracy, the European Commission of Human Rights had had recourse to Article 17 of the Convention, either directly or indirectly, in rejecting their arguments and declaring their applications inadmissible (examples included *J. Glimmerveen and J. Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78 (joined), Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 187, and *Pierre Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, DR 86, p. 184.) In the Government's view, the Court subsequently confirmed that approach (*Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 47 and 53). Moreover, they pointed out that, in a case concerning Article 11 (*W.P. and Others v. Poland*, decision of 2 September 2004, no. 42264/98, *Reports* 2004-VII), the Court had observed that “the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention.” Similar conclu-

sions were reached in the cases of *Norwood v. the United Kingdom* (decision of 16 November 2004, no. 23131/03, *Reports* 2004-VII), and *Witzsch v. Germany* (decision of 13 December 2005, no. 7485/03).

22. Since in the Government's view the red star symbolises totalitarian ideas and practices directed against the Convention's underlying values, they asserted that to wear it – being conduct disdainful of the victims of the Communist regime – meant the justification of a policy aimed at the destruction of the rights and freedoms under the Convention. Although the cases cited above concerned the expression of racist and anti-Semitic ideas pertaining to the Nazi totalitarian ideology, the Government submitted that all ideologies of a totalitarian nature (including bolshevism symbolised by the red star) should be treated on an equal footing, and their expression should thus be removed from the protection of Article 10.
23. The applicant did not comment on this point.
24. The Court considers that the present application is to be distinguished from those relied on by the Government. It observes, particularly in *Garaudy v. France* (cited above) and *Lehideux and Isorni v. France* (cited above), that the justification of Nazi-like politics was at stake. Consequently, the finding of an abuse under Article 17 lay in the fact that Article 10 had been relied on by groups with totalitarian motives.
25. In the instant case, however, it has not been argued by the Government that the applicant expressed contempt for the victims of a totalitarian regime (contrast *Witzsch v. Germany* (cited above)) or belonged to a group with totalitarian ambitions. Nor do the elements contained in the case file support such a conclusion. The applicant was, at the material time, an official of a registered left-wing political party and wore the contested red star at one of its lawful demonstrations. In these circumstances, the Court cannot conclude that its display was intended to justify or propagate totalitarian oppression serving “totalitarian groups”. It was merely the symbol of lawful left-wing political movements. Unlike in the above-cited cases, the expression which was sanctioned in the instant case was unrelated to racist propaganda.
26. It follows that, for the Court, the application does not constitute an abuse of the right of petition for the purposes of Article 17 of the Convention. Therefore, it is not incompatible *ratione materiae* with the provisions of the

Convention, within the meaning of Article 35 § 3 of the Convention. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Whether there has been an interference*

27. The applicant emphasised that the domestic courts had convicted him of the offence of using a totalitarian symbol. Whilst it is true that for a probationary period of one year the Hungarian courts had refrained from imposing a criminal sanction, in his view it was beyond doubt that there had been an interference with his freedom of expression, since his criminal liability had been established.
28. The Government submitted that, even supposing that the applicant's conviction had constituted an interference with his freedom of expression, that interference had been justified under paragraph 2 of Article 10.
29. The Court considers that the criminal sanction in question constituted an interference with the applicant's rights enshrined in Article 10 § 1 of the Convention. Moreover, it reiterates that such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve those aims.

2. *“Prescribed by law”*

30. The Government reiterated the Constitutional Court's position according to which the restriction on the use of totalitarian symbols was prescribed by law, an Act of Parliament, which was sufficiently clear and met the requirements of foreseeability.
31. The Court notes that this issue has not been in dispute between the parties. It is therefore satisfied that the interference was indeed prescribed by law.

3. *Legitimate aim*

(a) *The applicant's arguments*

32. The applicant stressed that almost two decades had elapsed since Hungary's transition from a totalitarian regime to a democratic society. Hungary had become a member of the Council of Europe, the North Atlantic Treaty

Organisation, the Organisation for Economic Co-operation and Development and the European Union. The country was a stable democracy, in which five multi-party general elections had been held since 1990. The left-wing party to which the applicant belonged had never been accused of attempting to overthrow the Government. It had participated in all these elections but had never passed the threshold required for gaining a seat in Parliament. The Government have not claimed that the applicant, his party or its ideology would threaten the democratic political regime of the country. In these circumstances, the legitimate aim for instituting criminal proceedings against the applicant for having displayed a red star at a political event remained unclear.

(b) The Government's arguments

33. The Government submitted that the contested provision had been inserted into the Criminal Code because twentieth-century dictatorships had caused much suffering to the Hungarian people. The display of symbols related to dictatorships created uneasy feelings, fear or indignation in many citizens, and sometimes even violated the rights of the deceased. To wear the symbols of a one-party dictatorship in public was, in the Government's view, tantamount to the very antithesis of the rule of law, and must be seen as a demonstration against pluralist democracy. In line with the Constitutional Court's position in the matter, the Government contended that the measure in question pursued the legitimate aims of the prevention of disorder and the protection of the rights of others.

(c) The Court's assessment

34. The Court considers that the interference in question can be seen as having pursued the legitimate aims of the prevention of disorder and the protection of the rights of others.

4. *"Necessary in a democratic society"*

(a) The applicant's arguments

35. The applicant argued that there was a profound difference between Fascist and Communist ideologies and that, in any event, the red star could not be exclusively associated with "Communist dictatorship". In the international workers' movement, the red star – sometimes understood as representing the five fingers of a worker's hand or the five continents – had been regarded since the nineteenth century as a symbol of the fight for social justice, the lib-

eration of workers and freedom of the people, and, generally, of socialism in a broad sense.

36. Moreover, in 1945 Hungary and other countries of the former Eastern block had been liberated from Nazi rule by Soviet soldiers wearing the red star. For many people in these countries, the red star was associated with the idea of anti-fascism and freedom from right-wing totalitarianism.

It had been adopted by the progressive intelligentsia seeking to achieve the reconstruction and modernisation of Hungary from the beginning of the twentieth century.

37. The applicant conceded that, before the transition to democracy in Central and Eastern Europe, serious crimes had been committed by the security forces of totalitarian regimes, whose official symbols included the red star. These violations of human rights could not, however, discredit the ideology of Communism as such, let alone challenge the political values symbolised by the red star.
38. The applicant drew attention to the fact that, unlike Fascist propaganda (see, *inter alia*, Article 4 of the 1947 Paris Treaty of Peace with Hungary – Volume 41 UNTS 135), the promotion of Communism had not been outlawed by instruments of international law. The red star was understood to represent various left-wing ideas and movements, and could be freely displayed in most European states. In fact, Hungary was the only Contracting State in which its public display was a criminal offence.
39. Finally, the applicant stressed that the Government had not demonstrated the existence of a "pressing social need" requiring a general ban on the public display of this symbol. In his view, it was unlikely that the stability of Hungary's pluralistic democracy could be undermined by his using a political logo in order to express an ideological affiliation and political identity. On the contrary, the general ban on using the red star as a political symbol undermined pluralism by preventing him and other left-wing politicians from freely expressing their political views.

(b) The Government's arguments

40. The Government submitted that in Hungary the red star was not only the symbol of the international workers' movement, as alleged by the applicant. Recent history in Hungary had altered its meaning to symbolise a totalitarian

- regime characterised by ideologies and practices which had justified mass violations of human rights and the violent seizure of power. To wear this symbol in public amounted to identification with, and the intention to propagate, the ideologies of a totalitarian nature which characterised Communist dictatorships.
41. The Government drew attention to the Constitutional Court's findings that the restriction at issue, having regard to the historical experience of Hungarian society, had been a response to a "pressing social need" in pursuit of the legitimate aims of the prevention of disorder and the protection of the rights of others. That court had been satisfied that these aims could not have been achieved by less severe means than those of the criminal law. Moreover, it had found that the restriction had been proportionate to the aims pursued since it had been limited in scope, extending only to some well-defined forms of the public use of such symbols, which entailed identification with, and the intention to propagate, the totalitarian ideologies represented by them. It had been satisfied that the use of such symbols for scientific, artistic, educational or informational purposes was not prohibited.
42. The Government also submitted that the offence in question was qualified not as a felony (*büntető*) but only as a misdemeanour (*vétség*), punishable with a criminal fine (*pénzbüntetés*) which was the least severe sanction in Hungarian penal law. Moreover, the applicant had been put on probation, which was not a punishment (*büntetés*) but a 'measure' (*intézkedés*).
- (c) The Court's assessment**
- i *General principles*
43. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).
44. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).
45. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient", and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports 1997-VII*, pp. 2547-48, § 51).
46. The Court further reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see, among many other authorities, *Oberschlick v. Austria* (no. 1), judgment of 23 May 1991, *Series A* no. 204, § 57, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII). Although freedom of expression may be subject to exceptions, they "must be narrowly interpreted" and "the necessity for any restrictions must be convincingly established" (see, for instance, *The Observer and The Guardian v. the United Kingdom*, judgment of 26 November 1991, *Series A* no. 216, pp. 29-30, § 59).
47. Furthermore, the Court stresses that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on the debate of questions of public interest (see *Feldek v. Slovakia*, no. 29032/95, § 74, ECHR 2001-VIII, and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV). In the instant case, the applicant's decision to wear a red star in public must be regarded as his way

of expressing his political views. The display of vestimentary symbols falls within the ambit of Article 10.

ii *Application of these principles to the present case*

48. At the outset, the Court recalls the case of *Rekvényi v. Hungary* ([GC], no. 25390/94, § § 44-50, ECHR 1999-III), which concerned, as a matter of freedom of expression, a restriction on certain political rights of Hungarian police officers. In that case those restrictions were found to be compatible with Article 10 of the Convention, essentially on the ground that they concerned members of the armed forces who – in the specific circumstances of transition to democracy – were to play a crucial role in sustaining pluralism, but could equally undermine it if they lost their neutrality. The Court held that the interference in question fell within the national authorities' margin of appreciation, since they had the requisite understanding of the Hungarian historical experience underlying the restriction at issue.
49. However, the Court finds that the circumstances of the present application are to be distinguished from that case in at least two respects. Firstly, Mr Vajnai was a politician not participating in the exercise of powers conferred by public law, while Mr Rekvényi had been a police officer. Secondly, almost two decades have elapsed from Hungary's transition to pluralism and the country has proved to be a stable democracy (see in this connection *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII, and *Rainys and Gasparavičius v. Lithuania*, nos. 70665/01 and 74345/01, § 36, 7 April 2005). It has become a Member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention. Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government have not shown the existence of such a threat prior to the enactment of the ban in question.
50. The Court further notes the Constitutional Court's argument relied on by the Government concerning the broad scope of the margin of appreciation which States enjoy in this field. However, it must be emphasised that none of the cases cited by the Constitutional Court (*Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149; *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165; *Chorherr v. Austria*, judgment of 25 August 1993, Series A no. 266-B; *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A; *Jacobowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A) dealt with the particular question of the extent of State discretion in restricting the freedom of expression of politicians.
51. In the Court's view, when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need. Consequently, utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings. In such situations, the Court perceives a risk that a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be justified.
52. The Court is mindful of the fact that the well-known mass violations of human rights committed under Communism discredited the symbolic value of the red star. However, in the Court's view, it cannot be understood as representing exclusively Communist totalitarian rule, as the Government have implicitly conceded (see paragraph 40 above). It is clear that this star also still symbolises the international workers' movement, struggling for a fairer society, as well certain lawful political parties active in different Member States.
53. Moreover, the Court notes that the Government have not shown that wearing the red star exclusively means an identification with totalitarian ideas, especially when seen in the light of the fact that the applicant did so at a lawfully organised, peaceful demonstration in his capacity as vice-president of a registered, left-wing, political party, with no known intention of participating in Hungarian political life in defiance of the rule of law. In this connection the Court emphasises that it is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society.
54. The Court therefore considers that the ban in question is too broad in view of the multiple meanings of the red star. The ban can encom-

pass activities and ideas which clearly belong to those protected by Article 10, and there is no satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law does not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship.

55. As regards the aim of preventing disorder, the Court observes that the Government have not referred to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. In the Court's view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a "pressing social need". In any event, apart from the ban in question, there are a number of offences sanctioned by Hungarian law which aim to suppress public disturbances even if they were to be provoked by the use of the red star (see paragraph 15 above).
56. As to the link between the prohibition of the red star and its offensive, underlying, totalitarian ideology, the Court stresses that the potential propagation of that ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction. A symbol which may have several meanings in the context of the present case, where it was displayed by a leader of a registered political party with no known totalitarian ambitions, cannot be equated with dangerous propaganda. However, section 269/B of the Hungarian Criminal Code does not require proof that the actual display amounted to totalitarian propaganda. Instead, the mere display is irrefutably considered to do so unless it serves scientific, artistic, informational or educational purposes (see paragraph 41 above *in fine*). For the Court, this indiscriminate feature of the prohibition corroborates the finding that it is unacceptably broad.
57. The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression. Given the well-known

assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.

58. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's conviction for the mere fact that he had worn a red star cannot be considered to have responded to a "pressing social need". Furthermore, the measure with which his conduct was sanctioned, although relatively light, belongs to the criminal law sphere, entailing the most serious consequences. The Court does not consider that the sanction was proportionate to the legitimate aim pursued. It follows that the interference with the applicant's freedom of expression cannot be justified under Article 10 § 2 of the Convention.

There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

60. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage for the loss of reputation resulting from the judgment against him.
61. The Government were of the view that the finding of a violation would, in itself, provide sufficient just satisfaction for the applicant, given the possibility under domestic law to request the revision of a final criminal judgment after such a finding.

62. The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

63. The applicant also claimed EUR 2,000 plus 20% VAT, for the legal fees incurred before the Court. This figure corresponded to 10 hours' legal work, charged at an hourly rate of EUR 200, including 3 hours of client consultations, 2 hours to study the file, 2 hours for the legal analysis and 3 hours for drafting submissions.

64. The Government contested this claim.

65. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court awards the entire amount claimed.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the application admissible;
2. Holds that there has been a violation of Article 10 of the Convention;
3. Holds that the finding of a violation constitutes sufficient just satisfaction for any moral damage which the applicant may have suffered;
4. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, which sum is to be converted into Hungarian forints at the rate applicable at the date of the settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 July 2008, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Sally Dollé, *Registrar*

Françoise Tulkens, *President*

ECHR

ECJ

FIRST SECTION

CASE OF ŽDANOKA v LATVIA

(Application no. 58278/00)

JUDGMENT

STRASBOURG

17 June 2004

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON

16 March 2006

ARTICLE 17, PUBLIC INTEREST, STATE INTERVENTION,
DEMOCRATIC VALUES, DEMOCRACY

IN THE CASE OF ŽDANOKA V. LATVIA,

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

Mr **C.L. Rozakis**, *President*,

Mr **P. Lorenzen**,

Mr **G. Bonello**,

Mrs **F. Tulkens**,

Mr **E. Levits**,

Mr **A. Kovler**,

Mr **V. Zagrebelsky**, *judges*,

and Mr **S. Nielsen**, *Section Registrar*,

Having deliberated in private on 6 May 2004,

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

PROCEDURE

1. The case originated in an application (no. 58278/00) against the Republic of Latvia lodged with the Court on 20 January 2000 under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Tatjana Ždanoka ("the applicant").
2. The applicant alleged, in particular, that her disqualification from standing for election to the Latvian Parliament and to municipal councils, imposed on account of her active participation within the Communist Party of Latvia after 13 January 1991, infringed her rights as guaranteed by Article 3 of Protocol No. 1 to the Convention and by Articles 10 and 11 of the Convention.
3. The application was assigned to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

On 1 November 2001 the Court changed the composition of its sections (Rule 25 § 1). This case was assigned to the newly composed First

Section (Rule 52 § 1).

4. By a decision of 6 March 2003 the Chamber declared the application partly admissible.
5. The applicant and the Government each filed observations on the merits (Rule 59 § 1 of the Rules of Court). On 7 April 2003 the applicant submitted her claim for just satisfaction (Article 41 of the Convention). On 12 May 2003 the Government submitted their observations on that claim. On 24 July 2003 the applicant clarified and expanded her claim for just satisfaction. The Government replied on 4 September 2003.
6. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 May 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms **I. Reine**, *Agent*,

Ms **I. Freimane**, *Adviser*;

(b) *for the applicant*

Mr **W. Bowring**, *barrister, Counsel*.

The Court heard addresses by Mr Bowring and Ms Reine. Ms Ždanoka, the applicant, was also present at the hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The historical context and the background to the case

1. *The Soviet period*

7. In 1971 the applicant, who at the material time was a mathematics student at the University of Latvia, joined the Communist Party of Latvia (hereafter "the CPL"). This organisation was in reality a regional branch of the Communist Party of the Soviet Union (hereafter "the CPSU"), the USSR's single ruling party.

From 1972 to 1990 the applicant worked as a lecturer at the University of Latvia. Throughout this period she was a member of the CPL's university branch.

8. From 1988 onwards there was considerable

social pressure in Latvia, as in several other countries of central and eastern Europe, for democratisation of political life and restoration of state independence, which in Latvia's case had been lost in 1940.

9. In March 1990 the applicant was elected to the Supreme Council (*Augstākā Padome*) of the "Soviet Socialist Republic of Latvia" (hereafter "the Latvian SSR") as a representative for the Pļavnieki constituency in Riga. She subsequently joined the CPL's local branch. In April 1990 this branch selected her to attend the CPL's 25th Congress, where she was elected to the party's Central Committee for Supervision and Audit. According to copies of that Committee's minutes, the applicant was a member of a sub-committee responsible for supervising the implementation of decisions and activities arising from the CPL's programme.
10. At the same congress, a group of delegates expressed their disagreement with the CPL's general policy, which remained loyal to the Soviet Union and the CPSU, was opposed to any democratisation of public life and sought to maintain the status quo. These delegates publicly announced their withdrawal from the CPL and established a new party, the "Independent Communist Party", which immediately declared its support for Latvian independence and for a multi-party political system. The applicant did not join the dissident delegates and remained within the CPL.

2. Latvia's declaration of independence

11. On 4 May 1990 the Supreme Council adopted a Declaration on the Restoration of the Independence of the Republic of Latvia, which declared Latvia's incorporation into the USSR unlawful and void and restored legal force to the fundamental provisions of the Latvian Constitution (*Satversme*) of 1922. However, paragraph 5 of the Declaration introduced a transition period, aimed at a gradual restoration of genuine State sovereignty as each institutional tie with the USSR was severed. During that transition period, various provisions of the Constitution of the Latvian SSR would remain in force. A special governmental commission was given responsibility for negotiating with the Soviet Union on the basis of the Russo-Latvian Peace Treaty of 11 August 1920.

The above-mentioned Declaration was adopted by 139 out of a total of 201 Supreme Council members, with one abstention. 57 members of the "*Līdztiesība*" parliamentary bloc ("Equal

Rights", in reality the CPL group), including the applicant, did not vote. On the same day, 4 May 1990, the Central Committee of the CPL adopted a resolution strongly criticising the Declaration and calling on the President of the Soviet Union to intervene.

12. On 7 May 1990 the Supreme Council selected the government of the Independent Republic of Latvia.

3. The events of January and March 1991

13. The parties dispute the events of January and March 1991. According to the Government, on 12 January 1991 the Soviet army launched military operations against the government of independent Lithuania, which had been formed in the same way as the Latvian government. Several persons were killed in the course of those events. Against this background, an attempted coup was also launched in Latvia. On 13 January 1991 the Plenum of the CPL Central Committee called for the resignation of the Latvian government, the dissolution of the Supreme Council and the assumption of full powers by the Latvian Committee of Public Safety (*Višlatvijas Sabiedriskās glābšanas komiteja*), set up on the same date by several organisations, including the CPL. On 15 January 1991 this committee announced that the Supreme Council and the government were stripped of their respective powers and declared that it was assuming full powers. After causing the loss of several lives during armed confrontations in Riga, this attempted coup failed.
14. The applicant contested the version of events put forward by the Government. In her opinion, the Soviet army's aggression against the Lithuanian government and people was not a proven fact; in this connection, she submitted a copy of a Russian newspaper article which claimed that it had been the Lithuanian independence supporters themselves, rather than Soviet soldiers, who fired into the crowd, with the aim of discrediting the Soviet army. The applicant also claimed that, at the material time, a series of public demonstrations had been held in Latvia to protest against the increase in food prices ordered by the government; those demonstrations were thus the main reason for the events of January 1991. Finally, the applicant argued that, in their respective statements of 13 and 15 January 1991, the Plenum of the CPL's Central Committee and the Committee of Public Safety had not only called for or announced the removal of the Latvian authori-

ties, but had also stated that early elections would be held for the Supreme Council.

15. On 3 March 1991 a national vote was held on Latvian territory. According to the Government, this was a genuine national referendum; the applicant argues that it was a simple consultative vote. Electors had to reply to a question worded as follows: *“Do you support a democratic and politically independent Republic of Latvia?”* According to figures supplied by the Government, 87.5 % of all residents registered on the electoral roll voted: 73.6 % of them responded in the affirmative to the question posed. The applicant contests the above-mentioned turnout rate and thus the very legitimacy of the plebiscite.

4. The events of August and September 1991

16. On 19 August 1991 there was an attempted coup in Moscow. The self-proclaimed “National State of Emergency Committee” declared that Mr Gorbachev, President of the USSR, was suspended from his duties, declared itself the sole ruling authority and imposed a state of emergency “in certain regions of the USSR”.
17. On the same day, 19 August 1991, the Central Committee and the Riga Committee of the CPL declared their support for the National State of Emergency Committee and set up an “operational group” to provide assistance to it. According to the Government, on 20 August 1991 the CPL, the *“Līdztiesība”* parliamentary bloc and various other organisations signed and disseminated an appeal called *“Godājamiē Latvijas iedzīvotāji!”* (“Honourable residents of Latvia!”), urging the population to comply with the requirements of the state of emergency and not to oppose the measures imposed by the National State of Emergency Committee in Moscow. According to the applicant, the CPL’s participation in all those events has not been proved; in particular, the members of the *“Līdztiesība”* bloc were taking part in parliamentary debates over two consecutive days and were not even aware that such an appeal was to be issued.
18. This coup also ended in failure. On 21 August 1991, the Latvian Supreme Council enacted a constitutional law on the state status of the Republic of Latvia and proclaimed the country’s immediate and absolute independence. Paragraph 5 of the Declaration of 4 May 1990, concerning the transition period, was repealed.
19. By a decision of 23 August 1991 the Supreme

Council declared the CPL unconstitutional. The following day, the party’s activities were suspended and the Minister of Justice was instructed “to investigate the unlawful activities of the CPL and to put forward ... a motion on the possibility of authorising its continued operations”. On the basis of the Minister of Justice’s proposal, the Supreme Council ordered the party’s dissolution on 10 September 1991.

20. In the meantime, on 22 August 1991, the Supreme Council set up a parliamentary committee to investigate the involvement of members of the *“Līdztiesība”* bloc in the coup. On the basis of that committee’s final report, the Supreme Council revoked fifteen members’ right to sit in parliament on 9 July 1992; the applicant was not one of those concerned.

E. Subsequent developments

21. In February 1993 the applicant became chairperson of the “Movement for Social Justice and Equal Rights in Latvia” (*“Kustība par sociālo taisnīgumu un līdztiesību Latvijā”*), which later became a political party, *“Līdztiesība”* (“Equal rights”).
22. On 5 and 6 June 1993 parliamentary elections were held in accordance with the restored Constitution of 1922. For the first time since Latvian independence had been regained, the population elected the Parliament (*Saeima*), which took over from the Supreme Council. It was at that point that the applicant’s term of office as a member of parliament expired. As a result of the Latvian authorities’ refusal to include her on the residents’ register as a Latvian citizen, she was unable to take part in those elections, in the following parliamentary elections, held in 1995, or in the municipal elections of 1994. Following an appeal lodged by the applicant, the courts recognised her Latvian nationality in January 1996, instructing the authorities to register her as such and to supply her with the appropriate documents.

B. The 1997 municipal elections

23. On 25 January 1997 the “Movement for Social Justice and Equal Rights in Latvia” submitted to the Riga Electoral Commission a list of ten candidates for the forthcoming municipal elections of 9 March 1997. The applicant was one of those candidates. In line with the requirements of the Municipal Elections Act, she signed the list and attached a written statement confirming that she was not one of the persons referred to in section 9 of that Act. Under the

terms of the Act, individuals who had “actively participated” (*darbojušās*) in the CPSU, the CPL and several other named organisations after 13 January 1991 were not entitled to stand for office.

In a letter sent on the same day, 25 January 1997, the applicant informed the Electoral Commission that she had been a member of the CPL’s Pļavnieki branch and of its Central Committee for Supervision and Audit until 10 September 1991, date of the CPL’s official dissolution. However, she argued that the restrictions mentioned above were not applicable to her, since they were contrary to Articles 2 and 25 of the International Covenant on Civil and Political Rights.

24. By a decision of 11 February 1997 the Riga Electoral Commission registered the list submitted by the applicant. At the elections of 9 March 1997 this list obtained four of the sixty seats on Riga City Council (*Rīgas Dome*). The applicant was one of those elected.

C. The 1998 parliamentary elections

25. With a view to participating in the parliamentary elections of 3 October 1998, the “Movement for Social Justice and Equal Rights in Latvia” formed a coalition with the Party of National Harmony (*Tautas Saskaņas partija*), the Latvian Socialist Party (*Latvijas Sociālistiskā partija*) and the Russian Party (*Krievu partija*). The four parties formed a united list entitled “Party of National Harmony”. The applicant appeared on this list as a candidate for the constituencies of Riga and Vidzeme.

On 28 July 1998 the list was submitted to the Central Electoral Commission for registration. In accordance with the requirements of the Parliamentary Elections Act, the applicant signed and attached to the list a written statement identical to the one she had submitted prior to the municipal elections. As she had done for the 1997 elections, she likewise sent a letter to the Central Electoral Commission explaining her situation and arguing that the restrictions in question were incompatible with the International Covenant on Civil and Political Rights and with Article 3 of Protocol No. 1 to the Convention.

26. On 29 July 1998 the Central Electoral Commission suspended registration of the list on the ground that the applicant’s candidacy did not meet the requirements of the Parliamentary Elections Act. Not wishing to jeopardise the

entire list’s prospects of being registered, the applicant withdrew her candidacy, after which the list was immediately registered.

D. The procedure for determining the applicant’s participation in the CPL

27. By a letter of 7 August 1998 the President of the Central Electoral Commission asked the State Procurator General to examine the legitimacy of the applicant’s election to the Riga City Council.
28. By a decision of 31 August 1998, a copy of which was sent to the Central Electoral Commission, the Procurator General’s Office (*Ģenerālprokuratūra*) noted that the applicant had not committed any action defined as an offence in the Criminal Code. The decision stated that, although the applicant had provided false information to the Riga Electoral Commission regarding her participation in the CPL, there was nothing to prove that she had done so with the specific objective of misleading the Commission. In that connection, the Procurator’s Office considered that the statement by the applicant, appended to the list of candidates for the elections of 9 March 1997, was to be read in conjunction with her explanatory letter of 25 January 1997.

On 14 January 1999 the General Procurator’s Office applied to the Riga Regional Court for a finding that the applicant had participated in the CPL after 13 January 1991. The Procurator’s Office attached the following documents to its submission: the applicant’s letter of 25 January 1997; the minutes of the meeting of 26 January 1991 of the CPL’s Central Committee for Supervision and Audit; the minutes of the joint meeting of 27 March 1991 of the Central Committee for Supervision and Audit and the municipal and regional committees for supervision and audit; the appendices to those minutes, indicating the structure and composition of the said committee and a list of the members of the Audit Committee at 1 July 1991.

29. Following adversarial proceedings, the Riga Regional Court allowed the request by the Procurator’s Office in a judgment of 15 February 1999. It considered that the submitted documents clearly attested to the applicant’s participation in the party’s activities after the critical date, and that the evidence provided by the applicant was insufficient to refute this finding. Consequently, the court dismissed the applicant’s arguments to the effect that she was only formally a member of the CPL and

that she did not participate in the meetings of its Central Committee for Supervision and Audit, and that accordingly she could not be held to have “acted”, “been a militant” or “actively participated” (*darboties*) in the party’s activities.

30. The applicant appealed against this judgment to the Civil Division of the Supreme Court. On 12 November 1999 the Civil Division began examining the appeal. At the oral hearing, the applicant submitted that the content of the above-mentioned minutes of 26 January and 27 March 1991, referring to her by name, could not be held against her since on both those dates she had been carrying out her duties in the Latvian Supreme Council and not in the CPL. After hearing evidence from two witnesses who stated that the applicant had indeed been present at the Supreme Council, the Division suspended examination of the case in order to enable the applicant to submit more cogent evidence in support of her statements, such as a record of parliamentary debates or minutes of the “*Līdztiesība*” parliamentary bloc’s meetings. However, as the above-mentioned minutes had not been preserved by the Parliamentary Record Office, the applicant was never able to produce such evidence.

By a judgment of 15 December 1999 the Civil Division dismissed the applicant’s appeal. It stated that the evidence gathered by the Procurator’s Office was sufficient to conclude that the applicant had taken part in the CPL’s activities after 13 January 1991. The Division further noted that the CPL’s dissolution had been ordered “in accordance with the interests of the Latvian State in a specific historical and political situation” and that the international conventions relied on by the applicant allowed for justified limitations on the exercise of electoral rights.

31. Following the Civil Division’s judgment, enforceable from the date of its delivery, the applicant was disqualified from electoral office and lost her seat as a member of Riga City Council.
32. The applicant applied to the Senate of the Supreme Court to have the Civil Division’s judgment quashed. She stressed, *inter alia*, the disputed restriction’s incompatibility with Article 11 of the Convention. By a final order of 7 February 2000 the Senate declared the appeal inadmissible. In the Senate’s opinion, the proceedings in question were limited to a single

strictly-defined objective, namely a finding as to whether or not the applicant had taken part in the CPL’s activities after 13 January 1991. The Senate concluded that it did not have jurisdiction to analyse the legal consequences of this finding, on the ground that this was irrelevant to the finding itself. In addition, the Senate noted that any such analysis would involve an examination of the Latvian legislation’s compatibility with constitutional and international law, which did not come within the final appeal court’s jurisdiction.

E. The 2002 parliamentary elections

33. The next parliamentary elections took place on 5 October 2002. With a view to taking part in those elections, the “*Līdztiesība*” party, chaired by the applicant, formed an alliance entitled “For Human Rights in a United Latvia” (“*Par cilvēka tiesībām vienotā Latvijā*”, abbreviated to *PCTVL*) with two other parties, the Party of National Harmony and the Socialist Party. The alliance’s electoral manifesto expressly referred to the need to abolish the restrictions on the electoral rights of persons who had been actively involved in the CPL after 13 January 1991.
34. In spring 2002 the Executive Council of the “*Līdztiesība*” party put forward the applicant as a candidate in the 2002 elections; the Council of the *PCTVL* alliance approved this nomination. Shortly afterwards, however, on 16 May 2002, the outgoing Parliament dismissed a motion to repeal section 5(6) of the Parliamentary Elections Act (see paragraph 47 below). The alliance’s council, which was fully aware of the applicant’s situation and feared that her candidacy would prevent registration of the *PCTVL*’s entire list, changed its opinion and decided not to include her name on the list of candidates. The applicant then decided to submit a separate list containing only one name, her own, entitled “Party of National Harmony”.
35. On 23 July 2002 the *PCTVL* electoral alliance submitted its list to the Central Electoral Commission. In all, it contained the names of 77 candidates for Latvia’s five constituencies. On the same date the applicant asked the Commission to register her own list, for the constituency of Kurzeme alone. As she had done for the 1998 elections, she attached to her list a written statement to the effect that the disputed restrictions were incompatible with the Constitution and with Latvia’s international undertakings. On 25 July 2002 the Commission registered both lists.

36. By a decision of 7 August 2002 the Central Electoral Commission, referring to the Civil Division's judgment of 15 December 1999, removed the applicant from its list. In addition, having noted that the applicant had been the only candidate on the "Party of National Harmony" list and that, following her removal, there were no other names, the Commission decided to cancel the registration of that list.
37. At the elections of 5 October 2002 the *PCTVL* alliance's list obtained 18.94 % of the vote and won twenty-five seats in Parliament.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions regarding Latvia's state status

38. The operative provisions of the Declaration of 4 May 1990 on the Restoration of the Independence of the Republic of Latvia read as follows:

"The Supreme Council of the Latvian SSR *decides*:

(1) in recognition of the supremacy of international law over the provisions of national law, to consider illegal the Pact of 23 August 1939 between the USSR and Germany and the subsequent liquidation of the sovereignty of the Republic of Latvia through the USSR's military aggression on 17 June 1940;

(2) to declare null and void the Declaration by the Parliament [*Saeima*] of Latvia, adopted on 21 July 1940, on Latvia's integration into the Union of Soviet Socialist Republics;

(3) to restore the legal effect of the Constitution [*Satversme*] of the Republic of Latvia, adopted on 15 February 1922 by the Constituent Assembly [*Satversmes sapulce*], throughout the entire territory of Latvia. The official name of the Latvian state shall be the REPUBLIC OF LATVIA, abbreviated to LATVIA;

(4) to suspend the Constitution of the Republic of Latvia pending the adoption of a new version of the Constitution, with the exception of those articles which define the constitutional and legal foundation of the Latvian State and which, in accordance with Article 77 of the same Constitution, may only be amended by referendum, namely:

Article 1 – Latvia is an independent and democratic republic.

Article 2 – The sovereign power of the State of Latvia is vested in the Latvian people.

Article 3 – The territory of the State of Latvia, as established by international agreements, consists of Vidzeme, Latgale, Kurzeme and Zemgale.

Article 6 – The Parliament (*Saeima*) shall be elected in general, equal, direct and secret elections, based on proportional representation.

Article 6 of the Constitution shall be applied after the restoration of the state and administrative structures of the independent Republic of Latvia, which will guarantee free elections;

(5) to introduce a transition period for the re-establishment of the Republic of Latvia's *de facto* sovereignty, which will end with the convening of the Parliament of the Republic of Latvia. During the transition period, supreme power shall be exercised by the Supreme Council of the Republic of Latvia;

(6) during the transition period, to accept the application of those constitutional and other legal provisions of the Latvian SSR which are in force in the territory of the Latvian SSR when the present Declaration is adopted, in so far as those provisions do not contradict Articles 1, 2, 3 and 6 of the Constitution of the Republic of Latvia.

Disputes on matters relating to the application of legislative texts will be referred to the Constitutional Court of the Republic of Latvia.

During the transition period, only the Supreme Council of the Republic of Latvia shall adopt new legislation or amend existing legislation;

(7) to set up a commission to draft a new version of the Constitution of the Republic of Latvia that will correspond to the current political, economic and social situation in Latvia;

(8) to guarantee social, economic and cultural rights, as well as universally recognised political freedoms compatible with international instruments of human rights, to citizens of the Republic of Latvia and citizens of other States permanently residing in Latvia. This shall apply to citizens of the USSR who wish to live in Latvia without acquiring Latvian nationality;

(9) to base relations between the Republic of Latvia and the USSR on the Peace Treaty of 11 August 1920 between Latvia and Russia, which is still in force and which recognises the independence of the Latvian State for all time. A governmental commission shall be set up to conduct the negotiations with the USSR."

39. The operative provisions of the Constitutional

Law of 21 August 1991 on the State Status of the Republic of Latvia (*Konstitucionālais likums "Par Latvijas Republikas valstisko statusu"*) state:

"The Supreme Council of the Republic of Latvia decides:

(1) to declare that Latvia is an independent and democratic republic in which the sovereign power of the State of Latvia belongs to the Latvian people, the state status of which is defined by the Constitution of 15 February 1922;

(2) to repeal paragraph 5 of the Declaration of 4 May 1990 on the Restoration of the Independence of the Republic of Latvia, establishing a transition period for the *de facto* restoration of the Republic of Latvia's state sovereignty;

(3) until such time as the occupation and annexation is ended and Parliament is convened, supreme state power in the Republic of Latvia shall be fully exercised by the Supreme Council of the Republic of Latvia. Only those laws and decrees enacted by the supreme governing and administrative authorities of the Republic of Latvia shall be in force in its territory;

(4) this constitutional law shall enter into force on the date of its enactment."

B. The status of the CPSU and the CPL

40. The role of the CPSU in the former Soviet Union was defined in Article 6 of the Constitution of the USSR (1977) and in Article 6 of the Constitution of the Latvian SSR (1978), which were worded along identical lines. Those provisions stated:

"The leading and guiding force of Soviet society and the nucleus of its political system and of all state organizations and public organizations is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people.

The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the USSR's domestic and foreign policy, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically-substantiated character to their struggle for the victory of communism.

All party organisations shall function within the framework of the Constitution of the USSR."

41. The Supreme Council's decision of 24 August

1991 on the suspension of the activities of certain non-governmental and political organisations was worded as follows:

"On 20 August 1991 the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Republican Council of War and Labour Veterans, the Central Committee of the Communist Party of Latvia and the Central Committee of the Latvian Union of Communist Youth issued a proclamation informing the Republic's population that a state of emergency had been decreed in Latvia and encouraging all private individuals to oppose those who did not submit to the orders of the National State of Emergency Committee. In so doing, the above-mentioned organisations ... declared their support for the organisers of the coup d'état and encouraged other individuals to do the same.

The actions of those organisations are contrary to Articles 4, 6 and 49 of the Latvian Constitution, which state that Latvian citizens are entitled to form parties and other associations only if their objectives and practical activities are not aimed at the violent transformation or overturn of the existing constitutional order... and that associations must observe the Constitution and legislation and act in accordance with their provisions.

The Supreme Council of the Republic of Latvia decrees:

1. The activities of the Communist Party of Latvia [and of the other above-mentioned organisations] are hereby suspended..."

42. The relevant parts of the Supreme Council's decision of 10 September 1991 on the dissolution of the above-mentioned organisations read as follows:

"... In May 1990 the Communist Party of Latvia, the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives and the Republican Council of War and Labour Veterans set up the Committee for the Defence of the Constitution of the USSR and the Latvian SSR and the Rights of Citizens, which was renamed the Latvian Committee of Public Safety on 25 November 1990...

On 15 January 1991 the Latvian Committee of Public Safety declared that it was seizing power and dissolving the Supreme Council and the Government of the Republic of Latvia.

In August 1991 the Central Committee of the Communist Party of Latvia [and the other above-mentioned organisations] supported the coup...

Having regard to the preceding, the Supreme Council of the Republic of Latvia decrees:

1. The Communist Party of Latvia [and the other above-mentioned organisations], together with the coalition of these organisations, the Latvian Committee of Public Safety, are hereby dissolved on the ground that they have acted against the Constitution;...

2. Former members of the Communist Party of Latvia [and of the other above-mentioned organisations] are informed that they are entitled to associate within parties and other associations whose objectives and practical activities are not aimed at the violent transformation or overthrow of the existing constitutional order, and which are not otherwise contrary to the Constitution and the laws of the Republic of Latvia ..."

C. The electoral legislation

1. Substantive provisions

43. The relevant provisions of the Constitution (*Satversme*) of the Republic of Latvia, adopted in 1922 and amended by the Law of 15 October 1998, are worded as follows:

Article 9

"All citizens of Latvia who enjoy full civic rights and who have reached the age of 21 on the day of the elections may be elected to Parliament.

Article 64

Legislative power lies with the Parliament [*Saeima*] and with the people, in the conditions and to the extent provided for by this Constitution.

Article 91

All persons in Latvia shall be equal before the law and the courts. Human rights shall be exercised without discrimination of any kind.

Article 101

All citizens of Latvia are entitled to participate, in accordance with the law, in the activities of the State and of local government..."

44. The relevant provisions of the Parliamentary Elections Act (*Saeimas vēlēšanu likums*) of 25 May 1995 provide:

Section 4

"All Latvian citizens who have reached the age of 21 on the date of the elections may be

elected to Parliament, on condition that they are not concerned by one of the restrictions provided for in section 5 of the present law.

Section 5

The following may not stand as candidates in elections or be elected to Parliament: ...

(6) persons who actively participated [*darbojušās*] after 13 January 1991 in the CPSU (CPL), the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans or the Latvian Committee of Public Safety, or in their regional committees;

...

section 11

The following documents must be appended to the list of candidates: ...

(3) a signed declaration by each candidate on the list confirming that he or she meets the requirements of section 4 of this Act and that he or she is not concerned by section 5(1) – (6) of the present Act; ...

section 13

"... 2. Once registered, the candidate lists are definitive, and the Central Electoral Commission may make only the following corrections:

1) removal of a candidate from the list, where:

...

(a) the candidate is not a citizen enjoying full civic rights (sections 4 and 5 above); ...

3. ... [A] candidate shall be removed from the list on the basis of a statement from the relevant authority or of a court decision. The fact that the candidate: ...

(6) actively participated after 13 January 1991 in the CPSU (CPL), the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans or the Latvian Committee of Public Safety, or in their regional committees, shall be attested by a judgment of the relevant court; ..."

45. The Law of 13 January 1994 on elections to municipal councils and city councils (*Pilsētas domes un pagasta padomes vēlēšanu likums*) contains similar provisions to the provisions of the Parliamentary Elections Act cited above. In particular, section 9(5) is identical to section 5(6) of that Act.

2. Procedural provisions

46. The procedure for obtaining a judicial statement attesting to an individual's participation or non-participation in the above-mentioned organisations is governed by Chapter 23-A of the Code of Civil Procedure (*Civilprocesa kodekss*), which was inserted by a Law of 3 September 1998 and is entitled "Examination of cases concerning the attestation of restrictions on electoral rights". The provisions of that chapter read as follows:

Article 233-1

"A request for a statement of restriction on electoral rights may be submitted by the prosecutor...

The request must be submitted to the court in whose territorial jurisdiction is situated the home of the person in respect of whom the attestation of a restriction on electoral rights is requested.

The request may be submitted where an electoral commission has registered a list of candidates which includes ... a citizen in respect of whom there is evidence that, subsequent to 13 January 1991, he or she actively participated in the CPSU (in the CPL).... A request concerning a person included in the list of candidates may also be submitted once the elections have already taken place.

The request must be accompanied by a statement from the electoral commission confirming that the person in question has stood as a candidate in elections and that the list in question has been registered, as well as by evidence confirming the allegations made in the request."

Article 233-3

After examining the request, the court shall give its judgment:

- (1) finding that, after 13 January 1991, the person concerned did actively participate in the CPSU (in the CPL) ...;
- (2) declaring the request ill-founded and dismissing it ..."

D. Proposals to repeal the disputed restrictions

47. The Parliamentary Elections Act was enacted on 25 May 1995 by the first Parliament elected after the restoration of Latvia's independence, otherwise known as the "Fifth Legislature" (the first four legislatures having operated between

1922 and 1934). The following legislature (the Sixth), elected in October 1995, examined three different proposals seeking to repeal section 5(6) of the above-mentioned Act. At the plenary session of 9 October 1997, the three proposals were rejected by large majorities after lengthy debates. Likewise, on 18 December 1997, during a debate on a proposal to restrict section 5(6), the provision's current wording was confirmed. Elected in October 1998, the following legislature (the Seventh) examined a proposal to repeal section 5(6) at a plenary session on 16 May 2002. After lengthy discussions, the majority of members of parliament refused to accept the proposal.

Finally, the Eighth Legislature, elected in October 2002, examined a similar proposal on 15 January 2004. It was also rejected.

E. F. The Constitutional Court's judgment of 30 August 2000

48. In a judgment of 30 August 2000 in case no. 2000-03-01, the Constitutional Court (*Satversmes tiesa*) found that the restrictions imposed by section 5(6) of the Parliamentary Elections Act and section 9(5) of the Municipal Elections Act were compatible with the Latvian Constitution and with Article 14 of the Convention, taken in conjunction with Article 3 of Protocol No. 1.

In that judgment, adopted by four votes to three, the Constitutional Court first reiterated the general principles laid down in the settled case-law of the Convention institutions in applying Article 14 of the Convention and Article 3 of Protocol No. 1. It further held:

"... 4. The argument that the provisions complained of, forbidding certain Latvian citizens from standing as candidates or being elected to Parliament and municipal councils, discriminate against them on the basis of their political allegiance, is without foundation.... The impugned provisions do not provide for a difference in treatment on the basis of an individual's political convictions (opinions) but for a restriction on electoral rights for having acted against the re-established democratic order after 13 January 1991...

Accordingly, Parliament limited the restrictions to the degree of each individual's personal responsibility [*individuālās atbildības pakāpe*] in carrying out those organisations' objectives and programmes, and the restriction on the right to be elected to Parliament or to a municipal council ... is related to the

specific individual's activities in the respective ... associations.

In itself, formal membership of the above-mentioned organisations cannot serve as a basis for preventing an individual from standing as candidate or being elected to Parliament...

Consequently, the impugned provisions are directed only against those who attempted, subsequent to 13 January 1991 and in the presence of the army of occupation, to re-establish the former regime through active participation [*ar aktīvu darbību*]; on the other hand, they do not affect persons who have differing political convictions (opinions). The tendency of certain courts to concentrate solely on the finding of the fact of formal membership and not to evaluate the person's behaviour is inconsistent with the objectives sought by Parliament in enacting the provision in issue...

6. ...Given that those organisations' objectives were linked to the overthrow of the existing state regime [*pastāvošās valsts iekārtas graušana*], they were essentially unconstitutional...

Consequently, the aim of the restrictions on passive electoral rights is to protect the democratic state order, national security and territorial integrity of Latvia. The impugned provisions are not directed against pluralism of ideas in Latvia or against a person's political opinions, but against those who, through their active participation, have attempted to overthrow the democratic state order.... The exercise of human rights may not be directed against democracy as such...

The substance and effectiveness of law is demonstrated in its ethical nature [*ētiskums*]. A democratic society has a legitimate interest in requiring loyalty to democracy from its political representatives. In establishing restrictions, the candidates' honour and reputation is not challenged, in the sense of personal legal protection [*personisks tiesisks labums*]; what is challenged is the worthiness of the persons in question to represent the people in Parliament or in the relevant municipal council. These restrictions concern persons who were permanent agents of the occupying power's repressive regime, or who, after 13 January 1991, participated in the organisations mentioned in the impugned provisions and actively fought against the re-established Latvian Constitution and State...

The argument ... that democratic state order must be protected against individuals who are

not ethically qualified to become representatives of a democratic state at political or administrative level ... is well-founded...

...The removal from the list of a candidate who was involved in the above-mentioned organisations is not an arbitrary administrative decision; it is based on an individual judgment by a court. In accordance with the law, evaluation of individual responsibility comes under the jurisdiction of the courts....

7. ...In order to determine whether the measure applied, namely the restrictions on passive electoral rights, is proportionate to the objectives being pursued, namely the protection, firstly, of democratic state order and, secondly, of the national security and integrity of the Latvian State, it is necessary to assess the political situation in the country and other related circumstances. Parliament having evaluated the historical and political circumstances of the development of democracy on several occasions ... the Court does not consider that at this stage there would be grounds for challenging the proportionality between the measure applied and its aim.

However, Parliament, by periodically examining the political situation in the State and the necessity and merits of the restrictions, should decide to establish a time-limit on these restrictions ... since such limitations on passive electoral rights may exist only for a specific period."

49. Three of the Constitutional Court's seven judges who examined the above-mentioned case issued a dissenting opinion in which they expressed their disagreement with the majority's conclusions. Referring, *inter alia*, to the judgments in *Vogt v. Germany* of 26 September 1995 (Series A no. 323) and *Rekvényi v. Hungary* (GC, no. 25390/94, ECHR 1999-III), they argued that the disputed restrictions could be more extensive with regard to civil servants than to elected representatives. According to those judges, Latvia's democratic regime and institutional system had become sufficiently stable in the years since 1991 for individuals who had campaigned against the system ten years previously no longer to represent a real threat to the State. Consequently, the restriction on those persons' electoral rights was not proportionate to the legitimate aim pursued.

THE LAW

I. THE GOVERNMENT'S OBJECTION

50. In their letter of 11 February 2004 the Government informed the Court that the European Parliament Elections Act (*Eiropas Parlamenta vēlēšanu likums*), which was enacted by the Latvian Parliament on 29 January 2004 and entered into force on 12 February 2004, did not contain a provision similar to section 5(6) of the Parliamentary Elections Act. Consequently, the applicant was free to stand as a candidate in the elections to the European Parliament, which were to be held on 12 June 2004. The Government argued that, as a supra-national legislature, the European Parliament ought to be considered as a "higher" legislative body than the Latvian Parliament, and that "the applicant will be able to exercise her passive electoral rights effectively at an even higher level than that foreseen at the outset".

The Government acknowledged that no amendments had so far been made to the laws on parliamentary and municipal elections, so that the disputed restriction remained in force and the applicant remained disqualified from standing for Parliament and for municipal councils. However, they did not consider that this fact was really material to the outcome of the case. Latvia's accession to the European Union in spring 2004 marked the culmination of the transition period, i.e., the country's journey from a totalitarian to a democratic society, and the members of parliament had been aware of this. The Government also argued that the periodic re-consideration of the disputed provisions constituted a stable parliamentary practice (see paragraph 47 above) and that the restrictions complained of by the applicant were provisional in nature.

Against that background, the Government considered that the dispute at the origin of the present case had been resolved, and that the application should be struck out of the list in accordance with Article 37 § 1 (b) of the Convention.

51. The applicant disagreed. She acknowledged that she was entitled to stand in the European elections and that she intended to do so; however, this fact did not resolve the dispute. The applicant emphasised that the restrictions contained in the laws on parliamentary and local elections were still in force and that it was not

at all certain that they would be repealed in the near future, especially since a large number of members of parliament seemed to favour their continued inclusion in the statute book. She also pointed out that the circumstances of the present case were very different from those in all the cases where the Court had indeed applied Article 37 § 1 (b). In short, the dispute had not been resolved and there was no reason to strike out the application.

52. In the Court's view, the question posed here is whether the applicant has in fact lost her status as a "victim" within the meaning of Article 34 of the Convention. In that connection, the Court refers to its settled case-law to the effect that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of victim status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Labita v. Italy* [GC], no. 26772/95, § 142, ECHR 2000-IV; and *Ilaşcu and Others v. Moldova and Russia* [GC] (dec.), no. 48787/99 48787/99, 4 July 2001). In the present case, the Court notes that the legislative provisions impugned by the applicant remain in force, and that she is still disqualified from standing both for Parliament and for municipal councils. As to the parliamentary practice referred to by the Government, this hardly suffices to affect the applicant's status as a "victim", since future repeal of the disputed restrictions is merely hypothetical and without any certainty. In any event, any such repeal would not negate the measures already taken against the applicant, namely the prohibition on her participation in the parliamentary elections of 1998 and 2002 and the forfeiture of her seat as Riga city councillor in 1999.

In so far as the Government refer to the opportunity for the applicant to take part in the European elections, the Court recognises that Article 3 of Protocol No. 1 is applicable (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § § 39-44 and 48-54, ECHR 1999-I). However, the fact that a person is entitled to stand for election to the European Parliament does not release the State from its obligation to respect his or her rights under Article 3 with regard to the national parliament.

53. In sum, the Latvian authorities have neither

recognised nor, even less, redressed the violations alleged by the applicant. She remains a “victim” of those alleged violations, the dispute is far from being resolved, and there is accordingly no reason to apply Article 37 § 1 (b) of the Convention.

Accordingly, the Government’s objection must be dismissed.

II. IV. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

54. The applicant complained that her disqualification from standing for election to Parliament on the ground that she had actively participated in the CPL after 13 January 1991 constituted a violation of her right to stand as candidate in parliamentary elections. This right is guaranteed by Article 3 of Protocol No. 1 to the Convention, which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A. The parties’ submissions

1. The applicant

55. The applicant considered that the reasons given for her disqualification should be examined in the light of the principles and conclusions identified by the Court in the *United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998 (*Reports* 1998-I, pp. 21-22, § § 45-46). In her opinion, the impact of her disqualification, on herself and on her comrades, was comparable to the dissolution of the Communist Party in the above-mentioned case. Equally, the applicant argued that the limitations on the rights guaranteed under Article 3 of Protocol No. 1 were to be analysed in the same way as the restrictions on the freedom of assembly and association authorised by Article 11 § 2 of the Convention. Consequently, the reasoning in the *United Communist Party of Turkey and Others* judgment, adopted under Article 11 of the Convention, was applicable *mutatis mutandis* to her case.
56. The applicant disputed the Government’s arguments derived from the CPL’s participation in the events of January and August 1991 and from the need to defend “an effective

democracy”. Firstly, she contested the allegations regarding the CPL’s allegedly totalitarian and dangerous nature. In that connection, she quoted from the party’s official programme, adopted in April 1990, which advocated “constructive cooperation between different political forces favourable to the democratic transformation of society” and “a society based on the principles of democracy [and] humanism”. Equally, referring to the proceedings of the CPL’s 25th Congress, the applicant argued that the party had had no intention at that time of restoring the former totalitarian communist regime.

Furthermore, the applicant denied the Government’s submissions regarding the CPL’s alleged illegality. She pointed out that the CPL was declared unconstitutional only on 23 August 1991 and that the party’s activities had remained perfectly legal until that date, including during the period after the events of January 1991.

57. Secondly, the applicant argued that membership of the CPL did not in itself suffice to prove a lack of loyalty towards Latvia. Indeed, of the 201 members of the Supreme Council, 106 had originally been members of the CPL and the division of members of parliament into two main camps had been based solely on their attitude to the Declaration of Independence and not on whether they had been members of that party.

Equally, the applicant considered that the CPL could not be accused of having attempted to overthrow the democratic regime. With regard to the events of January 1991, she repeated her own version of events, according to which there had been no attempt to usurp power. In this connection, she submitted a copy of the appeal by the CPL’s parliamentary group, published on 21 January 1991, which denied that the Party had been involved in organising the armed incursions and deploring “political provocation ... aimed at ... misleading world opinion”. In any event, the applicant emphasised that she herself had never been a member of the Committee of Public Safety. As to the events of 19 August 1991, the applicant submitted that there was evidence exculpating the CPL.

58. In any event, the applicant considered that the Republic of Latvia’s ambiguous constitutional status during the period in question was an important factor to be taken into consideration under this point. In that connection, she noted

that the Declaration of 4 May 1990 had established a transition period so that institutional links with the USSR could be gradually broken off. In reality, it had been a period of diarchy, during which Soviet and Latvian constitutional and legislative texts, and even some Soviet and Latvian institutions, coexisted and functioned in parallel throughout the national territory. The applicant acknowledged that the Constitutional Law of 21 August 1991 had ended the transition period; however, she submitted that it was impossible to declare null and void the very existence of that period. Since the legitimacy of the institutions which were then functioning in Latvian territory was not clearly established, one could not correctly speak of a coup d'état.

59. Equally, the CPL could not be criticised for having taken a pro-Soviet and anti-independence attitude during the transition period. Whilst acknowledging that the CPL and she herself had declared their firm support for a Latvia which enjoyed greater sovereignty but remained an integral part of the USSR, the applicant observed that, at the material time, there was a very wide range of opinions on the ways in which the country should develop politically, even amongst those members of parliament who supported independence in principle. In addition, leaders of foreign States had also been divided on this subject: some had been very sceptical about the liberation of the Baltic states and had preferred to adopt an approach of non-interference in the Soviet Union's internal affairs. In short, in supporting one of the possible avenues for development, the CPL had in fact exercised its right to pluralism of political opinions, which was inherent in a democratic society.
60. The applicant considered ill-founded and unsubstantiated the Government's argument that to allow persons who had been members of the CPL after 13 January 1991 to become members of Parliament would be likely to compromise national security. She pointed out that the impugned restriction had not existed until 1995 and that, in the first parliamentary elections following restoration of the 1922 Constitution, three individuals in the same position as herself had been elected to parliament. In those circumstances, the applicant could not see how her election could threaten national security such a long time after the facts held against her.
61. In any event, the applicant considered that the criteria identified in the Court's case-law with regard to the political loyalty of civil servants could not be applied to current or potential members of a national parliament.
62. In so far as the Government referred to the Constitutional Court's judgment of 30 August 2000, the applicant referred to the dissenting opinion signed by three of the seven judges who had examined the case, finding that the disputed restriction was disproportionate. The applicant endorsed the arguments put forward by those three judges, particularly the contention that the Latvian democratic system had become sufficiently strong for it no longer to fear the presence within its legislative body of persons who had campaigned against the system ten years previously.
63. With regard to the Constitutional Court's restrictive interpretation of the electoral law, which presupposed evaluation of the individual responsibility of each person concerned, the applicant argued that nothing in her personal conduct justified the disputed measure, since she had never attempted to restore the totalitarian regime or overthrow the legitimate authorities. On the contrary, she had campaigned for democratisation and for reform within the CPSU, the CPL and society as a whole.
64. The applicant also argued that nothing in her personal conduct since the alleged facts justified the restriction on her electoral rights. Thus, subsequent to January 1990, she had campaigned in a non-governmental organisation, "*Latvijas Cilvēktiesību komiteja*" ("Latvian Committee for Human Rights"), and had co-chaired that organisation until 1997. Working within the committee, she had become very well known for her activities in providing legal assistance to thousands of individuals; she had helped to promote respect for human rights in Latvia and she had been responsible for implementing three Council of Europe programmes.
65. Finally, and contrary to the Government's submissions, the applicant considered that the disputed restriction was not provisional. In that connection, she pointed out that, although Parliament had indeed re-examined the electoral law before each election, this re-examination had always resulted in an extension rather than a reduction in the number of circumstances entailing disqualification. Consequently, it had to be acknowledged that the disqualification of individuals who had been active within the CPL after 13 January 1991 was likely to contin-

ue. The measure reduced electoral rights to the point of impairing their very essence, and the free expression of the opinion of the people had been impeded in the present case.

2. The Government

66. The Government began by submitting a long description of the historical events related to the restoration of Latvian state independence. In particular, they referred to the following facts, which they considered common knowledge and not open to dispute:
- (a) Having failed to obtain a majority on the Supreme Council in the democratic elections of March 1990, the CPL and the other organisations listed in section 5(6) of the Parliamentary Elections Act decided to take the unconstitutional route and set up a Committee of Public Safety, which attempted to usurp power and to dissolve the Supreme Council and the legitimate government. Such actions were contrary not only to Article 2 of the 1922 Constitution, which stated that sovereign power was vested with the people, but also to Article 2 of the Constitution of the Latvian SSR, which conferred authority to act on behalf of the people on elected councils (*soviets*) alone.
 - (b) The Central Committee of the CPL provided financial support to the special unit of the Soviet police which was entirely responsible for the fatal incidents of January 1991 (see paragraph 13 above); at the same time, the Committee of Public Safety publicly expressed its support for this militarised body.
 - (c) During the coup of 19 August 1991 the Central Committee of the CPL openly declared its support for the “National State of Emergency Committee”, set up an “operational group” with a view to providing assistance to it and published an appeal calling on the public to comply with the regime imposed by this self-proclaimed and unconstitutional body.
67. In support of the above arguments, the Government submitted a copy of the Supreme Court’s judgment of 27 July 1995, which found Mr A.R. and Mr O.P., former senior officials in the CPL, guilty of attempting to overthrow the legitimate authorities by violent means. In substance, this judgment established the above-mentioned events as historical facts.
68. The Government acknowledged that Parliament was not part of the “civil service” in the same way as the police or the armed forces. However, they considered that Parliament was a “public service” since, in enacting legislation, members of parliament were participating directly in the exercise of powers conferred by public law. Consequently, in the Government’s opinion, the criteria identified by the Court under Articles 10 and 11 of the Convention with regard to restrictions on the political activity of civil servants were applicable by analogy to candidates for office and elected representatives.
69. With regard to the aim pursued by the impugned restriction, the Government observed that the disqualification from standing for election applied to those persons who had been active within organisations which, following the proclamation of an independent republic, had openly turned against the new democratic order and had actively sought to restore the former totalitarian communist regime. It was consequently necessary to exclude those persons from exercising legislative authority since, having failed to respect democratic principles in the past, there was no guarantee that they would now exercise their authority in accordance with such principles. In other words, the disqualification from standing for election was justified by the need to protect effective democracy, to which all of society was entitled, against a possible resurgence of communist totalitarianism. Relying on *Ahmed and Others v. the United Kingdom*, judgment of 2 September 1998 (*Reports* 1998-VI, p. 2395, § 52), the Government argued that the disputed disqualification was preventative in nature and did not require the factual existence of dangerous and undemocratic actions on the part of those persons. Referring also to the above-mentioned *Rekvényi* judgment (particularly § 41), the Government considered that the principle of a “democracy capable of defending itself” was compatible with the Convention, especially in the context of the post-communist societies of central and eastern Europe.
70. Furthermore, the Government were of the view that the above-mentioned *Vogt* judgment could not be relied upon in support of the applicant’s submissions. Mrs Vogt’s activities within the German Communist Party had been legal activities within a legal organisation. In contrast, in the present case, the enactment on 4 May 1990 of the Declaration on the Restoration of the Independence of the Republic of Latvia had created a new constitutional order,

of which that Declaration had become the basis. Accordingly, during the period from 4 May 1990 to 6 June 1993, the date on which the 1922 Constitution was fully re-established, any action against the said Declaration or against the state system founded by it had to be considered unconstitutional and consequently illegal. The Government also disputed the applicant's assertion regarding the existence of a constitutional diarchy during the events of 1991.

71. In addition, the Government argued that the impugned restriction had the aim of protecting the State's independence and national security. Referring in that connection to the resolutions adopted in April 1990 by the CPL's 25th Congress, the Government noted that that party had always been hostile to the restoration of Latvia's independence and that one of its main aims had been to keep the country inside the Soviet Union. Accordingly, the Government considered that the very existence of a State Party to the Convention was threatened in the instant case, and that granting access to the bodies of supreme State power to individuals who were hostile to that State's independence would be likely to compromise national security.
72. The Government were of the opinion that the restriction in question was proportionate to the legitimate aims pursued. In that connection, they emphasised that the impugned disqualification was not applicable to all those individuals who had officially been members of the CPL after 13 January 1991, but only to those who had "*acted*" or "*actively participated*" in the party's operations after the above-mentioned date, i.e. to persons who, in their administrative or representative functions, had threatened Latvia's democratic order and sovereignty. This restrictive interpretation of the electoral legislation had in fact been imposed by the Constitutional Court in its judgment of 30 August 2000.
73. The Government considered that, in the present case, the applicant's hostile attitude to democracy and to Latvia's independence had been clear since the CPL's 25th Congress, during which she chose not to align herself with the dissident progressive delegates, opting instead to remain with those who supported the "hard line" Soviet policy (see paragraph 10 above). Equally, the Government asserted that the Central Committee for Supervision and Audit had a leading position in the CPL's internal

structure and that the applicant was a member of a sub-committee responsible for supervising implementation of the party's decisions and policies. The majority of decisions taken by CPL bodies reflected an extremely hostile attitude to the re-establishment of a democratic and independent republic. In that connection, the Government referred once again to the statement issued by the CPL's Central Committee on 13 January 1991, establishing the Committee of Public Safety and aimed at usurping power; however, they admitted that the applicant herself had not been present at the Central Committee's meeting on that date. In short, according to the Government, as one of those responsible for supervising implementation of the CPL's decisions, the applicant could not have failed to oppose an independent Latvia during the period in question.

The Government submitted that, although the applicant's position within the CPL sufficed in itself to demonstrate her active involvement with that party's activities, the courts had nonetheless based their reasoning on the degree of her personal responsibility rather than on a formal finding regarding her status in the party's organisational structure.

74. In the Government's opinion, the applicant's current conduct continued to justify her disqualification. Supporting their argument with numerous press articles, they submitted that the applicant's political activities were part of a "carefully scripted scenario" aimed at harming Latvia's interests, moving it away from the European Union and NATO and bringing it closer to the Commonwealth of Independent States. The Government referred to certain critical statements recently made by the applicant about the State's current policy towards the Russian-speaking minority and the new Language Act; they also criticised the applicant's role in the organisation of public meetings on the dates of former Soviet festivals.
75. Finally, and still with regard to the proportionality of the disputed measure, the Government pointed out that, since the reinstatement of the 1922 Constitution, each successive parliament had examined the need to maintain the disqualification of individuals who had been active members of the CPSU or the CPL after 13 January 1991; that periodic re-examination thus constituted an established parliamentary practice. In those circumstances, the Government reiterated their argument that the restriction in question was provisional in nature. For

the same reason, the restriction could not be regarded as an impairment of the very essence of electoral rights.

76. In view of all of the above, the Government considered that the applicant's disqualification from standing for election was proportionate to the legitimate aims pursued, and that there had therefore been no violation of Article 3 of Protocol No. 1 to the Convention in the instant case.

B. The Court's assessment

1. Establishment of the facts of the case

77. The Court observes, in the first place, that a number of facts in the present case are disputed between the parties. Thus, the applicant contests the Government's version of events with regard to the origins and nature of the first coup attempt in January 1991, the plebiscite of March 1991 and the CPL's collaboration with the perpetrators of the second attempted coup in August 1991 (see paragraphs 13-17, 57 and 66 above). In that connection, the Court wishes to reiterate that, in exercising its supervisory jurisdiction, its task is not to take the place of the competent national authorities but rather to review the decisions they delivered pursuant to their power of appreciation. In so doing, it has to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts and that they committed no arbitrary acts (see, for example, the judgments in *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 39, ECHR 1999-VIII; *Vogt v. Germany*, cited above, p. 26, § 52 (iii); and *Socialist Party and Others v. Turkey*, 25 May 1998, Reports 1998-III, p. 1256, § 44). The Court also considers that it must abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them (see *Marais v. France*, Commission decision of 24 June 1996, DR 86, p. 184, and *Garaudy v. France* (dec.), no. 65831/01 65831/01, ECHR 2003-IX).

In the present case, the Court finds no indication of arbitrariness in the way in which the Latvian courts evaluated the relevant facts. In particular, it notes that the CPL's participation in the events of 1991 has been established by a Supreme Court judgment in the context of a criminal case (see paragraph 67 above). Equally, the Court does not have any reason to dispute the findings of fact made by the Riga Regional

Court and the Civil Division of the Supreme Court with regard to the events of 1991 and the applicant's personal participation in the CPL's activities (see paragraphs 29-30 above). Moreover, the Court has no information at its disposal which would permit it to suspect the Latvian authorities of having distorted in any way the historical facts concerning the period in question.

2. The general principles established by the case-law of the Convention institutions

(a) Democracy and its protection in the Convention system

78. The Court recalls at the outset that democracy constitutes a fundamental element of "European public order". That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. This common heritage consists in the underlying values of the Convention; thus, the Court has pointed out on many occasions that the Convention was in fact designed to maintain and promote the ideals and values of a democratic society. In other words, democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it (see, among many other examples, the above-mentioned *United Communist Party of Turkey and Others v. Turkey* judgment, pp. 21-22, § 45; *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 86, ECHR 2003-II; and, lastly, *Gorzelik and Others v. Poland* [GC], no. 44158/98 44158/98, § 89, to be published in ECHR 2004).
79. However, it cannot be ruled out that a person or a group of persons will rely on the rights enshrined in the Convention or its Protocols in order to attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention; any such destruction would put an end to democracy. It was precisely this concern which led the authors of the Convention to introduce Article 17, which

provides: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention” (see *Collected Edition of the “Travaux Préparatoires”: Official Report of the Consultative Assembly, 1949*, pp. 1235-1239). Following the same line of reasoning, the Court considers that no one should be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society (see *Refah Partisi and Others v. Turkey*, cited above, § 99).

80. Consequently, in order to guarantee the stability and effectiveness of a democratic system, the State may be required to take specific measures to protect it. Thus, in the above-cited *Vogt* judgment, with regard to the requirement of political loyalty imposed on civil servants, the Court acknowledged the legitimacy of the concept of a “democracy capable of defending itself” (loc. cit., pp. 25 and 28-29, § 51 and 59). It has also found that pluralism and democracy are based on a compromise that requires various concessions by individuals, who must sometimes be prepared to limit some of their freedoms so as to ensure the greater stability of the country as a whole (see *Refah Partisi and Others v. Turkey*, cited above, § 99). The problem which is then posed is that of achieving a compromise between the requirements of defending democratic society on the one hand and protecting individual rights on the other (see *United Communist Party of Turkey and Others v. Turkey*, cited above, p. 18, § 32). Every time that a State intends to rely on the principle of “a democracy capable of defending itself” in order to justify interference with individual rights, it must therefore carefully evaluate the scope and consequences of the measure under consideration, to ensure that the aforementioned balance is achieved.
81. Finally, with regard to the implementation of measures intended to defend democratic values, the Court has stated in its *Refah Partisi and Others v. Turkey* judgment, cited above (loc. cit., § 102):

“The Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the dan-

ger of that policy for democracy is sufficiently established and imminent. The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may ‘reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime’”.

(b) Article 3 of Protocol No. 1

82. The Court points out that Article 3 of Protocol No. 1 implies the personal rights to vote and to stand for election. Although those rights are important, they are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for “implied limitations”. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see also the following judgments: *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987, Series A no. 113, p. 23, § 52; *Gitonas and Others v. Greece* of 1 July 1997, Reports 1997-IV, pp. 1233-1234, § 39; *Ahmed and Others v. the United Kingdom*, cited above, p. 2384, § 75; and *Labita v. Italy*, cited above, § 201). In that connection, and in the light of the pre-eminence of democracy in the Convention system, the Court considers that it must adhere to the same criteria applied with regard to the interference permitted by Articles 8 to 11 of the Convention: the only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from “democratic society” (see, *mutatis mutandis*, the above-cited judgments in the cases of *United Communist Party of Turkey and Others v. Turkey* pp. 21-22, § 45, and *Refah Partisi and Others v. Turkey*, § 86).

In any event, like all the other substantive provisions of the Convention and the Protocols thereto, Article 3 must be interpreted in the

light of the principle of the effectiveness of rights inherent in the entire Convention system: this Article must be applied in such a way as to make its stipulations not theoretical or illusory but practical and effective (see *Podkolzina v. Latvia*, no. 46726/99, § 35, ECHR 2002-II).

83. The Court further points out that the States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including the criteria for declaring them ineligible. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of electors, these criteria vary in accordance with the historical and political factors specific to each State; the multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned. However, the State's margin of appreciation in this regard is limited by the obligation to respect the fundamental principle of Article 3, namely "the free expression of the opinion of the people in the choice of the legislature" (see the above-cited judgments in the cases of *Mathieu-Mohin and Clerfayt v. Belgium*, pp. 23-24, § 54, and *Podkolzina v. Latvia*, § 33).
84. The Court notes that the former Commission was required on several occasions to consider whether the decision to withdraw an individual's active and passive election rights on account of his or her previous activities constituted a violation of Article 3 of Protocol No. 1. In practically all those cases, the Commission found that it did not. Thus, in the cases of *X. v. the Netherlands* (no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 88) and *X. v. Belgium* (no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250), it declared inadmissible applications from two persons who had been convicted following the Second World War of collaboration with the enemy or "uncitizenlike conduct" and, on that account, permanently deprived of the right to vote. In particular, the Commission considered that "the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their political rights in a

manner prejudicial to the security of the state or the foundations of a democratic society (see the above-cited *X. v. Belgium* decision, loc. cit.). Equally, in the case of *Van Wambeye v. Belgium* (no. 16692/90, decision of 12 April 1991), the Commission declared inadmissible, on the same grounds, an application from a former member of the *Waffen-SS*, convicted of treason in 1945, who complained that he had been unable to take part in the elections to the European Parliament in 1989.

Finally, in the case of *Glimmerveen and Hagenbeek v. the Netherlands* (applications nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187), the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election. On that occasion, the Commission referred to Article 17 of the Convention, noting that the applicants "intended to participate in these elections and to avail themselves of the right [concerned] for a purpose which the Commission [had] found to be unacceptable under Article 17" (loc. cit.).

3. Application of those principles to the present case

(a) Do the criteria concerning the political activities of public servants apply to members of parliament?

85. According to the Government, the applicant's disqualification from standing for election must be analysed in the light of the same criteria and general principles applied to members of the civil and military forms of public service. In that connection, the Court points out that it has on several occasions acknowledged the legitimacy of restrictions on the political activities of police officers, civil servants, judges and other persons in State service who exercise public authority (see the following above-cited judgments: *Rekvényi v. Hungary*, § 41 and 46, and *Vogt v. Germany*, pp. 28-29, § 58, as well as *Briķe v. Latvia* (dec.), no. 47135/99, 29 June 2000). However, in the cases cited above, the individuals subjected to the contested restrictions belonged to the executive or the judiciary, and the Court accepted that it was particularly important to maintain their political neutrality so as to ensure that all citizens received equal and fair treatment that was not vitiated by political considerations. In contrast, the present case concerns the legislature,

which functions in accordance with fundamentally different principles. In protecting “the free expression of the opinion of the people”, Article 3 of Protocol No. 1 is actually based on the idea of political pluralism; neither a parliament nor an individual member of parliament may, by definition, be “politically neutral”.

Consequently, and assuming that a certain “duty of loyalty” also exists on the part of parliamentarians, the Court is of the opinion that it cannot be identical or even similar to that required of members of the public service.

(b) Did the applicant’s disqualification from standing for election pursue a legitimate aim?

86. The Court points out that, as a general rule, in assessing the limitations imposed by States on the rights guaranteed under Article 3 of Protocol No. 1, it takes a similar approach to that applied in analysing interference within the meaning of Articles 8 to 11 of the Convention (see paragraph 82 above). However, in contrast to the situation with regard to those four provisions, the Court is not bound by an exhaustive list of “legitimate aims” with regard to Article 3 of Protocol No. 1; thus, in the above-cited *Podkolzina* judgment, it recognised the legitimacy of the State’s “interest ... in ensuring that its own institutional system functions normally” (loc. cit., § 34). Having regard to the respondent Government’s margin of appreciation, the Court accepts that the impugned measure pursues at least three legitimate aims referred to by the Government: protection of the State’s independence, protection of the democratic order and protection of national security.

(c) Is the restriction proportionate to the aim which it pursues?

87. It remains to be determined whether the measure in question is proportionate to the legitimate aims mentioned above. In the light of the Government’s observations, the Court considers that this form of disqualification from standing for election may serve a double function and may be analysed in two ways: as a punitive measure, i.e. as a sanction for having demonstrated uncitizenlike conduct in the past, but also as a preventative measure, where the applicant’s current conduct is likely to endanger democracy and where his or her election could create an immediate threat to the State’s constitutional system. The Court will examine each of these two aspects in turn.

i The punitive aspect

88. With regard, firstly, to the punitive aspect, the Court acknowledges its legitimacy. However, it considers that, generally speaking, the measure in question must remain temporary in order to be proportionate. The Court is unable to agree with the Government’s argument that the applicant’s disqualification from standing for election was merely “temporary” or “provisional” in nature. Admittedly, the disqualification cannot be described as “life-long”, in that it has not been expressly stated that the situation will never change; nonetheless, in the Court’s opinion, the restriction is indeed permanent, in that it is of indefinite duration and will continue until the relevant legislation is repealed.

Admittedly, in several cases brought before it (see paragraph 84 above) the former Commission found that instances of permanent disqualification were proportionate. However, in all of those cases, the applicants had been convicted of particularly grievous criminal offences, such as war crimes or high treason; in contrast, in the present case, the applicant’s activities have not given rise to any criminal penalties.

ii The preventative aspect

89. As to the preventative aspect of the disqualification from standing for election, the Court notes that the Government’s submissions may be summarised in the form of two main arguments. Firstly, it may be deduced that in 1991 the applicant committed acts of such seriousness that they remain in themselves sufficient to justify her disqualification, even in the absence of specific actions by her at the present time. Secondly, the Government submits that the applicant’s current conduct also justifies the disputed measure.

α – The applicant’s conduct in 1991

90. As to the first argument, the Court notes at the outset that the reference date chosen by the Latvian legislature is not 23 August 1991, the date on which the CPL was declared unconstitutional, but 13 January 1991, the date of the first coup d’état supported by that party. The Government submit that the CPL was to be considered illegal from the latter date. The Court cannot accept that argument. It points out that, when examining compliance with the “lawfulness” criterion in respect of the interference provided for in Articles 8 to 11 of the Convention, it has on numerous occasions stated that any restrictive provision must be “foreseeable”, this requirement being closely linked to the principle of legal certainty (see, most re-

cently, *Maestri v. Italy* [GC], no. 39748/98, § 30, to be reported in ECHR 2004). Yet, according to the information available to the Court, no legislation explicitly or even implicitly prohibited the operations of the CPL or of the CPSU prior to August 1991. Consequently, in becoming involved or participating actively in those organisations during the period in question, the applicant could not reasonably have foreseen the adverse consequences that might arise in the future. Accordingly, she cannot be accused of having been active in an illegal association (see *Vogt v. Germany*, cited above, p. 30, § 60, *in fine*).

91. The Court further observes that it is not its role to rule on the historical controversy between the parties concerning the events of 1991. As it noted above (paragraph 77), the Government's version of the facts seems neither arbitrary nor unreasonable; in particular, the Court considers that the totalitarian and anti-democratic nature of the ruling communist parties in the States of central and eastern Europe prior to 1990 is a well-known historical reality (see, *mutatis mutandis*, *Rekvényi v. Hungary*, cited above, § § 41 and 47). Equally, to the extent that the applicant refers to the CPL's official programme and to its alleged moves towards democratisation after 1990 (see paragraph 56 above), the Court points out that a political party's constitution and programme cannot be taken into consideration as the only criterion in determining its objectives and intentions. The political experience of the Contracting States has shown that in the past political parties with aims contrary to the fundamental principles of democracy have not revealed such aims in their official publications until after taking power. For that reason, the Court has always noted that it cannot be ruled out that the programme of a political party may conceal objectives and intentions different from those that it proclaims; to verify that it does not, the content of the programme must be compared with the actions of the party's leaders and members and the positions they defend (see *Refah Partisi and Others v. Turkey*, § 101; *United Communist Party of Turkey and Others v. Turkey*, p. 27, § 58; and *Socialist Party and Others v. Turkey*, pp. 1257-1258, § 48, all cited above).
92. That being so, the Court does not exclude the possibility that the impugned restriction could have been justified and proportionate during the first years after the re-establishment of Latvia's independence. It is undeniable that the authorities of a newly-established State are best placed to evaluate the risk of "fall-out" from a totalitarian political regime from which the country concerned has just freed itself and to assess the need for preventative measures. In those circumstances, the Court accepts that to bar from the legislature persons who had held positions within the former regime's ruling body and who had also actively supported attempts to overthrow the new democratic system may be a legitimate and balanced solution, without it being necessary to look into the applicant's individual conduct; such a measure would be fully compatible with the concept of a "democracy capable of defending itself" relied on by the Government. After a certain time, however, this ground is no longer sufficient to justify the preventative aspect of the restriction in question; it then becomes necessary to establish whether other factors, particularly an individual's personal participation in the disputed events, continue to justify his or her ineligibility. Furthermore, the Court notes that this principle was, in essence, acknowledged by the Latvian Constitutional Court in its judgment of 30 August 2000, encouraging the legislature to re-examine periodically the need to maintain the disputed measure (see paragraph 48 above).
93. The Court notes that, according to the disqualification mechanism introduced by the Latvian electoral legislation, the courts' jurisdiction is strictly limited to a factual finding of participation or non-participation by the person concerned in CPL or CPSU activities subsequent to the above-mentioned date; it does not imply the power to draw the legal consequences of such participation, which are already laid down by the legislation. Consequently, and having regard to the interpretation of the term "active participation" given by the Constitutional Court, the courts have only limited powers to assess the real danger posed to the current democratic order by each individual. In the Court's opinion, such inflexibility is striking, in that it deprives the national courts of jurisdiction to rule on whether the disputed disqualification remains proportionate over time. Accordingly, the Court must itself examine whether the applicant's conduct more than ten years ago still constitutes sufficient justification for barring her from standing in parliamentary elections.
94. The Court notes firstly that, unlike certain other persons (see paragraph 67 above), the applicant has never been convicted of a criminal offence in connection with her activities within

the CPL. Secondly, it notes that in August 1991 a special committee of the Supreme Council was instructed to investigate the participation of certain members of parliament in the second coup d'état, but that the applicant was not one of the fifteen members of parliament who were removed from their seats following this investigation (see paragraph 20 above). The Court therefore concludes that no sufficiently serious misconduct on the applicant's part had been proven.

It is true that, in its judgment of 30 August 2000, the Constitutional Court imposed a restrictive interpretation of section 5(6) of the Parliamentary Elections Act, emphasising that the restriction in question had been "limited... to the degree of each individual's personal responsibility" and that it was "directed only against those who attempted ... to re-establish the former regime through active participation". However, although the documents in the case file show that the applicant held an important post within the CPL and that she took part in meetings of that party's governing bodies, none of the evidence produced by the Government proves that she herself committed specific acts aimed at destroying the Republic of Latvia or at restoring the former system. Furthermore, the Government themselves acknowledge that the applicant was absent from the meeting of the CPL's Central Committee on 13 January 1991 at which the party decided to participate in the creation of the Committee of Public Safety; nor has it been contended that the applicant was a member of that committee.

95. Finally, the Court notes that the disputed restriction was not inserted in the electoral law until 1995 and did not exist at the time of the previous elections in 1993. That being so, it questions why parliament, if it considered that former active members of the CPSU and the CPL were so dangerous for democracy, did not enact a similar provision in 1993 – scarcely two years after the events complained of – but waited until the following elections. In addition, the applicant alleges – and this has not been denied by the Government – that three persons who were in the same position as the applicant were elected to parliament in the 1993 elections (see paragraph 60 above), without this entailing any adverse consequences for the State.
96. Consequently, in the light of the observations and information submitted by the parties, the

Court concludes that the applicant's individual conduct in 1991 was not sufficiently serious to justify her disqualification from standing for office at present.

β – The applicant's current conduct

97. The question remains of the applicant's current conduct. In that connection the Court points out that, as a general rule, its scrutiny must be based on the domestic authorities' disputed decisions and the legal grounds on which those authorities relied, and that it is unable to take into account alternative legal grounds suggested by the respondent Government in order to justify the measure in question if those grounds are not reflected in the decisions of the competent domestic authorities (see *Slivenko v. Latvia* [GC], no. 48321/99 48321/99, § 103, to be reported in ECHR 2003). As the Court has noted above, the procedure for disqualification introduced by the Parliamentary Elections Act is very firmly focused on the past and does not allow for sufficient evaluation of the current threat posed by the persons concerned. Consequently, the Court considers it expedient to examine whether the Government's arguments concerning the post-1991 period could justify the applicant's disqualification from standing for election.
98. The Court notes that the accusations levelled at the applicant by the Government concern mainly the fact of defending and disseminating ideas which are diametrically opposed to the Latvian authorities' official policy and which are unpopular among a large proportion of the population (see paragraph 74 above). However, the Court points out that there is no democracy without pluralism. On the contrary, it is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised and those which offend, shock or disturb a section of the population (see, *mutatis mutandis*, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, cited above, § 39 and 41). A person or an association may promote a change in the law or even the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles (see *Refah Partisi and Others v. Turkey*, cited above, § 98). In the present case, there is no factual evidence before the Court enabling it to conclude that the applicant has failed to

comply with either of those conditions.

With regard, firstly, to the ideas advocated by the applicant concerning the Russian-speaking minority in Latvia and the legislation on language matters, the Court discerns no evidence of anti-democratic leanings or incompatibility with the fundamental values of the Convention (see, *mutatis mutandis*, *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95, § 45, 12 November 2003). The same conclusion is inescapable as regards the means used by the applicant to attain her political objectives. In particular, she has never been accused of having been secretly active within the CPL after the latter's dissolution, let alone of having sought to re-establish that party in its previous totalitarian form. As regards the various activities criticised by the Government, the Court notes that they are not prohibited by the Latvian legislation, and that the applicant has never been investigated for or convicted of any offence. In sum, the Government have not supplied information about any specific act by the applicant capable of endangering the Latvian State, its national security or its democratic order.

4. Conclusion

99. Having regard to all the above, the Court concludes that the permanent disqualification from standing for election to the Latvian Parliament imposed on the applicant on account of her activities within the CPL after 13 January 1991 is not proportionate to the legitimate aims which it pursued and curtails the applicant's electoral rights to such an extent as to impair their very essence, and that its necessity in a democratic society has not been established. Accordingly, there has been a violation of Article 3 of Protocol No. 1 in this case.

III. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

100. The applicant considers that her disqualification from standing for election to Parliament or to municipal councils also amounts to a violation of Articles 10 and 11 of the Convention. In so far as they are relevant to the present case, these Articles provide:

Article 10

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart informa-

tion and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ... for the protection of the reputation or rights of others ..."

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association...

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

A. The parties' submissions

1. The applicant

101. The applicant acknowledged that the interference in issue was "prescribed by law" within the meaning of Articles 10 § 2 and 11 § 2 of the Convention. However, referring to the dissenting opinion by the minority of Constitutional Court judges, she argued that section 5(6) of the Parliamentary Elections Act was disproportionate. Equally, the applicant considered that the Government's submissions concerning the legitimate aim pursued by the measure in question and its proportionality were unsubstantiated; in particular, she maintained that neither the *Rekvényi* judgment, cited above, nor Article 17 of the Convention could be used to support the Government's position in the present case.

2. The Government

102. The Government acknowledged that the restriction in issue amounts to an interference with the applicant's enjoyment of her rights as guaranteed by Articles 10 and 11 of the Convention. However, they considered that this interference complied with the requirements of the second paragraph of each of those Articles.
103. In the first place, the Government submitted

that the impugned interference was “prescribed by law”. Secondly, with regard to the aims pursued by the disputed measure, the Government referred to their submissions under Article 3 of Protocol No. 1. Thus, they alleged that the interference pursued legitimate aims, namely the protection of national security and of the rights of others to an effective political democracy.

104. The Government were also of the opinion that the impugned measure was “necessary in a democratic society”. They argued that the measure had to be considered in the light of the country’s historical and political context and bearing in mind the margin of appreciation enjoyed by the States in this regard. In that connection, the Government reiterated the arguments already submitted with regard to the applicant’s complaints under Article 3 of Protocol No. 1, to the effect that the applicant’s disqualification from standing for election should be assessed using the same criteria as for restrictions on the political activities of civil servants and other public-sector employees (see paragraph 68 above). In particular, the Government argued that the opposing conclusions as to the existence of a violation of Articles 10 and 11 reached by the Court in the above-mentioned *Vogt* and *Rekvényi* cases were due to the objective difference in the level of political development in the two countries concerned. Thus, the existence of a “pressing social need” was not demonstrated in Germany’s stable democratic system, while such a need did exist in Hungary, a newly democratic State going through a transitional period; the situation in Latvia resembled that of Hungary in many respects.

Finally, the Government pointed out that the impugned restriction was limited to the official position of member of parliament, and did not prohibit the applicant from expressing her political opinions or from being active within a party. Accordingly, the restriction was applied in such a way as to ensure a distinction between private and official activities. In short, the interference in question was proportionate to the legitimate aims pursued.

105. In the alternative, the Government relied on Article 17 of the Convention, prohibiting the abuse of individual rights under the Convention. In so far as this part of the application concerned the applicant’s participation in the CPL, Article 17 prevented the applicant from availing herself of the rights guaranteed by Articles

10 and 11 of the Convention.

B. The Court’s assessment

106. In the present case, the parties agreed that there had been an interference with the exercise of the applicant’s right to freedom of association within the meaning of the second paragraph of Article 11 of the Convention, and that that interference was “prescribed by law”. The Court sees no reason to decide otherwise. It points out that such interference cannot be justified under Article 11 except where it had a legitimate aim or aims under paragraph 2 and was “necessary in a democracy society” in order to achieve these aims.
107. The Court considers that the impugned measure may be considered to have pursued at least one of the legitimate aims set out in paragraph 2 of Article 11 of the Convention: the protection of “national security” (see paragraph 86 above).
108. As to the proportionality of the disputed measure, the Court points out that the adjective “necessary”, within the meaning of Article 11 § 2, does not imply the same flexibility as terms such as “acceptable”, “reasonable” or “appropriate”; “necessity” always implies “a pressing social need” (see, among other authorities, *Vogt v. Germany*, cited above, p. 26, § 52 (ii)). In that connection, the Court refers to the findings it has just reached with regard to Article 3 of Protocol No. 1. It points out that the party of which the applicant was an active member could not be said to have been “illegal” at the material time (see paragraph 90 above) and that the Government have provided no information about any specific act by the applicant aimed at destroying the newly-restored Republic of Latvia or its democratic order (see paragraph 94).

In so far as the Government refer to the Court’s case-law concerning restrictions on the political activities of civil servants, members of the armed forces, members of the judiciary or other members of the public service, the Court points out that the criteria established by its case-law with regard to those persons’ political loyalty cannot as such be applied to the members of a national parliament (see paragraph 85 above). The Court finds no cause to arrive at a different conclusion with regard to members of local councils, who are also elected by the people in accordance with the principles of pluralist democracy and are likewise responsible for taking political decisions. In summary,

the second sentence of Article 11 § 2 of the Convention, authorising “lawful restrictions” with regard to “members of the armed forces, of the police or of the administration of the State” does not apply to members of parliament or to members of the elected bodies of local authorities.

109. In so far as the Government rely on Article 17 of the Convention, the Court reiterates that the purpose of this provision is to prevent the principles laid down by the Convention from being exploited for the purpose of engaging in any activity or performing any act aimed at the destruction of the rights and freedoms set forth in the Convention (see *Preda and Dardari v. Italy* (dec.), nos. 28160/95 and 28382/95, ECHR 1999-II). In particular, one of the main objectives of Article 17 is to prevent totalitarian or extremist groups from justifying their activities by referring to the Convention. However, in the present case, the applicant’s disqualification from standing for election is based on her previous political involvement rather than on her current conduct, and the Court has just found that her current public activities do not reveal a failure to comply with the fundamental values of the Convention (see paragraph 98 above). In other words, there is no evidence before the Court that would permit it to suspect the applicant of attempts to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the Convention or the Protocols thereto. In this area, there is a clear distinction between the present case and the *Glimmerveen and Hagenbeek* case, cited above, in which the applicants’ conviction and the annulment of their electoral list were based on their real and specific conduct at the material time, or the *German Communist Party and Others v. Germany* case (no. 250/57, Commission’s report of 20 July 1957, Yearbook 1, pp. 222-225), in which the dissolution of the applicant party was based on the views expressed in its programme, which were contrary to democracy. Accordingly, the Court considers that Article 17 of the Convention is not applicable in the present case.

110. It follows that the applicant’s disqualification from standing for election to Parliament and local councils on account of her active participation in the CPL, maintained more than a decade after the events held against that party, is disproportionate to the aim pursued and, consequently, not necessary in a democratic society. There has therefore been a violation of Article 11 of the Convention.

111. The Court considers that the finding of a violation of Article 11 renders it unnecessary for the Court to rule separately on compliance with the requirements of Article 10 in this case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Pecuniary damage

113. The applicant pointed out that, when the Civil Affairs Division of the Supreme Court delivered its judgment on 15 December 1999, she lost her seat as a Riga City Councillor (see paragraph 31 above), and thus the salary that she received in that capacity. After December 1999 and until the following municipal elections, held in March 2001, she was replaced by another member of her party whose name followed hers on the relevant electoral list and who thus obtained the applicant’s seat, which had fallen vacant. That new councillor received a net salary of 1,690.50 lati (LVL) for 2000 and a net salary of LVL 546 for the first three months of 2001; in support of those figures, the applicant supplied copies of her replacement’s tax declarations. The applicant claimed that these were the exact amounts that she would have received had she not been removed from her seat. She thus submitted that she had sustained real pecuniary damage in the shape of loss of earnings, the total amount of which was LVL 2,236.50 (or about 3,450 euros (EUR)).

114. The Government argued that, according to the Court’s settled case-law, Article 3 of Protocol No. 1 was not applicable to municipal elections. Consequently, there was no link between the violation alleged by the applicant and the pecuniary damage she claimed to have sustained.

115. The Court acknowledges that Article 3 of Protocol No. 1 is inapplicable to local elections. However, it has also just found a violation of Article 11 of the Convention, on account of both the applicant’s disqualification from standing for Parliament and her removal from her post as Riga City Councillor. In leaving the municipal

council, the applicant sustained genuine pecuniary damage (see, in particular, *Sadak and Others v. Turkey* (no. 2), nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, § 56, ECHR 2002-IV). Given that the Government did not dispute the accuracy of the amounts claimed by the applicant, the Court considers that it can accept them. It therefore decides to award the applicant LVL 2,236.50 under this head.

B. Non-pecuniary damage

116. The applicant claimed EUR 75,000 by way of compensation for the anguish, humiliation and practical disadvantages that she suffered as a result of her removal from her municipal seat and the impossibility of standing as candidate in two subsequent parliamentary elections. As an example, she argued that in January 2002 she had won an open competition for the post of chairperson of a municipal committee for property privatisation; however, following a virulent press campaign against her, in which her reputation was attacked, Riga City Council refused to endorse the competition's results and to appoint her to that post. The applicant was convinced that this event was directly linked to the violations of her fundamental rights under the Convention.

117. The Government argued that the poor esteem in which the applicant was held by a large part of Latvian society was due solely to her political activities in the past. Accordingly, it was her own conduct which had ruined her reputation and her career, and her misadventures were completely unrelated to the domestic courts' impugned decisions. In any event, the Government considered that the amount claimed by the applicant was excessive, regard being had in particular to the standard of living and the level of income in Latvia at present. Consequently, they submitted that the finding of a violation would in itself constitute sufficient redress for any non-pecuniary damage that the applicant might have suffered.

In the event of the Court deciding to award the applicant compensation for non-pecuniary damage, the Government asked that it be formulated in lati, the Latvian national currency, rather than in euros.

118. Like the Government, the Court considers that no direct causal link has been shown between the violations found and Riga City Council's refusal to endorse the results of the competition in January 2002. However, it cannot deny that the applicant sustained non-pecuniary dam-

age as a result of being prevented from standing as a candidate in the parliamentary election and of being removed from her post as city councillor (see, *mutatis mutandis*, *Podkolzina v. Latvia*, cited above, § 52). Consequently, deciding on an equitable basis and having regard to all the circumstances of the case, the Court awards her EUR 10,000 in respect of non-pecuniary damage.

C. Costs and expenses

119. The applicant requested reimbursement of the costs incurred in preparation and presentation of her case before the Court. She claimed the following sums, which she wished to receive in euros:

- (a) LVL 1,000 in respect of fees for Mr A. Ogurcovs, the Latvian lawyer who represented her before the Latvian courts. The applicant submitted no invoices in substantiation of this claim; she claimed that Mr Ogurcovs had lost all the invoices when moving office. However, she considered this sum to be reasonable, having regard to the fees for legal aid payable in Latvia;
- (b) a total of 12,100 pounds sterling (GBP), exclusive of value-added tax, for 121 hours of work by Mr W. Bowring, the applicant's lawyer, GBP 3,500 of which corresponded to 35 hours of work subsequent to the hearing on 15 May 2003;
- (c) LVL 60.60 in respect of the costs of the applicant's correspondence with the Court and GBP 117.77 under the same head for the period subsequent to 7 April 2003;
- (d) GBP 475.31 in respect of travel and subsistence costs for the applicant and Mr Bowring, to enable them to attend the hearing in Strasbourg on 15 May 2003.

120. The Government questioned the evidence submitted in support of the majority of the sums claimed by the applicant. Thus, they emphasised that, in the absence of supporting documents, there was no evidence that Mr Ogurcovs had provided the alleged services. With regard to Mr Bowring, the only costs acknowledged by the Government were the costs for correspondence with the Court and a part of the travel and subsistence costs. As to Mr Bowring's fees, the Government submitted a video recording of a television programme in which the applicant had taken part; during that programme, the applicant replied to one of the

presenter's questions by stating that "Mr Bowring [was her] friend" and that she "ha[d] not paid him anything". In those circumstances, the Government stated that the bills submitted by Mr Bowring were nothing but bogus documents drafted solely for the purposes of the proceedings pending before the Court; consequently, they objected to reimbursement of those fees. In the alternative, the Government argued that the total amount claimed by the applicant was excessive, and asked that the amount of any award for costs and expenses be expressed in lati.

121. In reply to the Government's arguments, the applicant confirmed the validity of the bills issued by Mr Bowring. She explained that she had indeed paid him nothing to date; however, their contract stipulated that, in the event of a favourable decision by the Court, she would be obliged to pay him the totality of the invoiced sums. According to the applicant, this was a very widespread practice in legal representation, including before the Court. Contrary to the Government's request, the applicant urged the Court to express the amount awarded in euros rather than in lati.

122. The Court reiterates that, to be entitled to an award of costs and expenses under Article 41 of the Convention, the injured party must have genuinely "incurred" or "sustained" them (see, among many other authorities, *Eckle v. Germany (Article 50)*, judgment of 21 June 1983, Series A, no. 65, p. 11, § 25). However, this principle must be interpreted in the light of the overall objectives pursued by Article 41. The Court has accepted that the high costs of proceedings may of themselves constitute a serious impediment to the effective protection of human rights, and that it would be wrong for the Court to give encouragement to such a situation in its decisions awarding costs under Article 41 (see *Bönisch v. Austria (Article 50)*, judgment of 2 June 1986, Series A no. 103, p. 9, § 15). In those circumstances, reimbursement of fees cannot be limited only to those sums already paid by the applicant to his or her lawyer; indeed, such an interpretation would discourage many lawyers from representing less prosperous applicants before the Court. In any event, the Court has always awarded costs and expenses in situations where the fees remained, at least in part, payable by the applicant (see, for example, *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, p. 47, § 115; *Koendjibiharie v. the Netherlands*, judgment of 25 October 1990, Series A,

185-B, p. 42, § 35; and *Iatridis v. Greece [GC] (just satisfaction)*, no. 31107/96, § 55, ECHR 2000-XI). In the present case, there is nothing to suggest that the bills drawn up by Mr Bowring are bogus or that the applicant has decided not to pay them.

123. The Court further reiterates that, in order to be reimbursed, the costs must relate to the violation or violations found and must be reasonable as to quantum. In addition, Rule 60 § 2 of the Rules of Court provides that itemised particulars must be submitted of all claims made under Article 41 of the Convention, together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part (see, for example, *Lavents v. Latvia*, no. 58442/00, § 154, 28 November 2002). Equally, the Court may award the injured party payment not only of the costs and expenses incurred in the proceedings before it, but also those incurred before the domestic courts to prevent or rectify a violation found by the Court (see *Van Geyselghem v. Belgium [GC]*, no. 26103/95, § 45, ECHR 1999-I, and *Rotaru v. Romania [GC]*, no. 28341/95, § 86, ECHR 2000-V).

In the present case, the Court considers that, in the absence of the relevant vouchers, it cannot allow the request for reimbursement of Mr Ogurcovs's fees. As to Mr Bowring's bills, it observes that several references are fairly general and do not substantiate the specific nature of the legal services rendered. In any event, the overall sum claimed by the applicant in respect of costs and expenses is somewhat excessive. On the other hand, the Court does not deny that the case was very complex, which had an undoubted bearing on the costs of preparing the application. Finally, it notes that the applicant and her lawyer attended the hearing on 15 May 2003 without having first obtained legal aid. In those circumstances, and making its assessment on an equitable basis, the Court considers it reasonable to award the applicant the sum of EUR 10,000 to cover all heads of costs taken together. To this amount is to be added any value-added tax that may be chargeable (see *Lavents v. Latvia*, cited above, § 154).

D. Default interest

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

points.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection that the applicant was not a victim;
2. Holds by five votes to two that there has been a violation of Article 3 of Protocol No. 1 to the Convention;
3. Holds by five votes to two that there has been a violation of Article 11 of the Convention, and that it is not necessary to examine separately the complaint under Article 10 of the Convention;
4. Holds by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) LVL 2,236.50 (two thousand two hundred and thirty-six lati and fifty santimi) for pecuniary damage;
 - (ii) EUR 10,000 (ten thousand euros), to be converted into Latvian lati at the rate applicable on the date of settlement, for non-pecuniary damage;
 - (iii) EUR 10,000 (ten thousand euros), to be converted into Latvian lati at the rate applicable on the date of settlement, for costs and expenses;
 - (iv) any tax that may be payable on the above sums;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 17 June 2004, pursuant to Rule 77 § 2 and 3 of the Rules of Court.

Søren Nielsen, *Registrar*
Christos Rozakis, *President*

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinions of Mr Bonello and Mr Levits are annexed to this judgment.

DISSENTING OPINION OF JUDGE BONELLO

Some relevant facts

1. These have been recounted in considerable detail in the judgement. For the purposes of this opinion I believe the following ought to be highlighted.

1.1. The applicant had been, since 1971, an activist, and eventually a prominent member, of the Latvian Communist Party (CPL) a regional branch of the Communist Party of the Soviet Union in Latvia. This nation had lost its independence and its democratic regime in 1940.

1.2 On May 4, 1990 Latvia declared its independence from the Soviet Union. At that time the applicant was an elected member of the Supreme Council of the Soviet Socialist Republic of Latvia. The CPL on that same day condemned the declaration of independence and requested the Soviet Union to intervene.

1.3. In January 1991, according to the respondent Government, the Soviet authorities started military action against the government of independent Latvia. Several persons were killed and wounded in the streets and a "coup d'état" was organised to overthrow the independent government. The Plenum of the CPL pressed for the dissolution of the Supreme Council of Latvia, to be replaced by a so-called Committee of Public Safety (which included the CPL). This proclaimed the government had forfeited its powers, and claimed to have assumed those powers itself. This coup failed after armed battles in the streets of Riga.

1.4. In August 1991 a "coup d'état" took place in Moscow, by which power was taken over by a State of Emergency Committee. The Riga CPL instantly pledged its support to the Committee and appealed to the Latvian people to cooperate with the new Soviet revolutionary Committee.

1.5. The law relating to municipal and general elections excludes those who "participated actively after the 13 January 1991" (date of the coup and

popular uprising) in the CPL, the CPUS and some other named organisations. The applicant was barred from standing as candidate in the municipal election of 1997 and the parliamentary elections of 1998. She challenged that ban; she admitted her membership of the CPL and her being an official in the Central Control and Audit Committee of the CPL up to 10 September 1991, when the CPL was officially dissolved; but claimed this ban violated her rights under international conventions.

1.6 In fully adversarial proceedings in 1998 – 1999, three levels of jurisdiction of the Latvian courts established that the applicant had actively participated in the CPL after 13 January 1991 and this in practice confirmed she had forfeited the right to stand for election, as provided for by Latvian electoral law.

1.7 The applicant claims that this disenfranchisement violates her rights under Article 3 of Protocol No1.

The proportionality test

2.1 I am fundamentally in disagreement with the majority's finding that the ban on standing for election provided for by law (in relation to those who persisted in participating actively inside the CPL after the failed "coup d'état" of January 1991), was disproportionate to the legitimate aims pursued by the law.

2.2. It goes almost without saying it is my "preferred position" that everyone should, in principle, enjoy with the minimum of hindrance, all fundamental rights guaranteed by the Convention, including that of standing for political election. This does not, however, lead me to justify the attainment of these desired optimums even in defiance of historical realities, the weakness of emergent and fragile pluralisms and the contradictions faced by a democracy called to contain democratically those who consider democracy, at best, expendable and, at worst, wholly detrimental. I do not believe that the majority have reached their conclusions only through an *a posteriori* rationalisation of their own 'preferred positions'. But I cannot find sufficient value in the other reasons.

2.3 It is my belief that the judicial tensions underlying this controversy should have been settled in the light of the Court's doctrine, reiterated only recently, that "A political party whose leaders ... put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy, cannot lay claim to the Convention's protection against penalties imposed on those grounds."² I have no difficulty in transferring

the thrust of this reasoning from political parties to high-ranking officials in political parties.

2.4 The Court has also held that "The freedoms guaranteed by Article 11 and by Articles 9 and 10 of the Convention, cannot deprive the authorities of the State in which an association, through its activities, jeopardises the State's institutions, of the right to protect those institutions."³ The line of reasoning that justifies the curtailment of freedom of expression and of association, should govern the political rights implicit in Article 3 of Protocol No. 1, like that of standing for election.

2.5. I am not unduly impressed by the plea that the applicant does not, as of today, pose a clear and imminent threat to the survival of democracy in Latvia. Fortunately – but hardly thanks to her and her like-minded associates who vote Communist and dream Neanderthal - activists like her

evoke compassion and pathos rather than shock-waves of terror. Latvian democracy, after the horrific and blood-splattered coup meant to reverse the clock of history to the time-freeze in which the applicant is trapped, can today well survive her antics.

2.6. The fundamental question facing the Court was, in my view, the following: is the State justified in limiting political freedoms *only* when the survival of democracy is threatened? Or is it also justified to restrict some political rights when the authority, the image and the credibility of democracy are at stake? These, on my scale, are values to be protected, cherished and fortified, almost as much as the physical survival of democracy itself. In my book, a State is fully entitled in terms of its own enlightened sovereign policy, not to allow among the players on the democratic stage those who play the game of democracy by their own aberrant rules and for their own aberrant purposes.

2.7. It falls on the Strasbourg Court to exercise the maximum of judicial restraint when it comes to substituting its own rarefied and essentially second-hand vision of what is suitable for a democracy, to that of the prime guarantor of democratic order – which is the democratic State itself. I ask myself if the image of democracy is enhanced by according exactly the same rights and privileges to those who are delighted to die for democracy, as to those who are delighted to live with the negation of democracy. I can think of very few reasons why democracy should morally subsidize those who hold it in contempt.

2.8 In my opinion, it ill-suits the Court to delegitimise a State's efforts to uphold the image, the authority and the credibility of the democratic model

when, in the supreme interest of democracy, it opts not to extend each and every democratic faculty to those who, given the least opportunity, would only turn those faculties to the destruction of democracy itself.

“Wide margin of appreciation”

3.1 The Court, (not differently from the Commission) has, since its infancy, held that, in matters of limitations imposed by the State on the ability of persons to vote and to stand for political election, the national authorities enjoy “a wide margin of appreciation”, though it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No 1 have been complied with.⁴ The case-law of the Court seems to distinguish, in descending order of amplitude, between “a wide margin of appreciation”, “a certain margin of appreciation” and “a margin of appreciation”. In the matter of electoral rights, the Court assigns to the national authorities the supreme rank in the spread and depth of the discretion allowed.

3.2 In practice, over many years, the Court has, so far at least, always put in practice its theorem that national authorities are better placed than an international court to establish how electoral democracy and the demands of pluralism are best served in the specific light of the current political, historical and social conditions of each particular country. It is only in the most exceptional circumstances that the Court has unsheathed its supervisory powers to second-guess the local authorities in the area of restrictions on the right to vote and to stand for election. Virtually all the limitations prescribed by the national systems have, so far, passed the test of the Strasbourg organs. All, that is, except the Latvian one.

3.3 I believe that it was never for the Court to determine such subjective and elusive questions as the one whether in 1998 the transitional period to a new democracy had been fully played out or otherwise. The majority lays considerable emphasis on the fact that the measure complained of might have been justified in a transitional period, but not in 1998, when the adjustment period was over. I fail to see how an international Court is better placed to impose its own value judgements on such evanescent and ephemeral issues as to exactly when a state of emergency or transition is over, rather than the democratic sensors of the national authorities, in everyday, and far more intimate, contact with the realities of Latvian history. In the absence of objectively identifiable criteria (such as Latvia’s entry into NATO and the European Union in 2004) the Court should have considered the determination of when

a transition period comes to an end, to fall squarely within the national margin of appreciation.

3.4. Again, I fail to see why the respondent Government should have been penalised by the Court precisely because it exacted less than the full pound of flesh from the applicant. Any State, in the wake of a violent coup discoloured in blood, would have been justified in instituting criminal proceedings against those perceived to have been associated with an armed attempt to overthrow the democratic order. Had the applicant been found guilty in criminal proceedings, loss of election rights would have followed automatically. The Latvian authorities, (whether in a spirit of reconciliation, or for reasons of the fragility of the power structures is as unclear as it is irrelevant) spared the applicant severe criminal prosecution and instead favoured her with the far softer option of a penalty based on fully adversarial civil-law proceedings. The Court would not, presumably, have objected to a criminal sentence coupled with loss of electoral rights. It is, in my view, paradoxical that, for having spared the applicant the trauma of criminal penalties, Latvia then finds itself unable to discipline the applicant at all.

3.5 In the present case, the national authorities were driven by a manifest concern to safeguard the image and credibility of democracy; they feared that, by allowing militant non-democrats to stand for election shoulder to shoulder with those who, for the fulfilment of democracy, had been prepared to pay the ultimate cost, would destabilise the very moral authority of democracy itself, and obfuscate the unequivocal inspiration the image of pluralism should evoke. It is far from painless for me to see that it was only in the present case that the Court, in substance, abandoned its doctrine of “wide margin of appreciation”, to substitute a text-book political and historical credo for that of a State that had lost democracy through the proficiency of the likes of the applicant, regained it notwithstanding the impenitent struggles of the likes of the applicant, and retains it despite the cravings of the likes of the applicant.

Loss of electoral rights according to the Court

4.1 The Court has always accepted that the political rights implicit in Article 3 of Protocol No 1, i.e., to vote and to stand for election, are not absolute and may be restricted, provided the limitations do not impair the very essence of the right, are imposed in the pursuit of a legitimate aim, and that the means employed in curtailing those rights are not disproportionate.⁵

4.2 In the furtherance of this now sacrosanct doctrine, the Strasbourg organs have, at least so far,

accepted as legitimate the widest spectrum of limitations on the right to vote and to stand for elections devised by the national authorities of various member states.

4.3 Thus, limitations on these political rights based on residence have repeatedly passed the Strasbourg test 6– even when the disenfranchisement was based on a “four years continuous residence” requirement.⁷ The inability to exercise political rights due to nationality or citizenship requirements⁸, or consequent on double nationality⁹, has also been approved by Strasbourg. Age limitations in general¹⁰, including a minimum age of forty to stand as candidate for the Belgian senate¹¹ have been accepted, as also the ban on standing for election if the candidate is already a member of parliament of another state¹². Language proficiency was also found to be a sufficient reason to qualify or disqualify a person from standing for election¹³; similarly, regulations that made the right to stand as candidate dependent on a requirement to take the oath of office in a particular language.¹⁴ The disenfranchisement of persons in detention¹⁵, of persons previously convicted of serious crimes¹⁶, also obtained the Strasbourg seal of approval.

4.4 Very recently the Court, in an exceptional manner, struck down the loss of political rights imposed by U.K. law on all those serving a prison sentence. But this solely because the ban hit indiscriminately all those convicted, whether of a serious or of a petty offence, whether condemned to minimal terms or to life sentences. It was only the indiscriminate blanket effect of the ban that caused the Court to find a violation.¹⁷

4.5 To date, limitations on political rights to vote or to stand for election, not aimed in any way at securing the survival or the authority of the democratic principle, have received the blessing of the Strasbourg organs. It is disconcerting to discover that it was only a restriction inspired by a concern to foster the moral image of democracy that today failed the Strasbourg test.

4.6 It is perfectly acceptable, it seems, that a person with an inadequate knowledge of a particular language should be denied the right to stand for election – though that candidature would create absolutely no distress for democracy. It is not, on the other hand, acceptable, that a person who has spent a lifetime living and imposing dogmas of anti-democracy, be restricted in reaping a few of the benefits of that democracy which, had it been left to her, would have receded to an indifferent footnote of history.

4.7 The Court has been generous to those whose

rapport with democracy was and is wholly dysfunctional, and has been severe in its punishment of those who tried to shield it from the bane of self-satisfied and entrenched non-democrats.

DISSENTING OPINION OF JUDGE LEVITS

I.

1. To my regret I cannot agree in this case with the findings and particularly with the reasoning of the majority of my colleagues.
2. I completely share the objections of Judge Bonello expressed in his dissenting opinion in respect to the margin of appreciation left to the Contracting states regarding electoral laws including reasons for disqualification of candidates.
3. Indeed the Strasbourg organs had left to the Contracting States in those matters the widest possible margin of appreciation. In the following I would like to explain why, in my view, this case should also be covered by the margin of appreciation.

II.

4. All democracies are based on the same common values and main principles. However, the legal shape of these values and principles in the constitutional order is different from state to state. Therefore we can speak about a pluralism of the modern democratic constitutional orders.

The pluralism of democratic constitutional orders applies also to the electoral systems as a part of the constitutional order of a democratic state. Electoral systems are also different from state to state, but all of them are democratic, if they obey certain principles which are essential for democratic elections.

5. With regard to electoral rights as a central element of the constitutional order of a democratic state we can say that there is a common universal principle on which these rights are based. It is the principle according to which the majority of the people have both active and passive electoral rights. Compliance with this principle could be regarded as the central issue in the assessment whether an electoral system should be recognised as democratic.

6. Nevertheless, this principle is never applied without exceptions. Indeed, national constitutional orders contain democratic electoral rights, but at the same time they ban some people from exercising these rights. Thus, we can say that this ban is an exception from the general rule.

7. Concerning some types of disenfranchisement, there is a uniform approach amongst the democratic states. All these states ban from elections persons of unsound mind and minors. The exclusion of both groups is regarded as natural so that this is never seen as a problem.¹⁸

8. Besides minors, another large group of the population is normally excluded from elections – aliens, including those born in the country or long-standing residents. This is a natural consequence of the concept of a national democratic state.

Nevertheless, even here, there is no absolutely uniform state practice. In some Member States of the Council of Europe the disenfranchisement of foreigners was lifted and this large group has been granted electoral rights under certain conditions and mainly at a local level (Ireland as early as in 1963; it was followed by Sweden, Norway, the Netherlands, Denmark, and Finland; United Kingdom lifted the exclusion of the citizens of the Commonwealth states for all elected posts – including the national Parliament).

On the contrary, in 1990, in an extensively reasoned judgment, the German Constitutional Court held that lifting the disenfranchisement of foreigners would constitute a violation of the very essence of the principle of democracy and national sovereignty¹⁹.

9. In many Contracting States, a person loses his/her electoral rights after a conviction by a criminal court. For example, in Austria and Germany, people sentenced to more than one year's imprisonment are banned from elections. In Ireland, such legal consequences are entailed by a sentence to more than six months' imprisonment, whereas in Belgium four months' imprisonment suffices. In the United Kingdom, a person sentenced to any kind of imprisonment is disenfranchised.²⁰

On the contrary, in Sweden convicted persons are not disenfranchised at all. In a judgment of 5 March 2003 the Latvian Constitutional Court also found that a Latvian legal provision ban-

ning sentenced persons from elections contradicted the principle of free elections.

10. It is also to be noted that some civil misbehaviour may be held as a sufficient reason for disenfranchisement. For instance, in the United Kingdom and in Ireland, a person declared to be bankrupt is excluded from electoral rights. Obviously, the national legislator wanted to protect the institution of Parliament from persons who, in the eyes of society, do not have the necessary credibility to exercise these rights.

11. The constitutional orders of different democratic states provide for a deprivation of active and/or passive electoral rights also for some other reasons, which vary from state to state, for example, the residence of a citizen abroad can be a ground for his/her disenfranchisement. Furthermore,

some Contracting States ban from elections different categories of state servants (e.g., Greece, Spain, Ireland, Portugal, and Finland).

12. In conclusion, the constitutional orders of all democratic states contain electoral rights, based on the general principle *that the majority of the people possess these rights*. At the same time, all constitutional orders provide also for some grounds for exclusion from these rights.

13. The Court has recognised that the rights in Article 3 of Protocol

No. 1 are not unlimited, that, by analogy with Articles 8 to 11 of the Convention, there is room for implied limitations. The States have a wide margin of appreciation in this area, but it is for the Court to determine in the last resort whether the requirements of Article 3 of the First have been complied with.²¹ Thus, the rights concerned can be restricted by law, but the restrictions must pursue a legitimate aim, and the restriction must be proportionate.²²

III.

14. In order to understand the legal character of electoral rights, it is important to emphasise that they are personal *political* rights which are a part of the institutional order of the State.

Therefore, the functions of electoral rights are different from that of human rights. The functions of these rights are to ensure the democratic participation of the people in the

governing of the state and to legitimate state institutions, whereas the functions of human rights are to protect the personal freedom of individuals from state interference and, furthermore, to guarantee some material or immaterial benefits.

In other words, electoral rights are an instrument in the hands of an individual to influence the state policy, whereas human rights are a legal "shield" conferred on an individual against state interference in his/her freedom, and in some situations it is also a legal ground to demand from the state some benefit for himself or herself.

15. Consequently, in the national constitutional orders, and because of their different legal character, electoral rights are never regarded as human (basic, fundamental) rights but rather as political rights belonging to the institutional part of the constitutional order.

Therefore the legal scope of these rights, their interpretation and their application in practice follow different rules from those governing human rights.

16. Article 3 of Protocol No. 1 is the only Convention provision which makes electoral rights individual human rights. That cannot eliminate the specific character of electoral rights as political rights, but lends them a double character: they are at one and the same time human rights (in the Convention system) and political rights.²³
17. When examining applications under Article 3 of Protocol No. 1, the Court always faces a certain dilemma: on the one hand, of course, it is the Court's task to protect the electoral rights of individuals; but, on the other hand, it should not overstep the limits of its explicit and implicit legitimacy and try to rule instead of the people on the constitutional order which this people creates for itself.

This dilemma is unique problem within the Convention system, because only the rights in Article 3 of Protocol No. 1 have this double legal character as human rights and an important element of national constitutional order.

18. The appropriate way out of this dilemma is to use the instrument of *margin of appreciation*. That means that in examining the legitimate aim and the proportionality of a restriction, it is necessary to give a different weight to these two elements: if the Court finds that the restric-

tions pursue a legitimate aim and are not arbitrary, then only in exceptional situations can this restriction be found disproportionate.

Therefore, the Court should not disregard the specific character of Article 3 of Protocol No. 1. The Court should be aware of the fact that through its adjudication on matters arising under Article 3, it can unduly influence the national constitutional order of a Contracting State. In other words, *the Court is not empowered by the Convention system to interfere directly in the democratic constitutional order of a State*. Otherwise, there would be a violation of the principles of democracy and State sovereignty. A too simplistic approach to the examination of this Article can easily lead to a violation of both these principles.

19. It seems that the Court and the former Commission were indeed aware of the special character of Article 3 of Protocol No. 1. As the case-law shows, the general policy of the Strasbourg organs was to leave to the Contracting states the widest possible margin of appreciation in order to avoid a challenge to the principles of democracy and state sovereignty.²⁴

In fact all the abovementioned restrictions provided for in electoral law, in the constitutional orders of the different Contracting States, have been found by the Strasbourg organs to be compatible with Article 3 of Protocol No. 1. Only in a few exceptional situations, when the very core of the electoral rights was at stake, ²⁵ has the Court found a violation.

IV.

20. The finding of the majority, that the restrictions in the instant case pursued legitimate aims (§ 86 of the judgment), should in my view already indicate, that these restrictions were proportionate.

However, afterwards the majority applied the margin of appreciation in very narrow manner and consequently found the restrictions to be disproportionate.

I cannot share this view. On the contrary, in my view, the public interests in the instant case justified allowing to the respondent State and even wider margin of appreciation than in an "average" case under Article 3 of Protocol No. 1.

21. The majority recognise that the provision of Latvian law which disenfranchises those who continued to participate actively in certain

organisations after 13 January 1991 pursues legitimate aims – to protect the independence of the Latvian state, its democracy and national security (§ 86 of the judgment). Furthermore, the majority also recognise that restrictions were proportionate during the first years after the re-establishment of an independent democratic state (§ 92 of the judgment).

But then the majority analyse the current situation, and come to the conclusion that the applicant poses no more threat to the “legitimate aims” protected through the restrictions concerned (§§ 92-99 of the judgment).

22. I can agree with majority that in the current situation the applicant is no longer a real danger to the State and democracy, if the word “danger” is taken to mean only the preparation of a new “coup d’état” like those which happened twice in 1991. I would like to point out that only a mass defence of the Latvian Parliament and Government by mainly unarmed people (the so-called “barricades of Riga”) thwarted these attempts.
23. The Court should always be aware of the context of a case, especially in a politically sensitive and complex case like this one.

The first aspect of the general context of the instant case, which should be taken into account, is that of the re-establishing of a democratic order after an undemocratic (totalitarian) regime.²⁶ Most of the “old” Contracting States do not have any real experience in that. The second aspect is that of the re-establishing of an illegally occupied State. That means liquidating an illegal situation caused by a foreign state in continuous breach of international law.²⁷

The majority formally recognise, though in general terms, the difficult context in which this case is embedded (§§ 90-92 of the judgment). Nevertheless, when analysing the details of the case the majority seem to have lost sight of its true significance.

24. One of the most important problems for the new democracies is the confidence of people in their institutions. However, general confidence in the democratic institutions is a *conditio sine qua non* for a stable democracy.

Indeed, people have experienced a system of injustice (*Unrechtsstaat*), and that makes it difficult for them to recognise the good intentions of democratic politics and institutions.

Distance from of the state institutions and distrust of politicians is a usual and in a sense “normal” pattern of society in new democracies, especially when the “revolution” is over and the democratic routine starts.

25. In the context of this case it is important to note that building confidence in the new democratic institutions is considerably impeded if the new institutions (governmental bodies, public authorities, parliament, etc.) are permeated by protagonists or former representatives of the old regime of injustice – despite the fact that they might still have support in some parts of the society.
26. All these are elements of the general problem of “coping with the past” (*Vergangenheitsbewältigung*) which all the new democracies are facing.

Society and the State must find the right way to deal with injustices of the former regime: how to compensate the victims, how to treat the protagonists of the previous system of injustice, how to show to individual members of the society the qualitative difference between a system of injustice and a democratic system guided by the rule of law.

27. There is little help from the traditional “old” democracies in this respect, whether in the fields of (legal) theory or practice. Their advice is rather superficial. These questions were not relevant to them.²⁸

Therefore it is rather for the new democracies themselves to develop the right solution to these problems both in legal and political theory and in practice.

28. The scale of possible attitudes to these problems in the new democracies is very wide and differs from state to state. It depends on many factors like the relative strength of the democratic forces and the protagonists of the regime of injustice; the particularities of the democratic revolution; the degree to which of the new elite is intermixed with the protagonists or former representatives of the old regime; the historical experiences, and similar circumstances.

In some states there has been a formal criminal prosecution of the representatives of the former regime who committed crimes. Nevertheless, the principle of *nulla poena sine lege* prohibits the prosecution in most cases; therefore the criminal activities of former state officials

may remain without a just criminal punishment.²⁹

South Africa, Argentina and some other states in Latin America have established “truth commissions” as an instrument of the policy of the “coping with the past”.³⁰

29. In several new democratic states the laws provide preventing some restrictions for the former representatives and protagonists of the old system of injustice from holding some official posts, especially in the civil service.

For example, in Germany, the law provides preventing certain restrictions for the former agents of the secret service of the East German regime (“*Stas*”) from holding a parliamentary office.

This law has also been applied in practice. For example, on 29 April 1999, a member of the Parliament (“*Landtag*”) of Thüringen (a German “*Land*”) was deprived of his seat after it was revealed that he had been an agent of the secret service under the old regime.³¹ In the context of this case, it should be noted that, as in Latvia, it was not necessary to prove the individual guilt of the former agent – it was enough to prove that a parliamentarian had indeed been an agent of the secret service.

Again, as in Latvia, it was not necessary to examine whether he or she still presented an actual danger to the democratic order. The reason for this exclusion was the general assumption that such a person *discredits the Parliament*.

The purpose of such restrictions for members of Parliament has also been explained by the German Federal Constitutional Court in a case concerning the regulations for the special procedure for investigation whether deputies of the Federal Parliament formerly acted as agents of the “*Stas*”. The Federal Constitutional Court ruled that the reason for this investigation was the assumption, “*that the former activities of a deputy as an agent of the state security [of the former GDR] deprives him or her of the legitimacy needed to be a deputy of the German Bundestag. This regulation does not question his or her honour as a personal right deserting legal protection, but [rather] his or her suitability to represent the people in Parliament*”.³²

30. It should also be noted that in some new democracies there is no specific policy of “coping

with the past”, and the discussion on these questions has not yet begun. In other countries, such discussion only starts after a certain period of time, when the democratic culture and the legal consciousness attain a certain level and when there is no more fear that the old forces may come back. For example, the discussion about such problems in Argentina and Chile started and measures against the representatives of the former authoritarian regimes were taken only recently, nearly two decades after the establishing of the democratic order.

Therefore the implicit expectation of the majority in the instant case that these problems would continuously diminish without any discussions and any specific policy (§ § 92 and 97 of the judgment), is unrealistic, at least as long as the whole generation of victims of the former Soviet system of injustice is still alive.

31. The variety of different attitudes towards the complex problem of “coping with the past” allows only one conclusion – there cannot be a uniform approach.

Only an intensive discussion in society and an organised State policy aimed at redressing the injustice of the former system and strengthening the people’s confidence in democratic institutions (which may also include some restrictions on the protagonists of the former regime), can, in the long term, lead to a reconciliation in society and contribute to the stabilisation of the democratic order. It should also be mentioned that the reconciliation process requires some remorse on the part of the protagonists of the former regime for having committed injustice (which, as my colleague Judge Bonello notes in his dissenting opinion, is not the case with the applicant).

Anyway, it is a genuine *political* process in each country, which should not be distorted by simplistic judicial verdicts.

32. In Latvian society, the discussion on whether these restrictions are (still) necessary, is continuing. The Constitutional Court’s judgment of 30 August 2000, accompanied by a strong dissenting opinion of three judges, reflects this discussion. It should also be mentioned that, after very long and intensive discussions, the Latvian Parliament decided to lift these restrictions for the elections to the European Parliament in 2004.
33. In my view, the Court should respect the deep-ly *political* character of this problem, instead of

substituting itself for society and delivering a *judicial* decision on this issue. This will neither bring the discussion to an end nor solve the problem. In any case, some restrictions on the passive electoral rights of protagonists of the old regime of injustice are not disproportionate in comparison to the aims of these restrictions, especially strengthening confidence in the new democratic institutions. These restrictions are covered by the concept of the “self-defending democracy”, which is also recognised in the settled case-law of the Court and to which the majority (also refer) in the instant case (§ 92 of the judgment).

V.

34. The majority departed from the general principles, developed by the case-law of the Strasbourg organs in cases where persons were disenfranchised for “uncitizenlike conduct”, without having reasonable grounds for that change.

In my opinion, one of the weakest points of the reasoning adopted by the majority is the second part of § 88, in which the Court tries to draw a distinction between the present case and the case-law of the former Commission concerning the electoral rights of persons convicted in the aftermath of the World War II for collaboration with the enemy or similar uncitizenlike conduct during the war. In particular, in § 84 of the judgment, the Court quotes three decisions that are worth examining more thoroughly.

35. In the case of *X. v. the Netherlands*³³, the applicant, born in 1888, was convicted for “uncitizenlike conduct” by the Amsterdam Special Court in 1948. The applicant never participated in armed conflict against the legitimate Dutch authorities, nor did he take active part in any repressive mechanism set up by the Nazi occupation force. He was essentially blamed for having adopted a disloyal attitude, before and during the war, being officially the director of the Dutch Christian Press Bureau and unofficially a member of the Dutch National-Socialist Movement and a strong sympathiser with the Third Reich. Nevertheless, the Dutch authorities considered his fault to be sufficiently grave to deprive him for life of his right to vote. The Commission examined his application in 1974 – that is to say almost thirty years after the events – and declared it manifestly ill-founded in the following terms:

“[I]t does not follow that Article 3 accords the rights unreservedly to every single individual to take part in elections. It is indeed generally recognised that certain limited groups of individuals may be disqualified from voting, provided that this disqualification is not arbitrary.

[T]he Commission has still the task of considering whether the present deprivation of the right to vote is arbitrary and, in particular, whether it could affect the expression of free opinion of the people in the choice of the legislature. This is clearly not so in the present case.

(...)

[As regards Article 14 of the Convention, t]he Commission (...) finds it appropriate to refer to the jurisprudence of the European Court of Human Rights (judgment of 23 July 1968 – in the case “relating to certain aspects of the laws on the use of languages in Education in Belgium”) which laid down criteria for consideration of differences in treatment: objective and reasonable justification of a measure and reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The Commission has analysed the intention of the laws depriving, in several countries, convicted disloyal citizens of certain political rights, including the right to vote. The purpose of such laws is to prevent persons, who have grossly misused in wartime their right to participate in public life, from misusing their political rights in the future. Crimes against public safety or against the foundations of a democratic society should thus be avoided by such measures.

The Commission considers that this *ratio legis* meets the criteria laid down by the Court in the above mentioned judgment.”

36. The second decision was adopted in the case of *X v. Belgium*³⁴. In February 1948 the applicant, born in 1912, was convicted by the Brussels Military Court and sentenced to twenty years of extraordinary detention for collaboration with the enemy during the war. In February 1951 his prison term was reduced to eighteen years, and several months later he was conditionally released. However, his conviction initiated the automatic application of a legal provision depriving him permanently of the right to vote in national and local elections. In 1979, the Commission rejected his complaint in the following terms:

“[The] right [to vote], which is neither absolute

nor unlimited, is subject to certain restrictions imposed by the Contracting Parties, provided that these restrictions are not arbitrary and do not interfere with the free expression of the people's opinion (...).

When required to decide on cases of this kind, the Commission must decide whether or not this negative condition is fulfilled. In other words, it must decide, in the present instance, whether the permanent deprivation of the right to vote following conviction for treason, of which the applicant complains, is arbitrary, and, in particular, whether it is calculated to prejudice the free expression of the opinion of the people in the choice of the legislature. The Commission is of the opinion that this is certainly not the case in the present instance.

In fact, it notes that in Belgium, as in other countries, the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote is to ensure that persons who have seriously abused, in wartime, their right to participate in the public life of their country are prevented in the future from abusing their political rights in a manner prejudicial to the security of the state or the foundations of a democratic society (...)."

37. One might argue that the two aforementioned cases relate to a period prior to the judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the first judgment that defined clearly and authoritatively the extent of the rights covered by Article 3.

However, the Convention organs did not change their approach even after *Mathieu-Mohin*. In the case of *Van Wambeke v. Belgium*³⁵, the applicant, a former member of the *Waffen SS* born in 1922, was sentenced to fifteen years of extraordinary detention for treason by a judgment of the Ghent Military Court of 9 May 1945; he also lost his voting rights for life. In 1989 – that is almost forty-five years after the events – he was denied the right to vote in elections to the European Parliament. In 1991 the Commission rejected his application, reiterating the reasoning of the *X v. Belgium* decision quoted above.

38. I would like to place special emphasis on the fact that in all these cases, the right at stake was the active electoral right, the right to vote, that requires less qualification and much less responsibility than the right to stand for elections.

Generally speaking, the vast majority of the

domestic Constitutions or electoral laws of the Contracting States to the Convention set up different criteria for active and passive electoral rights, the latter being subordinated to considerably higher standards than the former – thus there always is a category of persons who may vote but are not entitled to stand for election because of various impediments that disqualify them in terms of the domestic law (age, criminal record, bankruptcy, etc.). Such a distinction is only natural, if we think of the remarkable difference between the degree of accountability required from a citizen for a simple participation in the suffrage, and the degree of accountability that a legislator has to bear. And still, the Commission found three times that a perpetual restriction of this basic civic right was compatible with Article 3 of Protocol No. 1.

39. Now, coming back to the present case, I have considerable difficulty understanding how the majority, after having quoted the above decisions, could find a fundamental difference between them and the present case. The only argument, mentioned by the Court at the very end of § 88 of the judgment, is that the three former applicants had been convicted for very serious crimes, namely treason, whereas the applicant was never tried nor convicted.

This argument does not convince me at all. In fact, if we submitted those three cases to the same type of analysis that the Court applied in the present instance – though the very idea of such analysis seems to me to be wrong – I am sure that the domestic measures would not stand the test and the Court should indubitably find a violation of Article 3 of Protocol No. 1.

40. I could accept the decision of the majority to operate a dichotomy between the *punitive* and the *preventive* aspects of the applicant's ineligibility (§ 87 of the judgment); however, it remains surprising to me why the present case has not been compared with *X v. the Netherlands*, *X v. Belgium* and *Van Wambeke v. Belgium* also under the *preventive* angle. If we follow this line, we will find that the first of these three applicants had been convicted for a non-violent crime implying merely ideological support for the occupation power – even though the Commission did not find any difference between him and the two others; that none of the applicants had ever been accused of having done something wrong for the many years after their conviction, and that the respective Governments had never blamed them for any disloyal conduct at the time of the introduction

of their applications.

41. Certainly, one can insist on the fact that, unlike the applicant in the instant case, they all had been criminally convicted. However, we should remember that the time elapsed since their conviction was more than impressive: twenty-six years in the first case (*X v. the Netherlands*), thirty-one years for the second case (*X. v. Belgium*) and forty-six years in the third case (*Van Wambeke v. Belgium*).

It means that at least one generation had changed before the Commission came to examine the respective complaints, whereas in the present instance, the controversial events of 1991 still fresh in the memory of the Latvian people. In my opinion, this fact suffices to outweigh the aforementioned difference.

42. Finally, as to the “actual dangerousness” criterion set up by the majority, we should recall that on the date of the respective Commission decisions, the first applicant was eighty-six years old, the two others being aged sixty-seven and sixty-nine.

This being said, if we rigorously apply the criteria set up by the present judgment, the three former collaborators and traitors appear to be much more inoffensive at the moment when the Commission examined their cases than the applicant in the instant case is today. And still the Commission found no appearance of a violation of Article 3 of Protocol No. 1.

43. As I already said, in my view, the Commission followed the most reasonable way by basing its reasoning not on the *actual dangerousness* of the applicants – a criterion that the national authorities are in a better position to evaluate – but on the question whether they were *qualified* to take part in the suffrage.

Here I would like to emphasise once more that the applicant in the present case was subject to the mildest and most lenient form of interference with Convention rights – she has been deprived only of the right to be elected; on the contrary, she can vote and even chair a political party without any restrictions.

44. Of course, the Court is bound neither by the former Commission’s case-law nor by its own, and is free to reverse it at any moment. However, if the present judgment is to be considered such a reversal, it should have adopted a much more thorough and complete reasoning; in my eyes, one tiny argument at the end of § 88 is

clearly insufficient.

45. As for myself, I remain convinced that in cases similar to the present instance and involving delicate considerations based on the painful political and historical experience of the country concerned, the Court must exercise the maximum self-restraint, reducing its control to two basic points: it should ensure, firstly, that the reasons given by the national authorities are serious and consistent and secondly, that there is no appearance of arbitrariness in the case.

VI.

46. Furthermore, I would like to mention some of the majority’s findings of fact that seem to me to be hardly appropriate.

Firstly, the majority notes that the organisations in which the applicant actively participated were not prohibited immediately after the first attempted of “*coup d’état*” in 13 January 1991, but only on 23 August 1991 after the failure of the second “*coup d’état*”. The majority concludes that during this period the organisations were not illegal (§ 90 of the judgment).

However, a formal prohibition is a *political* decision. The Government decided not to act this way because of the presence of foreign military forces which were still in the country, closely collaborating with the Communist party and other antidemocratic organisations, to which the applicant belonged. The purely formalistic approach of the majority, qualifying an organisation which organised a “*coup d’état*” as “legal”, ignores the real situation: a formal prohibition would destabilise the situation to the detriment of the new born democracy. This approach seems to me to be out of touch with the reality.

47. Secondly, the majority are of the opinion that the power of the national courts to assess the actual dangerousness of a concerned person is limited (§ 93 of the judgment).

This is true. However, the main purpose of the restrictions set up by Latvian law is to protect the Parliament from persons who have *discredited themselves* by their active participation in organisations which really attempted to overthrow the democratic order and to restore the former system of injustice – even if they still have some support in some parts of society. I have already explained that this might be nec-

essary in specific situations for new democracies to be able to strengthen the confidence of the majority of the people in the democratic institutions, including the Parliament.

48. Thirdly, the majority also found a violation of Article 11 of the Convention (§ 111 of the judgment). I cannot follow the majority for the same reasons as for Article 3 of Protocol No. 1. I am of the opinion that the same considerations justifying the recognition of a wide margin of appreciation to the Contracting States apply to Article 11 of the Convention.
49. Fourthly, the majority decided to award to the applicant for pecuniary damage LVL 2,236.50 for the time when she was deprived of her seat on Riga City Council. In my view, this sum is not substantiated. The applicant could have suffered a pecuniary damage only if she had not any other earnings which would fully or partially compensate for the loss of her income from the city council (for example, unemployment benefits or salary from other employment instead of the lost income from of the city council). In the instant case the applicant did not submit any information on that.
50. One last remark in order to avoid any misunderstanding: I have not argued in favour of the restrictions in question, which are provided for by Latvian law. I only wanted to show that this is a genuine political question, which is important for the society of a new democracy, and which should be decided in the democratic political process within the country. I also wanted to draw attention to the problem of the Court's *judicial self-restraint* in genuinely political matters. I think that in such cases the Court should be extremely careful, try to remain on the solid ground of judicial assessment, and not advance on to political ground, the latter being reserved for the democratic institutions of the Contracting States. That is why I have called for the application of a wide margin of appreciation.

INDEX

A

Adjudication 504
Archive 112
Article 15 674, 734, 742, 770
Article 17 796, 810

B

Balance 554
Ban 796
Business 372

C

Child 100
Civilian 504
Classified 580
Communication 276, 348, 276, 354, 348, 398, 372
Communications 122
Communications Infrastructure 168
Computer 10, 100, 60, 24, 112, 122, 168, 142, 198, 182, 220, 210, 232, 220, 248, 232, 276, 306, 322, 336, 354, 372, 388, 398, 430, 446, 462, 484, 504, 518, 634
Confidentiality 484
Confiscation 10, 220, 232, 220
Correspondence 60, 122, 198, 210, 232, 306, 322, 336, 122, 60, 210, 198, 306, 232, 336, 322, 372, 348, 446, 430, 398, 388, 446
Court 504
Criminal Proceedings 600

D

Dating 100
Declassified 580
Defamation 112
Democracy 60, 198, 210, 484, 518, 554, 614, 634, 656, 674, 734, 742, 60, 198, 210
Democratic Values 810
Disclosure 484, 504, 518
Disclosure of Evidence 600
Disclosure of Information 518
Discretion 122
DNA 142

E

Electronic Data 198

E-mail 60, 100, 60, 100, 112, 122, 142, 168, 182, 210, 198, 220, 232, 248, 276, 306, 322, 336, 354, 372, 388, 398, 430, 446, 462, 484, 504, 518, 634

Enjoyment of Possessions 10

Espionage 504, 518

Evidence 220

F

Fair Trial 182

Family 142

Fingerprints 142

Forum 24

Freedom of Expression 24, 100, 112, 518, 580, 614, 24, 100, 112

G

Governmental Control 168

H

Hard-Disk 198, 232, 198

Holocaust Denial 24

I

Incitement to Crime 182

Informational Self-Determination 248

Information Technology 248

Interception 122, 248, 276, 306, 322, 336, 348, 248, 122, 306, 276, 336, 322, 354, 348, 388, 372, 430, 398, 446

Interference 210, 276, 306, 322, 336, 348, 354, 276, 210, 322, 306, 348, 336, 388, 372, 446, 430, 398, 462, 446, 484, 504, 518, 634

Internet 24, 100, 60, 24, 112, 100, 122, 112, 142, 122, 168, 142, 182, 168, 198, 182, 210, 198, 220, 232, 248, 276, 306, 322, 336, 354, 372, 388, 398, 430, 446, 462, 484, 504, 518, 634

Internet Café 168

Internet Provider 168

Internet Publication Rule 112

Investigation 10, 142, 182, 232, 182, 142, 372, 232, 398

L

Lawyer 372

Legislation 306

License 168

Life of a Nation 674, 734, 742, 770

M

Military 504

Misuse of Power 60, 122, 60, 198, 122, 306, 210

Monitoring 122

N

Nagorno-Karabakh 24

Names 614

National Security 518, 554, 600, 614, 634, 656

News 112

O

Officials 614

Order 554

P

Pager 348

Peace Time 504

Pedophilia 100

Positive Obligations 100

Possessions 168

Posting 24

Prevention of Crime 554

Prevention of Disorder 220

Privacy 100

Private Life 60, 122, 142, 198, 210, 220, 232, 142, 122, 60, 198, 168, 220, 210, 248, 232, 276, 248, 306, 322, 306, 348, 336, 354, 372, 354, 372, 430, 398, 388, 462, 446, 484, 462, 504, 484, 518, 504, 518, 634

Private Person 484

Profiling 142, 248, 142

Prohibited Conduct 796

Prohibition 796

Property 10, 220

Proportionality 168

Protected Person 372

Public Interest 484, 518, 554, 600, 614, 634, 674, 734, 742, 770, 796, 810

Public Interest, 656

Public Knowledge 112

Public Safety 220, 674, 734, 742, 220

R

Reputation 112

Respect for Home 232

Restricting Freedoms 674, 734, 742, 770

S

Safety of Citizens 614, 634, 656

Secret 60, 276, 60, 322, 276, 354

Secret Information 248, 484, 518, 248

Security 674, 734, 742, 770

Seizure 10, 198, 198, 232, 220

Sensitive Data 142, 142, 248

Service Provider 100

Special Circumstances 614, 634, 656

Special Investigative Techniques 182

Spy 504, 518

State Intervention 810

Storage of Information 554

Surveillance 60, 210, 276, 306, 322, 336, 210, 60, 306, 276, 336, 322, 354, 348, 430, 398, 446

T

Taping 348

Tapping 276, 306, 322, 336, 354, 276, 322, 306, 354, 336, 388, 372, 430, 398, 446

Telephone 276, 306, 322, 336, 354, 372, 306, 276, 336, 322, 388, 354, 430, 398, 446

Terrorism 614, 634, 656, 674, 734, 742, 770

Threat 674, 734, 742, 770

Trial 504

Tribunal 504

U

Undercover 182

W

War Time 504

ECJ
CASES

PUBLIC SECURITY

Judgment of the Court of 10 July 1984

CASE 72/83 CAMPUS OIL LIMITED AND OTHERS v MINISTER FOR INDUSTRY AND ENERGY AND OTHERS

Reference for a preliminary ruling:
High Court - Ireland. - Free movements of goods
Supply of petroleum products

KEYWORDS

1. Questions for a preliminary ruling - reference to the court - stage of the proceedings at which reference should be made - appraisal by the national court (EEC Treaty, art. 177)
2. Free movement of goods - quantitative restrictions - measures having equivalent effect - concept (EEC Treaty, art. 30)
3. Competition - undertakings entrusted with the operation of services of general economic interest - subject to the Treaty rules - protection ensured by measures restricting imports from other member states - not acceptable (EEC Treaty, arts 30 and 90 (2))
4. Free movement of goods - quantitative restrictions - measures having equivalent effect - supplies of petroleum products - obligation to purchase from a national refinery (EEC Treaty, art. 30)
5. Free movement of goods - derogations - article 36 of the Treaty - community rules for the protection of the same interests - effects (EEC Treaty, art. 36)
6. Free movement of goods - derogations - article 36 of the Treaty - purpose - scope - unnecessary or disproportionate measures - not acceptable (EEC Treaty, art. 36)
7. Free movement of goods - derogations - pub-

lic security - supplies of petroleum products - objective covered by the concept of public security - adoption of appropriate rules - rules making it possible to achieve other objectives of an economic nature - acceptable (EEC Treaty, art. 36)

8. Free movement of goods - derogations - public security - supplies of petroleum products - obligation to purchase from a national refinery - acceptable - conditions and limits (EEC Treaty, art. 36)

SUMMARY

1. It is for the national court, in the framework of close cooperation established by article 177 of the Treaty between the national courts and the court of justice based on the assignment to each of different functions, to decide at what stage in the proceedings it is appropriate to refer a question to the court of justice for a preliminary ruling. It is also for the national court to appraise the facts of the case and the arguments of the parties, of which it alone has a direct knowledge, with a view to defining the legal context in which the interpretation requested should be placed.
2. Article 30 of the Treaty, in prohibiting as between the member states all measures having equivalent effect to quantitative restrictions on imports, covers any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-community trade.
3. Article 90 (2) of the Treaty, which defines more precisely the limits within which undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty, does not permit a member state to adopt in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other member states contrary to article 30 of the Treaty.
4. National rules which require all importers to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory constitute a measure having equivalent effect to a quantitative restriction on imports.
5. Recourse to article 36 of the Treaty is no longer justified if community rules provide for the necessary measures to ensure protection of the interests set out in that article. National

measures hindering intra-community trade cannot therefore be justified unless protection of the interests of the member state concerned is not sufficiently guaranteed by the measures taken for that purpose by the community institutions.

6. The purpose of article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the member states; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is justified in order to achieve the objectives set out in the article.

Article 36, as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure and the measures taken pursuant to that article must not create obstacles to imports which are disproportionate to those objectives.

7. Petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that article 36 of the Treaty allows states to protect.

The aim of ensuring a minimum supply of petroleum products at all times transcends purely economic interests - which, as such, may not be relied upon in the context of article 36 - and is thus capable of constituting an objective covered by the concept of public security.

The rules adopted for that purpose must be justified by objective circumstances corresponding to the needs of public security. Once that justification has been established, the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security, other objectives of an economic nature which the member state may also seek to achieve, does not exclude the application of article 36.

8. A member state which is totally or almost totally dependent on imports for its supplies of petroleum products may rely on grounds of public security within the meaning of article

36 of the Treaty for the purpose of requiring importers to cover a certain proportion of their needs by purchases from a refinery situated in its territory at prices fixed by the competent minister on the basis of the costs incurred in the operation of that refinery, if the production of the refinery cannot be freely disposed of at competitive prices on the market concerned. The quantities of petroleum products covered by such a system must not exceed the minimum supply requirement without which the public security of the state concerned would be affected or the level of production necessary to keep the refinery's production capacity available in the event of a crisis and to enable it to continue to refine at all times the crude oil for the supply of which the state concerned has entered into long-term contracts.

PARTIES

Reference to the court under article 177 of the EEC Treaty by the high court of Ireland for a preliminary ruling in the proceedings pending before that court between Campus Oil Limited, Estuary Fuel Limited, McMullan Bros Limited, Ola Teoranta, PMPA Oil Company Limited, Tedcastle McCormick & company Limited and The Minister for Industry and Energy, Ireland, The Attorney General Irish National Petroleum Corporation Limited,

SUBJECT OF THE CASE

On the interpretation of articles 30 and 36 of the EEC Treaty in relation to national legislation on the supply of petroleum products,

FOUNDATIONS

1. By order of 9 december 1982, which was received at the court on 28 april 1983, the high court of Ireland referred to the court for a preliminary ruling under article 177 of the EEC Treaty two questions on the interpretation of articles 30, 31 and 36 of the Treaty in order to enable it to decide whether irish rules requiring importers of petroleum products to purchase a certain proportion of their requirements at prices fixed by the competent minister from a state-owned company which operates a refinery in Ireland are compatible with the Treaty.
2. Those questions arose in proceedings instituted by six irish undertakings trading in petroleum products either exclusively or predominantly in Ireland, which supply approximately 14 % of the motor spirit market in Ireland and

- a somewhat higher percentage of other petroleum products, against Ireland and the Irish national petroleum corporation (hereinafter referred to as "the inpc"). In the main action, the six plaintiff undertakings are seeking a declaration in the high court that the fuels (control of supplies) order 1982 (hereinafter referred to as "the 1982 order") is incompatible with the EEC Treaty.
3. The 1982 order was made by the Irish minister for industry and energy under powers conferred on him by the fuels (control of supplies) act 1971, as amended in 1982, for the maintenance and provision of supplies of fuels. The 1982 order requires any person who imports any of the various petroleum products to which it applies to purchase a certain proportion of their requirements of petroleum products from the inpc at a price to be determined by the minister taking into account the costs incurred by the inpc.
 4. The inpc, whose share capital is owned by the Irish state and whose function is to improve the security of supply of oil within Ireland, purchased, in 1982, the share capital of the Irish refining company limited, owner of the only refinery in Ireland, which is situated at Whitegate, County Cork. The share capital of the Irish refining company limited, which is capable of supplying from the Whitegate refinery some 35% of the requirements of the Irish market in refined petroleum products, had until then been owned by four major oil companies which supply the greater part of the Irish market in refined petroleum products. The decision to acquire the Whitegate refinery by means of the purchase of the capital of the Irish refining company limited was taken after the four major international oil companies announced their intention to close the refinery.
 5. The reason given by the Irish government for acquiring the Irish refining company limited was the need to guarantee, by keeping refining capacity in operation in Ireland, the provision of supplies of petroleum products in Ireland, in view of the fact that if the refinery had closed, all suppliers of refined petroleum products on the Irish market would have been obliged to obtain their supplies from abroad. Approximately 80% of those supplies come from a single source, namely the United Kingdom.
 6. The obligation to purchase from the inpc, provided for by the 1982 order, is intended to ensure that the Whitegate refinery can dispose of its products. For each person to whom the 1982 order applies the proportion of requirements covered by the purchasing obligation is equal, for each type of petroleum product, to the proportion which the Whitegate refinery's output for a certain period represents of the total requirements for that type of petroleum product during the same period of all the persons to whom the 1982 order applies. However, each importer is only required to purchase up to a maximum of 35% of its total requirements of petroleum products and 40% of its requirements of each type of petroleum product.
 7. The plaintiff undertakings contend, in support of their application in the main action, that the 1982 order is contrary to community law and in particular to the prohibition, as between member states, of quantitative restrictions on imports and all measures having equivalent effect, laid down in article 30 of the Treaty. The Irish government and the inpc dispute that the 1982 order is a measure which comes within the scope of that prohibition and contend that in any event it is justified, under article 36 of the EEC Treaty, on grounds of public policy and public security inasmuch as it is intended to guarantee the operation of Ireland's only refinery, which is necessary to maintain the country's supplies of petroleum products.
 8. In the main action, the detailed circumstances and reasons which led the Irish minister for industry and energy to make the 1982 order are disputed between the parties. The high court took the view that before proceeding to inquire into the disputed facts, it was necessary to ask the court of justice to rule on the scope of the rules in the EEC Treaty on the free movement of goods as applied to a scheme such as the one at issue in the case. It therefore referred the following questions to the court:
 - " 1. Are articles 30 and 31 of the EEC Treaty to be interpreted as applying to a system such as that established by the fuels (control of supplies) order 1982 in so far as that system requires importers of oil products into a member state of the European Economic Community (in this case Ireland) to purchase from a state-owned oil refinery up to 35% of their requirements of petroleum oils?
 2. If the answer to the foregoing question is in the affirmative, are the concepts of "public policy" or "public security" in article 36 of the Treaty aforesaid to be interpreted in relation to a system such as that established by the 1982 order so that:

(a) such system as above recited is exempt by article 36 of the Treaty from the provisions of articles 30 to 34 thereof, or

(b) such scheme is capable of being so exempt in any circumstances and, if so, in what circumstances?"

9. The Irish government and the Inpc consider that the referral to the court is premature since the facts of the main action have not yet been established before the national court. They submit that to rule on the questions raised, and in particular on the first part of the second question, would have the effect of definitively depriving the defendants in the main action of the opportunity of defending their case before the national court and of producing all the relevant evidence, concerning in particular the reasons justifying the 1982 order.
10. As the court has held in a number of cases (see in particular the judgment of 10. 3. 1981, joined cases 36 and 71/80 Irish Creamery Milk Suppliers Association (1981) ECR 735), it is for the national court, in the framework of close cooperation established by article 177 of the Treaty between the national courts and the court of justice based on the assignment to each of different functions, to decide at what stage in the proceedings it is appropriate to refer a question to the court of justice for a preliminary ruling. It is also for the national court to appraise the facts of the case and the arguments of the parties, of which it alone has a direct knowledge, with a view to defining the legal context in which the interpretation requested should be placed. The decision as to when to make a reference under article 177 in this case was thus dictated by considerations of procedural organization and efficiency which are not to be weighed by the court of justice, but solely by the national court.
11. Since it is for the national court to give judgment in the main action on the basis of the interpretation of community law provided by the court of justice, the parties have the opportunity in the main proceedings to bring forward any evidence they wish, particularly with regard to the reasons for the 1982 order.

The first question on the interpretation of article 30 of the Treaty

12. The high court's first question is whether article 30 of the Treaty is to be interpreted as meaning that rules of the type laid down by the 1982 or-

der constitute a measure equivalent to a quantitative restriction on imports.

13. In the view of the plaintiffs in the main action and also of the commission, it is undeniable that such measures, under which importers are obliged to purchase part of their supplies within the member state, have a restrictive effect on imports within the meaning of article 30.
14. The Irish government, however, contends that such is not the case. First, the measure in question in no way restricts imports inasmuch as, in any event, all oil, whether crude or refined, used in Ireland, has to be imported. Secondly, it is possible to interpret article 30 as containing an unwritten derogation for products such as oil which are of vital national importance.
15. In this connection, it must first be borne in mind that, according to the settled case-law of the court, article 30 of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-community trade.
16. The obligation placed on all importers to purchase a certain proportion of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product. It thus has a protective effect by favouring national production and, by the same token, works to the detriment of producers in other member states, regardless of whether or not the raw materials used in the national production in question must themselves be imported.
17. As regards the Irish government's argument regarding the importance of oil for the life of the country, it is sufficient to note that the Treaty applies the principle of free movement to all goods, subject only to the exceptions expressly provided for in the Treaty itself. Goods cannot therefore be considered exempt from the application of that fundamental principle merely because they are of particular importance for the life or the economy of a member state.
18. The Greek government refers in this context to article 90 (2) of the Treaty, contending that a refinery is an undertaking of general economic interest and that a state refinery could not, without special measures in its favour, compete with the major oil companies.
19. It should be noted in that regard that article 90

- (1) provides that in the case of public undertakings and undertakings to which member states grant special or exclusive rights, member states are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty. Article 90 (2) is intended to define more precisely the limits within which, in particular, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty. Article 90 (2) does not, however, exempt a member state which has entrusted such an operation to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other member states contrary to article 30 of the Treaty.
20. The answer to the high court's first question is therefore that article 30 of the EEC Treaty must be interpreted as meaning that national rules which require all importers to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory constitute a measure having equivalent effect to a quantitative restriction on imports.
23. In the united kingdom's view, the term "public security" in article 36 of the Treaty covers the fundamental interests of the state such as the maintenance of essential public services or the safe and effective functioning of the life of the state. The exceptions provided for in that article cannot be relied upon if the measures in question are designed predominantly to attain economic objectives. Those measures must not go beyond what is necessary to attain the objective protected by article 36.
24. The plaintiffs in the main action point out that the problem is not whether or not refining capacity needs to be maintained in Ireland, but rather whether the system chosen to enable that refinery to function can be justified on the basis of article 36. The real purpose of the rules at issue is to ensure that the refinery does not operate at a loss. It is thus, in the plaintiffs' view, an essentially economic measure which cannot be covered by the concepts of public security or public policy.
25. The commission considers that national rules of the type laid down by the 1982 order are not justified under article 36 because the community, in accordance with its responsibility in this area, has adopted the necessary rules to ensure supplies of petroleum products in the event of a crisis. Furthermore, the irish government, by means of the system at issue, has pursued an economic interest which cannot be taken into consideration within the framework of article 36. In any event, according to the commission, the 1982 order is inadequate and ineffective for the purpose of securing supplies to the irish market, and it is disproportionate inasmuch as it requires all importers to buy at prices determined by the competent minister.
26. Having regard to those arguments, it is appropriate to examine:

The second question on the interpretation of article 36 of the Treaty

21. The second question asks whether article 36 of the Treaty and, in particular, the concepts of "public policy" and "public security" contained therein are to be interpreted as meaning that a system such as the one at issue in this case, established by a member state which is totally dependent on imports for its supplies of petroleum products, can be exempt from the prohibition laid down in article 30 of the Treaty.
22. The irish government and the inpc point out that it is for the member states to determine, for the purposes of article 36, and in particular with regard to the concept of public security, their interests that are to be protected and the measures to be taken to that end. They contend that Ireland's heavy dependence for its oil supplies on imports from other countries and the importance of oil for the life of the country make it indispensable to maintain refining capacity on the national territory, thereby enabling the national authorities to enter into long-term delivery contracts with the countries producing crude oil. Since the system at issue is the only means of ensuring that the white-gate refinery's products can be marketed, they
- First, whether rules of the type laid down by the 1982 order are justified in the light of the community rules on the matter;
- Secondly, whether, having regard to the scope of the exemptions on the grounds of public policy and public security, article 36 can cover rules of the type laid down by the 1982 order;
- Thirdly, whether the system at issue is such as

to enable the objective of ensuring supplies of petroleum products to be attained and whether it complies with the principle of proportionality.

The justification of the measures at issue in the light of community rules on the matter

27. Recourse to article 36 is no longer justified if community rules provide for the necessary measures to ensure protection of the interests set out in that article. National measures such as those provided for in the 1982 order cannot therefore be justified unless supplies of petroleum products to the member state concerned are not sufficiently guaranteed by the measures taken for that purpose by the community institutions.
28. Certain precautionary measures have indeed been taken at community level to deal with difficulties in supplies of crude oil and petroleum products. Council directives 68/414/eec of 20 december 1968 (official journal, english special edition 1968 (ii), p. 586) and 73/238/eec of 24 july 1973 (official journal 1973, l 228, p. 1) require member states to maintain minimum stocks and to coordinate to a certain extent the national measures adopted for the purpose of drawing on those stocks, of imposing specific restrictions on consumption and of regulating prices. Council decision 77/706/eec of 7 november 1977 (official journal 1977, l 292, p. 9) provides for the setting of a community target for a reduction in consumption in the event of difficulties in supply and for the sharing out between the member states of the quantities saved. Finally, council decision 77/186/eec of 14 february 1977 (official journal 1977, l 61, p. 23) establishes a system of export licences, granted automatically, to allow the monitoring of intra-community trade.
29. Measures have also been taken within the context of the international energy agency, set up within the framework of the organization for economic cooperation and development (oecd), of which most community states are members and in whose work the community, represented by the commission, takes part as an observer. Those measures are designed to establish solidarity between the participating countries in the event of an oil shortage transcending the communities.
30. Even though those precautions against a shortage of petroleum products reduce the risk of member states being left without essential supplies, there would none the less still be

real danger in the event of a crisis. According to article 3 of council decision 77/186/eec, the commission may, as a precautionary measure, authorize a member state, subject to certain conditions, to suspend the issue of export licences. That authorization is to be granted subject only to the condition that traditional trade patterns are maintained "as far as possible". The council, by a qualified majority, may revoke that authorization and that power is not subject to any express reference to traditional trade patterns. According to article 4, in the event of a sudden crisis, a member state may, subject to certain conditions, suspend the issue of export licences for a period of 10 days. In that case, the council, by a qualified majority, may adopt the appropriate measures.

31. Consequently, the existing community rules give a member state whose supplies of petroleum products depend totally or almost totally on deliveries from other countries certain guarantees that deliveries from other member states will be maintained in the event of a serious shortfall in proportions which match those of supplies to the market of the supplying state. However, this does not mean that the member state concerned has an unconditional assurance that supplies will in any event be maintained at least at a level sufficient to meet its minimum needs. In those circumstances, the possibility for a member state to rely on article 36 to justify appropriate complementary measures at national level cannot be excluded, even where there exist community rules on the matter.

The scope of the public policy and public security exceptions

32. As the court has stated on several occasions (see judgment of 12 july 1979, case 153/78 *Commission v Germany* (1979) ECR 2555, and the other judgments referred to therein), the purpose of article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the member states; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the article.
33. It is in the light of those statements that it must be decided whether the concept of public security, on which the irish government places particular reliance and which is the only one

relevant in this case, since the concept of public policy is not pertinent, covers reasons such as those referred to in the question raised by the national court.

34. It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that article 36 allows states to protect.
 35. It is true that, as the court has held on a number of occasions, most recently in its judgment of 9 June 1982 (case 95/81 *Commission v Italy* (1982) ECR 2187), article 36 refers to matters of a non-economic nature. A member state cannot be allowed to avoid the effects of measures provided for in the Treaty by pleading the economic difficulties caused by the elimination of barriers to intra-community trade. However, in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security.
 36. It should be added that to come within the ambit of article 36, the rules in question must be justified by objective circumstances corresponding to the needs of public security. Once that justification has been established, the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security, other objectives of an economic nature which the member state may also seek to achieve, does not exclude the application of article 36.
37. In that connection, the plaintiffs in the main action and the commission cast doubt, in the first place, on whether the installation of a refinery can ensure supplies of petroleum products in the event of a crisis, since a crisis gives rise above all to a shortage of crude oil, so that the refinery would be unable to operate in such circumstances.
 38. It is true that as the world oil market now stands, the immediate effect of a crisis would probably be an interruption or a severe reduction in deliveries of crude oil. It should, however, be pointed out that the fact of having refining capacity on its territory enables the state concerned to enter into long-term contracts with the oil-producing countries for the supply of crude oil to its refinery which offer a better guarantee of supplies in the event of a crisis. It is thus less at risk than a state which has no refining capacity of its own and which has no means of covering its needs other than by purchases on the free market.
 39. Furthermore, the existence of a national refinery constitutes a guarantee against the additional risk of an interruption in deliveries of refined products to which a state with no refining capacity of its own is exposed. Such a state would be dependent on the major oil companies which control refineries in other countries and on those companies' commercial policy.
 40. It may, therefore, be concluded that the presence of a refinery on the national territory, by reducing both of those types of risks, can effectively contribute to improving the security of supply of petroleum products to a state which does not have crude oil resources of its own.
 41. The plaintiffs in the main action and the commission consider, however, that even if the operation of a refinery is justified in the interest of public security, it is not necessary in order to achieve that objective, and, in any event, it is
 42. The plaintiffs in the main action and the commission consider, however, that even if the operation of a refinery is justified in the interest of public security, it is not necessary in order to achieve that objective, and, in any event, it is

The question whether the measures are capable of ensuring supplies and the principle of proportionality

37. As the court has previously stated (see judgments of 12. 10. 1978, case 12/78 *Eggers* (1978) ECR 1935, and of 22. 3. 1983, case 42/82 *Commission v France* (1983) ECR 1013), article 36,

disproportionate in relation to that objective, to oblige importers to satisfy a certain proportion of their requirements by purchase from the national refinery at a price fixed by the competent minister.

43. The Irish government contends, on the other hand, that the purchasing obligation is the only possible way of keeping the whitegate refinery in operation. That requires a certain degree of use of the plant's capacity since the major international oil companies, on which the Irish market depended for 80 % of its supplies in 1981, have clearly stated that they are not prepared to buy any petroleum products at all from the whitegate refinery, because they prefer to market the products from their own refineries in the United Kingdom. The fixing of the selling price by the minister on the basis of the refinery's costs is necessary in order to avoid financial losses.
44. It must be pointed out in this connection that a member state may have recourse to article 36 to justify a measure having equivalent effect to a quantitative restriction on imports only if no other measure, less restrictive from the point of view of the free movement of goods, is capable of achieving the same objective.
45. In the present case, therefore, it is necessary to consider whether the obligation placed on importers of petroleum products to purchase at prices determined on the basis of the costs incurred by the refinery in question is necessary, albeit only temporarily, for the purpose of ensuring that enough of the refinery's production can be marketed so as to guarantee, in the interest of public security, a minimum supply of petroleum products to the state concerned in the event of a supply crisis.
46. That obligation could be necessary if the distributors that hold the major share of the market concerned refuse, as the Irish government contends, to purchase supplies from the refinery in question. It is on the assumption that the refinery charges prices which are competitive on the market concerned that it must be determined whether the refinery's products could be freely marketed. If it is not possible by means of industrial and commercial measures to avoid any financial losses resulting from such prices, those losses must be borne by the member state concerned, subject to the application of articles 92 and 93 of the Treaty.
47. As regards, in the next place, the quantities of petroleum products which may, as the case may be, be covered by such a system of purchasing obligations, it should be stressed that they must in no case exceed the minimum supply requirements of the state concerned without which its public security, as defined above, and in particular the operation of its essential public services and the survival of its inhabitants, would be affected.
48. Furthermore, the quantities of petroleum products whose marketing can be ensured under such a system must not exceed the quantities which are necessary, so far as production is concerned, on the one hand, for technical reasons in order that the refinery may operate currently at a sufficient level of its production capacity to ensure that its plant will be available in the event of a crisis and, on the other hand, in order that it may continue to refine at all times the crude oil covered by the long-term contracts which the state concerned has entered into so that it may be assured of regular supplies.
49. The proportion of the total needs of importers of petroleum products that may be made subject to a purchasing obligation must not, therefore, exceed the proportion which the quantities set out above represent of the current total consumption of petroleum products in the member state concerned.
50. It is for the national court to decide whether the system established by the 1982 order complies with those limits.
51. The answer to the second question should therefore be that a member state which is totally or almost totally dependent on imports for its supplies of petroleum products may rely on grounds of public security within the meaning of article 36 of the Treaty for the purpose of requiring importers to cover a certain proportion of their needs by purchases from a refinery situated in its territory at prices fixed by the competent minister on the basis of the costs incurred in the operation of that refinery, if the production of the refinery cannot be freely disposed of at competitive prices on the market concerned. The quantities of petroleum products covered by such a system must not exceed the minimum supply requirement without which the public security of the state concerned would be affected or the level of production necessary to keep the refinery's production capacity available in the event of a crisis and to enable it to continue to refine at all times the crude oil for the supply of which the

state concerned has entered into long-term contracts.

Costs

52. The costs incurred by the greek government, the united kingdom and the commission of the european communities, which have submitted observations to the court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

OPERATIVE PART

On those grounds, The court, in answer to the questions referred to it by the high court of Ireland, by order of 9 december 1982, hereby rules:

1. **Article 30 of the EEC Treaty must be interpreted as meaning that national rules that require all importers to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory constitute a measure having equivalent effect to a quantitative restriction on imports.**
2. **A member state which is totally or almost totally dependent on imports for its supplies of petroleum products may rely on grounds of public security within the meaning of article 36 of the Treaty for the purpose of requiring importers to cover a certain proportion of their needs by purchases from a refinery situated in its territory at prices fixed by the competent minister on the basis of the costs incurred in the operation of that refinery, if the production of the refinery cannot be freely disposed of at competitive prices on the market in question. The quantities of petroleum products covered by such a system must not exceed the minimum supply requirements without which the public security of the state concerned would be affected or the level of production necessary to keep the refinery's production capacity available in the event of a crisis and to enable it to continue to refine at all times the crude oil for the supply of which the state has entered into long-term contracts.**

PROTECTION OF THE SECURITY OF A MEMBER STATE,
CONCEPT OF PUBLIC SECURITY

Judgment of the Court of 17 October 1995

CASE C-70/94 FRITZ WERNER INDUSTRIE- AUSRÜSTUNGEN GMBH v FEDERAL REPUBLIC OF GERMANY

Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. - Common commercial policy - Export of dual-use goods

KEYWORDS

1. Common commercial policy ° Scope ° Restriction on the export to non-member countries of goods which can be used for military purposes ° Included ° Exclusive competence of the Community (EC Treaty, Art. 113)
2. Common commercial policy ° Common export regime ° Regulation No 2603/69 ° Scope ° Measures having an effect equivalent to quantitative restrictions ° Requirement for a licence to export goods which can be used for military purposes ° Included ° Justification ° Public security (Council Regulation No 2603/69, Arts 1 and 11)

SUMMARY

1. Article 113 of the Treaty must be interpreted as meaning that a measure restricting exports to non-member countries of certain products capable of being used for military purposes falls within its scope and that the Community enjoys exclusive competence in that matter, which excludes the competence of the Member States save where the Community grants them specific authorization.

The concept of the common commercial policy provided for in Article 113 must not be interpreted restrictively, so as to avoid disturbances in intra-Community trade by reason of

the disparities to which a narrow interpretation of that policy would give rise in certain sectors of economic relations with non-member countries. Nor may a Member State restrict the scope of that concept by freely deciding, in the light of its own foreign policy or security requirements, whether a measure is covered by that article.

2. Although Article 1 of Regulation No 2603/69, establishing common rules for exports in the context of the common commercial policy, lays down the principle of freedom of exportation, Article 11 of that regulation provides that it does not preclude the adoption or application by a Member State of quantitative restrictions on exports that are justified, *inter alia*, on grounds of public security. That derogation must be understood as applying also to measures having equivalent effect and as referring to both internal and external security.

Consequently, Community law does not preclude national provisions applicable to trade with non-member countries under which the export of a product capable of being used for military purposes is subject to the issue of a licence on the ground that this is necessary in order to avoid the risk of a serious disturbance to its foreign relations which may affect the public security of a Member State within the meaning of the abovementioned Article 11.

PARTIES

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court between

Fritz Werner Industrie-Ausrüstungen GmbH

and Federal Republic of Germany,

on the interpretation of Article 113 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward, J.-P. Puissechot and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, P.J.G. Kapteyn (Rapporteur), C. Gulmann, J.L. Murray, P. Jann and H. Ragnemalm, Judges, Advocate General: F.G. Jacobs, Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- the German Government, by Ernst Roeder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Regierungsrat at the same Ministry, acting as Agents,
- the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry for Foreign Affairs, and Hubert Renié, Principal Deputy Secretary in the same Directorate, acting as Agents,
- the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, Stephen Richards and Rhodri Thompson, Barristers,
- the Commission of the European Communities, by Peter Gilsdorf, Principal Legal Adviser, and Joern Sack, Legal Adviser, acting as Agents,
- having regard to the Report for the Hearing,

after hearing the oral observations of Fritz Werner Industrie-Ausruestungen GmbH, represented by Peter Keil, Rechtsanwalt, Frankfurt on Main, the German Government, the Greek Government, represented by Panagiotis Kamarineas, State Legal Adviser, and Galatea Alexaki, Advocate in the special service for contentious Community affairs at the Ministry of Foreign Affairs, acting as Agents, the Spanish Government, represented by Rosario Silva de Lapuerta, Abogado del Estado, of the Legal Service representing the Spanish Government before the Court of Justice, acting as Agent, the French Government, represented by Philippe Martinet, Secretary for Foreign Affairs at the Directorate of Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, the United Kingdom and the Commission at the hearing on 21 March 1995, after hearing the Opinion of the Advocate General at the sitting on 18 May 1995, gives the following Judgment

GROUNDS

1. By order of 4 February 1994, received at the Court on 22 February 1994, the Verwaltungsgericht (Administrative Court) Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 113 of the Treaty.
2. That question was raised in proceedings between Fritz Werner Industrie-Ausruestungen GmbH (hereinafter "Werner") and the Federal Republic of Germany, represented by the Federal Minister for Economic Affairs, himself rep-

resented by the Bundesausfuhramt (Federal Export Office).

3. Werner had received an order to supply a vacuum-induction smelting and cast oven as well as induction spools for that oven to Libya, where, between 1979 and 1982, it had installed a repair shop with a foundry. In the course of 1991 it applied to the Bundesamt fuer Wirtschaft (Federal Office for Economic Affairs, hereinafter "the Bundesamt") for a licence to export the goods to Libya. However, a licence was refused on the ground that supplying those goods would seriously jeopardize the interests to be protected under Paragraph 7 of the Aussenwirtschaftsgesetz (Law on Foreign Trade) (hereinafter "the AWG"), subparagraph 1 of which provides:

"Legal transactions and activities in the sphere of foreign trade may be curtailed in order to:

1. guarantee the security of the Federal Republic of Germany;
2. prevent disturbance to the peaceful co-existence of nations;
3. prevent the external relations of the Federal Republic of Germany from being seriously disrupted."
4. Under Paragraph 2 of the AWG the Government is empowered to prescribe by regulation which legal transactions and activities may be prohibited or require a licence. In that context, Annex AL of the Aussenwirtschaftsverordnung of 18 December 1986 (BGBl. I, p. 2671) (Regulation on Foreign Trade, hereinafter "the AWW") specified the goods for which a licence was required; under Article 27 of the AWG it is possible to amend or supplement that annex by regulation. The 76th Regulation of 11 September 1991, which is relevant in the main proceedings, added item nos. 1204 and 1356, under which the following are subject to licence;

"1204

Vacuum or inert-gas furnaces suitable for operating temperatures of more than 1073K (800 C), specially constructed components, adjustment and guiding devices and specially developed software for such furnaces. Components or installations if the purchasing or destination country is Libya.

1356

Coiling machines whose movements for positioning, winding, or rolling up can be coordinated and programmed, suitable for the pro-

duction of compound material structures and steering devices for coordinating or programming, specially constructed components, specially constructed accessories and specially developed software in that connection, if the country of purchase or destination is Libya."

5. The Federal Minister for Economic Affairs stated that the introduction of that licensing requirement was intended to prevent furnaces and coiling machines from being used for military purposes, in particular in Libya's missile development programme.
6. When the Federal Export Office rejected its objection to the decision of the Bundesamt, Werner brought an action before the Verwaltungsgericht Frankfurt am Main. According to the Verwaltungsgericht, the arguments put forward by the Federal Export Office seem to be based more on grounds concerning the reputation of the Federal Republic of Germany than on considerations of public security: so the Federal Republic of Germany could be prevented from adopting its own measures prohibiting exports only if the common commercial policy covered commercial measures which, although affecting trade, were primarily intended to achieve foreign policy aims or objectives. The national court therefore decided to stay the proceedings and submit the following question to the Court for a preliminary ruling:

"Does Article 113 of the EEC Treaty preclude national provisions on foreign trade requiring a licence for the export of a vacuum-induction oven to Libya which in the present case was refused on the ground that such a refusal was necessary in order to protect the public security of the Member State owing to a feared disruption of foreign relations?"
7. It is therefore apparent from the order for reference that the national court is seeking clarification of the scope of Article 113 of the Treaty. More particularly, it asks whether the common commercial policy solely concerns measures which pursue commercial objectives, or whether it also covers commercial measures having foreign policy and security objectives.
8. Article 113 of the Treaty provides that the common commercial policy is to be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade.
9. Implementation of such a common commercial policy requires a non-restrictive interpretation of that concept, so as to avoid disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries (see Opinion 1/78 of the Court [1979] ECR 2871, paragraph 45).
10. So, a measure such as that described in the national court's question, whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives.
11. The specific subject-matter of commercial policy, which concerns trade with non-member countries and, according to Article 113, is based on the concept of a common policy, requires that a Member State should not be able to restrict its scope by freely deciding, in the light of its own foreign policy or security requirements, whether a measure is covered by Article 113.
12. Since full responsibility for commercial policy was transferred to the Community by Article 113(1), national measures of commercial policy are therefore permissible only if they are specifically authorized by the Community (judgments in Case 41/76 *Donckerwolke v Procureur de la République* [1976] ECR 1921, paragraph 32, and Case 174/84 *Bulk Oil v Sun International* [1986] ECR 559, paragraph 31).
13. The export of goods from the Community to non-member countries is therefore governed by Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports (OJ, English Special Edition 1969 (II), p. 590, hereinafter "the Export Regulation").
14. Article 1 of the Export Regulation provides that: "The exportation of products from the European Economic Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation."
15. Article 11 of the Export Regulation provides for such an exception by providing that: "Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public

- morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property."
16. The first question to be examined, therefore, is whether national measures, such as those at issue, fall within the scope of the Export Regulation and then whether such measures, adopted on the ground that they are necessary in order to protect the security of a Member State because of the risk of a disturbance to its foreign relations, are permitted under Article 11 of the Export Regulation.
 17. The German Government doubts that the requirement to obtain a licence constitutes a quantitative restriction; rather, on its view, the Export Regulation prohibits only quantitative restrictions on imports and not measures having equivalent effect.
 18. That view cannot be accepted.
 19. It is true that Article 34 of the Treaty, which concerns the free movement of goods within the Community, distinguishes between quantitative restrictions and measures having equivalent effect.
 20. However, it does not follow that the concept of quantitative restrictions used in a regulation concerning trade between the Community and non-member countries must be interpreted as excluding any measure having equivalent effect within the meaning of Article 34 of the Treaty.
 21. As the Court has emphasized in previous judgments, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part (Case 292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, paragraph 12, and Case 337/82 *St Nikolaus Brennerei v Hauptzollamt Krefeld* [1984] ECR 1051, paragraph 10).
 22. A regulation based on Article 113 of the Treaty, whose objective is to implement the principle of free exportation at the Community level, as stated in Article 1 of the Export Regulation, cannot exclude from its scope measures adopted by the Member States whose effect is equivalent to a quantitative restriction where their application may lead, as in the present case, to an export prohibition.
 23. Moreover, that finding is supported by Article XI of the General Agreement on Tariffs and Trade, which can be considered to be relevant for the purposes of interpreting a Community instrument governing international trade. That article, headed "General Elimination of Quantitative Restrictions", refers in its first paragraph to "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures".
 24. It must therefore be examined whether such measures, adopted on the ground that they are necessary for the protection of the security of a Member State because of the risk of disturbance to its foreign relations, are permissible under Article 11 of the Export Regulation.
 25. It follows from the Court's judgment in Case C-367/89 *Richardt and "Les Accessoires Scientifiques"* [1991] ECR I-4621, paragraph 22) that the concept of public security within the meaning of Article 36 of the Treaty covers both a Member State's internal security and its external security. To interpret the concept more restrictively when it is used in Article 11 of the Export Regulation would be tantamount to authorizing the Member States to restrict the movement of goods within the internal market more than movement between themselves and non-member countries.
 26. As the Advocate General stated in point 41 of his Opinion, it is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover, as he observes in point 46, it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components.
 27. So, the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State.
 28. Although it is for the national court to decide whether Article 11, as interpreted by the Court of Justice, applies to the facts and measures which it is called on to appraise, it should, however, be observed that it is common ground that the exportation of goods capable of being used for military purposes to a country at war with another country may affect the public security of a Member State within the meaning referred to above (see the judgment in Case C-367/89 *Richardt and "Les Accessoires Scientifiques"*, cited above, paragraph 22).

29. The answer to the question submitted by the national court must therefore be that Article 113 of the Treaty, and in particular Article 11 of the Export Regulation, do not preclude national provisions applicable to trade with non-member countries under which the export of a product capable of being used for military purposes is subject to the issue of a licence on the ground that this is necessary in order to avoid the risk of a serious disturbance to its foreign relations which may affect the public security of a Member State within the meaning of Article 11 of the Export Regulation.

Costs

30. The costs incurred by the German, Greek, Spanish and French Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

OPERATIVE PART

On those grounds,

THE COURT,

in answer to the question referred to it by the Verwaltungsgericht Frankfurt am Main, by order of 4 February 1994, hereby rules:

Article 113 of the EC Treaty, and in particular Article 11 of Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports, do not preclude national provisions applicable to trade with non-member countries under which the export of a product capable of being used for military purposes is subject to the issue of a licence on the ground that this is necessary in order to avoid the risk of a serious disturbance to its foreign relations which may affect the public security of a Member State within the meaning of Article 11 of the regulation.

ACCESS TO DOCUMENTS, LIMITATIONS TO ACCESS TO DOCUMENTS, PROTECTION OF THE PUBLIC INTEREST, CONCEPT OF PUBLIC SECURITY

Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 June 1998

CASE T-174/95 SVENSKA JOURNALISTFÖRBUNDET V COUNCIL OF THE EUROPEAN UNION

Access to information - Council Decision 93/731/EC - Refusal of an application for access to Council documents - Action for annulment - Admissibility - Title VI of the Treaty on European Union - Scope of the exception concerning the protection of public security - Confidentiality of the Council's proceedings - Statement of reasons - Publication of the defence on the Internet - Abuse of procedure

European Court reports 1998 Page II-02289

KEYWORDS

1. *Procedure - Time-limits - Community rules - Need for strict application - Extension on account of distance of time-limits for Sweden (Rules of Procedure of the Court of Justice, Annex II, Art. 1)*
2. *Actions for annulment - Interest in bringing proceedings - Applicant challenging a decision refusing to grant it access to an institution's documents (EC Treaty, Art. 173, fourth para.; Council Decision 93/731)*
3. *Procedure - Intervention - Objection as to admissibility not raised by the defendant - Inadmissibility - Absolute bar to proceeding - Examination by the Court of its own motion (EC Statute of the Court of Justice, Arts 37, third para., and 46; Rules of Procedure of the Court of First Instance, Art. 113)*
4. *Actions for annulment - Jurisdiction of the Community judicature - Decision refusing to grant public access to documents covered by Title VI of the Treaty on European Union (EC Treaty, Art. 173, fourth para.; Treaty on European Union, Arts K to K.9 and L; Council Deci-*

sion 93/731)

5. *Acts of the institutions - Statement of reasons - Obligation - Scope - Decision refusing public access to an institution's documents (EC Treaty, Art. 190; Council Decision 93/731, Art. 4)*
6. *Procedure - Procedure before the Court of First Instance - Protection for parties against misuse of pleadings and evidence - General principle in the due administration of justice - Scope (Rules of Procedure of the Court of First Instance, Art. 116(2); Instructions to the Registrar of the Court of First Instance, Art. 5(3))*

SUMMARY

1. The Community rules governing procedural time-limits must be strictly observed both in the interest of legal certainty and in order to avoid any discrimination or arbitrary treatment in the administration of justice. Accordingly, while Article 1 of Annex II to the Rules of Procedure of the Court of Justice provided for a 10-day extension on account of distance for certain designated countries, of which Sweden was not one, the extension on account of distance applicable to that Member State could only be the two weeks applicable to all other European countries and territories.
2. A person who is refused access by the Council to a Council document has, by virtue of that very fact, established an interest in the annulment of the decision refusing him such access.

The objective of Decision 93/731 on public access to Council documents is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. It does not require that members of the public must put forward reasons for seeking access to requested documents. The fact that the requested documents were already in the public domain is irrelevant in this connection.

3. Under the final paragraph of Article 37 of the EC Statute of the Court of Justice, applicable to the Court of First Instance by virtue of Article 46 thereof, an application to intervene is to be limited to supporting the form of order sought by one of the parties. An intervener is not therefore entitled to raise an objection as to admissibility that was not raised in its written pleadings and the Court is not therefore obliged to consider the submissions it has

made in that regard.

However, under Article 113 of the Rules of Procedure, the Court of First Instance may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case, including any raised by interveners.

4. The Court of First Instance has jurisdiction to entertain an action for the annulment of a Council decision refusing the applicant access to documents, even if those documents were adopted on the basis of the provisions of Title VI of the Treaty on European Union concerning cooperation in the fields of justice and home affairs.

First, Articles 1(2) and 2(2) of Decision 93/731 on public access to Council documents expressly provide that the Decision is to apply to all Council documents; it therefore applies irrespective of the contents of the documents requested. Secondly, since, pursuant to Article K.8(1) of the EU Treaty, measures adopted pursuant to Article 151(3) of the EC Treaty, which is the legal basis for Decision 93/731, are applicable to measures within the scope of Title VI of the EU Treaty, in the absence of any provision to the contrary, Decision 93/731 applies to documents relating to Title VI and the fact that the Court has, by virtue of Article L of the EU Treaty, no jurisdiction to review the legality of measures adopted under Title VI does not curtail its jurisdiction in the matter of public access to those measures.

5. The duty, pursuant to Article 190 of the Treaty, to state reasons in individual decisions has the double purpose of permitting, on the one hand, interested parties to know the reasons for the adoption of the measure so that they can protect their own interests and, on the other hand, enabling the Community court to exercise its jurisdiction to review the validity of the decision. In the case of a Council decision refusing to grant public access to documents, the statement of reasons must therefore contain - at least for each category of documents concerned - the particular reasons for which the Council considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Article 4(1) and (2) of Decision 93/731 relating, first, to the protection of the public interest, and secondly, to the confidentiality of the Council's proceedings.

A decision refusing the applicant access to a number of Council documents that indicates

only that disclosure of the documents in question would prejudice the protection of the public interest (public security) and that the documents relate to proceedings of the Council, including the views expressed by members of the Council, and for that reason fall within the scope of the duty of confidentiality, does not satisfy the above requirements and must therefore be annulled.

First, in the absence of any explanation as to why the disclosure of those documents would in fact be liable to prejudice a particular aspect of public security, it is not possible for the applicant to know the reasons for the adoption of the measures and therefore to defend its interests. It follows that it is also impossible for the Court to assess why the documents to which access was refused fall within the exception based upon the protection of the public interest (public security) and not within the exception based upon the protection of the confidentiality of the Council's proceedings. Secondly, as regards the latter exception, the terms of the decision do not permit the applicant or, therefore, the Court to check whether the Council has complied with its duty, under Article 4(2) of Decision 93/731, to make a comparative analysis which seeks to balance, on the one hand, the interest of the citizens seeking the information and, on the other hand, the confidentiality of the proceedings of the Council.

6. The rules which govern procedure in cases before the Court of First Instance, including the third subparagraph of Article 5(3) of the Instructions to the Registrar and Article 116(2) of the Rules of Procedure, under which parties are entitled to protection against the misuse of pleadings and evidence, reflect a general principle in the due administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public.

It follows that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing his own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties in the case.

PARTIES

Svenska Journalistförbundet, an association gov-

erned by Swedish law, established in Stockholm, represented by Onno W. Brouwer, of the Amsterdam Bar, and Frédéric P. Louis, of the Brussels Bar, assisted by Deirdre Curtin, Professor at the University of Utrecht, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe, applicant, supported by

Kingdom of Sweden, represented by Lotty Nordling, Director-General of the Legal Service of the Ministry of Foreign Affairs, acting as Agent,

Kingdom of Denmark, represented by Peter Biering, Head of Department in the Ministry of Foreign Affairs, and Laurids Mikælsen, Ambassador, acting as Agents, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal, and

Kingdom of the Netherlands, represented by Marc Fierstra and Johannes Steven van den Oosterkamp, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the Embassy of the Netherlands, 5 Rue C.M. Spoo, interveners,

v

Council of the European Union, represented by Giorgio Maganza and Diego Canga Fano, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, defendant, supported by

French Republic, represented by Catherine de Salins, Assistant Director in the Legal Department of the Ministry of Foreign Affairs, and Denys Wibaux, Secretary for Foreign Affairs in the same Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II, and

United Kingdom of Great Britain and Northern Ireland, represented by John Collins, of the Treasury Solicitor's Department, acting as Agent, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt, interveners,

APPLICATION for the annulment of the Council's decision of 6 July 1995 refusing the applicant access to certain documents concerning the European Police Office (Europol), requested under Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

(Fourth Chamber, Extended Composition),

composed of: K. Lenaerts, President, P. Lindh, J.

Azizi, J.D. Cooke and M. Jaeger, Judges, Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 17 September 1997, gives the following Judgment

GROUND S

1. In the Final Act of the Treaty on European Union ('the EU Treaty'), signed in Maastricht on 7 February 1992, the Member States incorporated a Declaration (No 17) on the right of access to information, in the following terms:

'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

2. On 8 June 1993 the Commission published Communication 93/C 156/05 on public access to the institutions' documents (OJ 1993 C 156, p. 5), which had been submitted to the Council, the Parliament and the Economic and Social Committee on 5 May 1993. On 17 June 1993 it published Communication 93/C 166/04 on openness in the Community (OJ 1993 C 166, p. 4), which had also been submitted to the Council, the Parliament and the Economic and Social Committee on 2 June 1993.
3. On 6 December 1993 the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter the 'Code of Conduct'), and each undertook to take steps to implement the principles thereby laid down before 1 January 1994.
4. In order to put that undertaking into effect, the Council adopted on 20 December 1993 Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43, hereinafter 'Decision 93/731'), the aim of which was to implement the principles established by the Code of Conduct. It adopted that decision on the basis of Article 151(3) of the EC Treaty, which states that '[t]he Council shall adopt its Rules of Procedure'.
5. Article 1 of Decision 93/731 provides:
 - '1. The public shall have access to Council documents under the conditions laid down in

this Decision.

2. "Council document" means any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2(2).'
6. Article 2(2) provides that applications for documents the author of which is not the Council must be sent directly to the author.
7. Article 4(1) of Decision 93/731 provides:

'Access to a Council document shall not be granted where its disclosure could undermine:

 - the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
 - the protection of the individual and of privacy,
 - the protection of commercial and industrial secrecy,
 - the protection of the Community's financial interests,
 - the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.'
8. Article 4(2) adds that '[a]ccess to a Council document may be refused in order to protect the confidentiality of the Council's proceedings.'
9. Articles 2(1), 3, 5 and 6 of Decision 93/731 set out in particular the procedure for submitting applications for access to documents and the procedure to be followed by the Council when replying to such applications.
10. Article 7 provides:

'1. The applicant shall be informed in writing within a month by the relevant departments of the General Secretariat either that his application has been approved or that the intention is to reject it. In the latter case, the applicant shall also be informed of the reasons for this intention and that he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

2. Failure to reply to an application within a month of submission shall be equivalent to a refusal, except where the applicant makes a confirmatory application, as referred to above,

within the following month.

3. Any decision to reject a confirmatory application, which shall be taken within a month of submission of such application, shall state the grounds on which it is based. The applicant shall be notified of the decision in writing as soon as possible and at the same time informed of the content of Articles 138e and 173 of the Treaty establishing the European Community, relating respectively to the conditions for referral to the Ombudsman by natural persons and review by the Court of Justice of the legality of Council acts.
4. Failure to reply within a month of submission of the confirmatory application shall be equivalent to a refusal.'

The facts

11. Following Sweden's accession to the European Union on 1 January 1995, the applicant decided to test the way in which the Swedish authorities applied Swedish citizens' right of access to information in respect of documents relating to European Union activities. For that purpose it contacted 46 Swedish authorities, among whom were the Swedish Ministry of Justice and the national Police Authority (Rikspolisstyrelsen), seeking access to a number of Council documents relating to the setting up of the European Police Office (hereinafter 'Europol'), including eight documents held by the national Police Authority and 12 held by the Ministry of Justice. In response to its requests the applicant was granted access to 18 of the 20 documents requested. It was refused access by the Ministry of Justice to two documents on the ground that they concerned the negotiating positions of the Netherlands and German Governments. Furthermore, certain passages in the documents to which access was granted had been deleted. In some documents it was difficult to ascertain whether passages had been deleted or not.
12. On 2 May 1995 the applicant also applied to the Council for access to the same 20 documents.
13. By letter dated 1 June 1995, the Council's General Secretariat allowed access to two documents only, those being documents which contained communications by the future French Presidency of its priorities in the field of asylum and immigration and in the field of justice. Access to the other 18 documents was refused on the ground that 'documents 1 to

15 and 18 to 20 are subject to the principle of confidentiality as laid down in Article 4(1) of Decision 93/731'.

14. On 8 June 1995 the applicant submitted a confirmatory application to the Council in order to obtain reexamination of the decision refusing access.
15. The competent department of the Council's General Secretariat, together with the Council's Legal Service, then prepared a note for the attention of the Information Working Party of the Permanent Representatives' Committee (hereinafter 'Coreper') and the Council. A draft reply, together with the exchange of correspondence that had taken place previously between the applicant and the General Secretariat, was distributed with a note dated 15 May 1995 prepared by Mr Elsen, Director-General of the Council's Justice and Home Affairs Directorate (DG H), when the first application was being examined (hereinafter 'Mr Elsen's note'). That note provided a brief summary of the contents of the documents and a preliminary assessment as to whether they could be released. It was communicated to the applicant for the first time in the course of the present proceedings as an annex to the Council's defence. On 3 July 1995 the Information Working Party decided to release two other documents but to refuse access to the remaining 16. At a meeting on 5 July 1995 Coreper approved the terms of the draft reply proposed by the Working Party.
16. The Council points out that all the documents concerned were at the disposal of the members of the Council and that copies of the documents were also available for examination at the Information Working Party meeting of 3 July.
17. After the Coreper meeting, the Council replied to the confirmatory application by a letter dated 6 July 1995 (hereinafter 'the contested decision'), in which it agreed to grant access to two other documents but rejected the application for the remaining 16 documents.
18. It explained that:

'[i]n the Council's opinion access to those documents cannot be granted because their release could be harmful to the public interest (public security) and because they relate to the Council's proceedings, including the positions taken by the members of the Council, and are therefore covered by the duty of confidentiality.'

Lastly, I would like to draw your attention to the provisions of Articles 138e and 173 of the EC Treaty concerning, respectively, the conditions governing the lodging of a complaint with the Ombudsman and the institution of proceedings before the Court of Justice by a natural person against acts of the Council.'

Procedure

19. By application lodged at the Registry of the Court of First Instance on 22 September 1995 the applicant instituted this action.
20. By a letter lodged on 9 February 1996, the European Parliament sought leave to intervene in the case in support of the applicant. It subsequently withdrew its intervention.
21. By order of the President of the Fourth Chamber of the Court of First Instance of 23 April 1996, the Kingdom of Denmark, the Kingdom of the Netherlands and the Kingdom of Sweden were granted leave to intervene in support of the applicant, and the French Republic and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the defendant.
22. By letter received on 3 April 1996 the Council drew the attention of the Court of First Instance to the fact that certain material documents, including the Council's defence, had been published on the Internet. The Council considered that the applicant's conduct was prejudicial to the proper course of the procedure. It requested the Court to take appropriate measures in order to avoid further such action on the part of the applicant.
23. The Court decided to treat this incident as a preliminary issue within the meaning of Article 114(1) of the Rules of Procedure, and accordingly invited the parties to submit observations on the matter. The written procedure was suspended in the meantime. Observations were received from the applicant and from the Danish, French, Netherlands, Swedish and United Kingdom Governments.
24. In the light of those observations the Court decided that the proceedings would be resumed, without prejudice to the consequences it would attach to that preliminary issue (see below, paragraphs 135 to 139).
25. By decision of 4 June 1996, the Court referred the case to the Fourth Chamber, Extended Composition. It did not accede to a request by

the Council of 20 June 1996 that the case be referred to the Court sitting in plenary session.

26. The written procedure was concluded on 7 April 1997.

Forms of order sought by the parties

27. The applicant, supported by the Kingdom of Denmark and the Kingdom of the Netherlands, requests the Court to:
- annul the contested decision;
 - order the Council to pay the costs.
28. The Kingdom of Sweden requests the Court to annul the contested decision.
29. The Council requests the Court to:
- declare the application inadmissible in its entirety;
 - alternatively, declare the application inadmissible in so far as it relates to documents which have already been received by the applicant and do not contain deleted passages;
 - in the further alternative, reject it as unfounded;
 - order the applicant to pay the costs.
30. The French Republic requests the Court to:
- dismiss the application;
 - order the applicant to pay the costs.
31. The United Kingdom requests the Court to dismiss the application as inadmissible or, in the alternative, as unfounded.

Admissibility

32. The Council claims that the application is inadmissible on several grounds, relating to the identity of the applicant, non-compliance with the time-limit for bringing an action, the applicant's lack of interest in bringing the action and the Court's lack of jurisdiction. Each of those grounds will be examined in turn.

The identity of the applicant

33. Svenska Journalistförbundet is the Swedish Journalists' Union. It owns and publishes a newspaper entitled *Tidningen Journalisten*. The application is headed 'Svenska Journalistförbundets tidning' and 'Tidningen Journalis-

ten'. The application states that the applicant is the magazine of the Swedish Journalists' Union, but the link between the two entities is not clearly explained. During the written procedure *Tidningen Journalisten* was therefore designated as 'the applicant'.

Arguments of the parties

34. In reply to a written question from the Court, the applicant's lawyers indicated by fax message of 4 August 1997 that the application should be regarded as having been lodged by the Swedish Journalists' Union as the proprietor of the magazine, since it alone of the two entities had capacity to sue under Swedish law.
35. At the hearing they added that any distinction between the Swedish Journalists' Union and *Tidningen Journalisten* was artificial. The application and confirmatory application sent to the Council had been presented on headed paper of Svenska Journalistförbundet and *Tidningen Journalisten* and the Council replied to Svenska Journalistförbundets *Tidning*. Svenska Journalistförbundet was thus a party to the case from the outset.
36. The Netherlands Government considers that it would be too formalistic to consider that an action instituted by an independent division of a legal person could not be attributed to that legal person, given that it is now clear that adequate proof of authority was produced when the action was instituted and the interests of the parties to the proceedings have not been injured in any way.
37. In a letter of 9 September 1997, the Council contends that in the light of the replies of the applicant's lawyers *Tidningen Journalisten*, which it had regarded as the applicant in the case, had no capacity to sue under Swedish law.
38. It further contends that even if the Swedish Journalists' Union could be substituted for *Tidningen Journalisten*, the former could not be regarded as the addressee of the Council's reply of 6 July 1995, nor as directly and individually concerned by that decision.
39. It therefore asks the Court to dismiss the application as inadmissible.

Findings of the Court

40. The first page of the application refers to both *Tidningen Journalisten* and 'Svenska Journalistförbundets tidning'.

41. The proof of authority granted to the applicant's lawyers as required by Article 44(5)(b) of the Rules of Procedure was signed on behalf of the Swedish Journalists' Union by Lennart Lund, Editor in Chief of the magazine *Tidningen Journalisten*. In that regard, the applicant has lodged, as an annex to its fax message of 4 August 1997 (see paragraph 34 above), a certificate confirming that the Swedish Journalists' Union had instructed Lennart Lund to bring the present application before the Court.
42. In those circumstances it is clear that the application has, in reality, been brought by the Swedish Journalists' Union as proprietor of *Tidningen Journalisten*.
43. The Swedish Journalists' Union being a legal person entitled to sue under Swedish law, the Council cannot object to the admissibility of the application on this basis.
44. Moreover, given that the Council had addressed the two negative replies of 1 June 1995 and 6 July 1995 to 'Mr Christoph Andersson, Svenska Journalistförbundets tidning', it cannot at this stage argue that the Swedish Journalists' Union was not the addressee of the contested decision.

The time-limit for bringing the action

Arguments of the parties

45. The Council questions whether the action was brought within the prescribed time-limit. It maintains that the applicant received the contested decision on 10 July 1995. It then had two months from that date to bring an action for its annulment.
46. The Council points out that Article 1 of Annex II to the Court's Rules of Procedure, in the version then applicable, provided that procedural time-limits were to be extended for parties not habitually resident in the Grand Duchy of Luxembourg by the following:
- for the Kingdom of Belgium: two days,
 - for the Federal Republic of Germany, the European territory of the French Republic and the European territory of the Kingdom of the Netherlands: six days,
 - for the European territory of the Kingdom of Denmark, for the Hellenic Republic, for Ireland, for the Italian Republic, for the Kingdom of Spain, for the Portuguese Republic (with the exception of the Azores and Ma-
- deira) and for the United Kingdom: 10 days,
- for other European countries and territories: two weeks.
47. The Council, supported by the French Government, doubts that the rule applicable to non-Member States should also apply to Member States of the European Union and considers that the applicant should have brought its action in compliance with a time-limit extended on account of distance by ten days, in order to avoid any discrimination between applicants from countries that are further away from Luxembourg than Sweden, which are entitled only to a ten-day extension.
48. The applicant relies on the actual terms of Article 1 of Annex II in the version reproduced above, and considers that they do not support the Council's contention. There is no reference to 'Member States' or 'non-Member States'. In the absence of any specific extension for Sweden, that country was entitled to the extension of two weeks applicable to all the European States not specifically mentioned. The Council's argument concerning discrimination does not carry conviction, since numerous places in Belgium are further away from Luxembourg than certain places in the Netherlands, yet all inhabitants of Belgium are entitled to a two-day extension while all inhabitants of the Netherlands are entitled to a six-day extension. Only the applicant's interpretation satisfies the requirement of legal certainty.
49. The Swedish and Netherlands Governments support that interpretation. At the hearing the Swedish Government's Agent pointed out that it was formerly entitled to an extension of two weeks.

Findings of the Court

50. It is settled law that the Community rules governing procedural time-limits must be strictly observed both in the interest of legal certainty and in order to avoid any discrimination or arbitrary treatment in the administration of justice (Case C-59/91 *France v Commission* [1992] ECR I-525, paragraph 8).
51. The wording of Article 1 of Annex II to the Rules of Procedure, in the version in force when the application was brought, does not support the submission that the extension for distance applicable in the case of Sweden was ten days and not two weeks. In fact, the ten-day extension applied only to certain designated coun-

tries, of which Sweden was not one. The extension of two weeks thus applied to all European countries and territories for which a shorter period was not laid down, including Sweden.

52. It follows that the action was commenced within time.

The applicant's interest in seeking annulment

Arguments of the parties

53. The Council also doubts that the application is admissible inasmuch as it concerns documents that the applicant had already received from the Swedish authorities, at least to the extent that those documents do not contain deleted passages. The Council was not informed that the purpose of the applicant's request was to identify any passages in those documents which had been deleted. The applicant's interest is general and political in nature, its intention being to ensure that the Council gives proper effect to its own Code of Conduct and Decision 93/731.
54. In the circumstances, although the Council is conscious of the fact that the applicant is the addressee of the contested decision, it questions whether the applicant is really affected by that decision within the meaning of Article 173 of the EC Treaty. That article does not allow individual actions in the public interest, but only permits individuals to challenge acts which concern them in a way in which they do not concern other individuals.
55. In this case the applicant cannot derive any benefit from obtaining access to documents which are already in its possession. Its insufficient interest in the outcome of the proceedings constitutes an abuse of procedure.
56. Supported by the French Government, the Council further contends that the release of the documents in question by the Swedish authorities to the applicant constitutes a breach of Community law, since no decision had been taken to authorise such a disclosure. It is contrary to the system of legal remedies provided for by Community law to take advantage of a breach of Community law and then to ask the Court to annul a decision whose effects have been circumvented as a consequence of such a breach. The fact that the documents in question were brought into the public domain following an act contrary to Community law should therefore preclude the applicant from

bringing an action in this case.

57. The applicant replies that the Council is confusing the rules on the admissibility of actions for the annulment of decisions brought by their addressees with the rules on the admissibility of actions for the annulment of regulations brought by certain individuals. Addressees must show that they have an interest in bringing their action but do not have to prove that they are individually concerned.
58. In this case the applicant considers that it has a sufficient interest in bringing the action and that that interest is neither political nor general in nature. It points out that Tidningen Journalisten publishes articles on specific subjects of general interest and on the functioning of public authorities and other matters concerning the way in which Swedish journalists can go about their job. It therefore has a direct interest in gaining access to Council documents and, if it is refused access for reasons which demonstrate that the Council is misapplying the relevant rules, in obtaining the annulment of the decision concerned so as to ensure that the Council rectifies its approach in the future. The fact that it has received documents from another source does not therefore mean that it has no interest in bringing the action.
59. In so far as the Council considers that the documents obtained from the Swedish authorities without its prior authorisation were obtained unlawfully, the applicant has a further ground for the application to be held admissible even as regards documents obtained in full from the Swedish authorities. Any use which the applicant may make of those documents will otherwise be thrown into doubt.
60. The applicant also rejects the Council's argument that the insufficient interest the applicant has in the present proceedings makes the application an abuse of procedure. It points out that at the time when it requested access to the Council's documents it had asked for and obtained from the national Police Authority only 8 of the 20 documents in question. The other 12 documents were requested from the Swedish Ministry of Justice on the same day as it sent its request for the 20 documents to the Council. Furthermore, many of the documents obtained appeared to have deleted passages and the applicant could not, therefore, be sure that it had received all the documents in full. The Council itself has not indicated to the Court which documents contain deleted

passages, although it has asked the Court to declare the application inadmissible to the extent that it concerns documents which the applicant has obtained and which do not contain deleted passages. The applicant is therefore not in a position to know which documents do not contain any such passages.

61. The Swedish Government supports the applicant's arguments as to admissibility. It does not share the Council's view that the release of the documents in Sweden constituted a breach of Community law. There is no implied Community rule based on a common legal tradition whereby only the author of a document may decide whether a document is to be released or not.
62. The Netherlands Government rejects the Council's argument as regards the applicant's lack of interest in bringing proceedings. It states that it was precisely in the public interest that Decision 93/731 was adopted. The applicant is not required therefore to show a particular interest in order to be able to rely on it. The application seeks to preserve the applicant's rights as the addressee of the contested decision and is not an action in the general interest. The applicant has an interest in seeking to prevent the Council from applying a restrictive policy in regard to requests by the applicant for access to documents in the future. Moreover, the Council's allegation that the applicant is in possession of documents in breach of Community law is sufficient to show that the latter does have a legitimate interest. It goes without saying that the interest recognised by Decision 93/731 relates to legally obtained access to a document.
63. The United Kingdom Government contends that the application is inadmissible because the applicant has no sufficient interest in the outcome of the proceedings. The application is therefore an abuse of procedure. None of the reasons given by the applicant is sufficient to give rise to an interest in bringing proceedings under Article 173 of the EC Treaty.

Findings of the Court

64. The applicant is the addressee of the contested decision and, as such, is not obliged to prove that the decision is of direct and individual concern to it. It need only prove that it has an interest in the annulment of the decision.
65. In the case of Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ

1994 L 46, p. 58, hereinafter 'Decision 94/90'), the Court has already held that from its overall scheme, it is clear that Decision 94/90 is intended to apply generally to requests for access to documents, and that, by virtue of that decision, any person may request access to any unpublished Commission document, and is not required to give a reason for the request (Case T-124/96 *Interporc v Commission* [1998] ECR II-0000, paragraph 48).

66. The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. Decision 93/731, like Decision 94/90, does not require that members of the public must put forward reasons for seeking access to requested documents.
67. It follows that a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision.
68. In this case the contested decision denied access to 16 of the 20 documents requested. The applicant has therefore proved an interest in the annulment of that decision.
69. The fact that the requested documents were already in the public domain is irrelevant in this connection.

The jurisdiction of the Court

Arguments of the parties

70. The French Government states that the contested decision concerns the arrangements for access to documents adopted on the basis of Title VI of the EU Treaty. No provision of Title VI governs the conditions of access to documents adopted on the basis of its provisions. In the absence of an express provision, Decision 93/731, which was adopted on the basis of Article 151(3) of the EC Treaty, is not applicable to acts adopted on the basis of Title VI of the EU Treaty.
71. The United Kingdom Government contends that the jurisdiction of the Court of First Instance does not extend to the matters covered by Title VI of the EU Treaty, and therefore to the question of access to the documents concerning those matters. Justice and Home Affairs fall outside the scope of the EC Treaty and are matters for inter-Governmental cooperation. It

is clear from Article E of the EU Treaty that in relation to Justice and Home Affairs the institutions in question are to exercise their powers under the conditions and for the purposes provided for by Title VI of the EU Treaty. In exercising those powers they are acting within the scope of Title VI, not of the EC Treaty. It follows from Article L of the EU Treaty that the provisions of the EC Treaty concerning the powers of the Court do not apply to Title VI of the EU Treaty. Accordingly the jurisdiction of the Court is excluded as much in procedural matters as in matters of substance. In any event, it is frequently impossible to draw a clear-cut distinction between the two.

72. The United Kingdom Government accepts that Decision 93/731 applies to Title VI documents, but considers that it does not follow that the Court may exercise jurisdiction over a refusal to allow access to such documents. In particular, the Court does not acquire jurisdiction simply because Decision 93/731 was adopted pursuant to Article 151 of the EC Treaty. Article 7(3) of Decision 93/731 is irrelevant in that connection, since reference to the possibility of an action under Article 173 of the EC Treaty cannot enlarge the jurisdiction of the Court.
73. According to the applicant, Decision 93/731 itself expressly confirms that the Court has jurisdiction in cases concerning application of that decision, since it specifies that its provisions are applicable to any document held by the Council. The criterion for application of Decision 93/731 is therefore the fact that the document is held by the Council, irrespective of its subject-matter, with the exception of documents drawn up outside the Council. In Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765, the Court of First Instance annulled a decision whereby the Council had refused the applicants access to the decisions adopted by the 'Justice and Home Affairs' Council; the Council did not contest the jurisdiction of the Court to adjudicate on access to documents falling under Title VI of the EU Treaty in that case.
74. That argument is supported by the Swedish, Danish and Netherlands Governments. Although the Court has no jurisdiction to review the legality of Title VI documents, it does have jurisdiction over matters concerning public access to those documents.
75. The Netherlands Government adds that the contested decision was not adopted on the

basis of Title VI of the EU Treaty, nor does that Title constitute the legal basis of Decision 93/731. The Court will not therefore be required to adjudicate on cooperation in Justice and Home Affairs as such.

Findings of the Court

76. Before considering the objection raised by the French and United Kingdom Governments, it is appropriate to consider its admissibility in the light of the Rules of Procedure.
77. This objection was not raised by the Council in the written pleadings. Furthermore, an application to intervene is to be limited to supporting the form of order sought by one of the parties (final paragraph of Article 37 of the EC Statute of the Court of Justice, applicable to the Court of First Instance by virtue of Article 46 of that Statute).
78. It follows that the French and United Kingdom Governments are not entitled to raise an objection to admissibility and that the Court is not therefore obliged to consider the submissions they have made in that regard (see Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 22).
79. However, under Article 113 of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, including any raised by interveners (Case T-239/94 *EISA v Commission* [1997] ECR II-1839, paragraph 26).
80. In this case the issue as to admissibility raised by the French and United Kingdom Governments does involve an absolute bar to proceeding in that it turns upon the jurisdiction of the Court to entertain the application. It can accordingly be examined by the Court of its own motion.
81. In this regard, Decision 93/731, in Articles 1(2) and 2(2), expressly provides that it is to apply to all Council documents. Decision 93/731 therefore applies irrespective of the contents of the documents requested.
82. Moreover, pursuant to Article K.8(1) of the EU Treaty, measures adopted pursuant to Article 151(3) of the EC Treaty, which is the legal basis for Decision 93/731, are applicable to measures within the scope of Title VI of the EU Treaty.
83. Thus, Council Decision 93/662/EC of 6 December 1993 adopting the Council's Rules of Procedure (OJ 1993 L 304, p 1), which was adopted on the basis of inter alia Article 151(3) of the EC

Treaty, also applies to meetings of the Council relating to Title VI of the EU Treaty.

84. It follows that, in the absence of any provision to the contrary in Decision 93/731 itself, its provisions apply to documents relating to Title VI of the EU Treaty.
85. The fact that the Court has, by virtue of Article L of the EU Treaty, no jurisdiction to review the legality of measures adopted under Title VI does not curtail its jurisdiction in the matter of public access to those measures. The assessment of the legality of the contested decision is based upon its jurisdiction to review the legality of decisions of the Council taken under Decision 93/731, on the basis of Article 173 of the EC Treaty, and does not in any way bear upon the intergovernmental cooperation in the spheres of Justice and Home Affairs as such. In any event, in the contested decision the Council itself drew the applicant's attention to its entitlement to appeal under Article 173 of the EC Treaty (see above, paragraph 18).
86. The fact that the documents relate to Title VI only is relevant in so far as the contents of the documents might possibly come within the scope of one or more of the exceptions provided for in Decision 93/731. That fact is thus relevant only to the examination of the substantive lawfulness of the decision taken by the Council and not to the admissibility of the application as such.
87. It follows from the foregoing that the application is admissible.

Substance

88. The applicant puts forward five pleas in law in support of its application for the annulment of the contested decision, namely: breach of the fundamental principle of Community law that citizens of the European Union should be granted the widest and fullest possible access to Community institutions' documents; breach of the principle of protection of legitimate expectations; infringement of Article 4(1) of Decision 93/731; infringement of Article 4(2) of Decision 93/731; and infringement of Article 190 of the EC Treaty.
89. The Court will first examine the third and fifth pleas together.

Third and fifth pleas in law: infringement of Article 4(1) of Decision 93/731 and infringement of Article 190 of the EC Treaty

Arguments of the parties

- *Infringement of Article 4(1) of Decision 93/731*

90. The applicant claims that the Council did not make a real assessment of the likely impact that granting access to the documents requested might have on public security in the European Union. On the contrary, the fact that a confirmatory application was necessary before the Council agreed to release one of the documents which had already been handed over to the European Parliament and was thus fully in the public domain is particularly disturbing in that respect.
91. In the absence of a definition of public security in Decision 93/731, the applicant suggests the following definition:

'documents or passages of documents whose access by the public would expose Community citizens, Community institutions or Member States' authorities to terrorism, crime, espionage, insurrection, destabilisation and revolution, or would directly hinder the authorities in their efforts to prevent such activities, shall not be accessible by virtue of the public security exception'.
92. The applicant then gives a precise description of the contents of all the documents requested that are in its possession, in support of its argument that the public security exception was applied in an unlawful manner by the Council.
93. It rejects the Council's assertion that it would not be in the interest of public security to allow those involved in illicit activities to obtain detailed knowledge of the structures and means available to police cooperation in the European Union. That assertion simply bears no relation to the actual content of the documents in question. The applicant points out that the two documents to which the Swedish authorities refused access concerned not public security but the negotiating positions of the Kingdom of the Netherlands and the Federal Republic of Germany.
94. The Council denies that it considered all the documents relating to Europol to be covered by the public security exception. The fact that four documents were disclosed shows that a real assessment was carried out, the outcome

- of which was that some of the requested documents could be released, whilst others could not.
95. The Council, supported by the French and United Kingdom Governments, contends that there is in any case no need to adopt a restrictive definition of public security for the purposes of the application of Decision 93/731. 'Public security' must be defined in a flexible way in order to meet changing circumstances. In any event, an assessment as to whether the release of a specific document could undermine the protection of the public interest (public security) can only be made by the Council itself.
96. That applies particularly as regards documents dealing exclusively with issues which fall under Titles V and VI of the EU Treaty. The Council trusts that, should the Court consider that it has jurisdiction in matters concerning access to documents dealing exclusively with matters falling under Title VI of the EU Treaty, it would nevertheless refrain from substituting its assessment for that of the Council in this regard.
97. The Council considers that the applicant's summary of the documents in question is neither objective nor precise.
98. The Swedish Government takes issue with the description given by the Council of the way in which the Information Working Party and Coreper dealt with the request for access to the documents in question.
99. In particular the documents requested were not made available to the Swedish representative in the Information Working Party before its meeting. The matter could not be dealt with satisfactorily in the short time available.
100. As far as Coreper was concerned, the only matter addressed by it was whether a decision concerning the request for disclosure could be taken by written procedure. When Coreper voted on 5 July 1995, the Swedish Government and four other Member States abstained. The Swedish Government made a statement expressing its dissatisfaction at the way the case had been handled.
101. The Danish Government shares to a large extent the Swedish Government's criticism of the way the case was handled. It considers that the Council's assessment of the various documents was purely formalistic. In the Council Secretariat the possibilities of derogation in Article 4(1) of Decision 93/731 were first examined and it was thought that considerations of public security could justify withholding of documents relating to Europol in general. When the confirmatory application was being examined, doubts arose as to whether public security considerations could really be applied generally as a ground for withholding Europol documents. Accordingly, it was then decided to retreat to a statement of reasons based on the very general considerations of Article 4(2) of Decision 93/731. The discussion in the Council Secretariat did not focus on whether publication would entail a risk of real adverse consequences either for public security or the requirement of confidentiality.
102. The Netherlands Government, having examined the documents in question, considers that the refusal to grant access to the documents cannot under any circumstances be justified by the requirements of public security. However, it reserves its opinion as far as a document which is not in its possession is concerned. In its view, in order to establish whether the Council was justified in refusing access to the documents in question on the ground of public security, it is necessary to examine, document by document, whether access to them would undermine the fundamental interests of the Community or of the Member States to the extent that their existence would be jeopardised. It points out that the Council later agreed to make available at least four of those documents to a journalist, Mr T., and that the refusal to grant the applicant access to those documents therefore constitutes arbitrary discrimination.
103. The Council insists that the content of the documents was in fact examined. It considers that there is no evidence that the other members of the Council who abstained did so for the same reasons as the Swedish Government. No Member State voted against the confirmatory decision or associated itself with the Swedish Government's statement.
- *Infringement of Article 190 of the EC Treaty*
104. The applicant claims that the refusal, expressed in a single sentence, to grant access to 16 of the 20 documents does not satisfy the requirements of Article 190 of the EC Treaty or Article 7(3) of Decision 93/731. It was impossible for it to assess whether the refusal should be challenged before the Court, and equally impossible for the Court to assess whether the Council had made proper use of the exceptions referred to above. It was only because

the applicant had in its possession most of the documents concerned, in full or in part, that it was able to show that the Council had applied those exceptions unlawfully in the present case. It asks the Court to examine the documents concerned in order to assess whether the Council was justified in availing itself of the exceptions cited.

105. The Council, supported by the French and United Kingdom Governments, contends that the statement of reasons for the contested decision discloses the essential objective pursued by the Council and its decision is therefore duly reasoned. It would be excessive to require a specific statement of reasons for each of the technical choices made by the institution. If it were necessary to provide a very detailed statement of reasons in the case of negative responses to requests for access, the underlying objectives of Article 4(1) would be compromised. Decision 93/731 lays down very tight time-limits for replying to applications. Consequently, when applications cover many documents involving large numbers of pages, the statement of reasons which can be provided will inevitably be rather briefer than the statement of reasons given in reply to applications of a more limited scope. Furthermore, the requested documents clearly had an essentially common subject-matter.
106. The Swedish Government maintains that the balancing of the Council's interest in maintaining the confidentiality of its proceedings and the public's interest in having access to documents should be undertaken in relation to each separate document and that the decision does not state sufficient reasons. It claims that the Council does not indicate whether both the reasons given for maintaining confidentiality are applicable to all the documents or, if that is not the case, which reason or reasons for maintaining confidentiality are applicable to each particular document. The public is entitled to know, from the particular circumstances surrounding each separate action or matter, why a specific document is to be kept confidential.
107. The Danish Government states that it is not sufficient to refer in general to the possibilities of derogation and to reproduce the terms of Decision 93/731. Refusal under Article 4(1) of that decision cannot lawfully be explained by indicating that a particular interest which is included therein can be regarded generally as affected, just as the option of derogation with regard to the duty of confidentiality in Ar-

ticle 4(2) cannot form the basis of a refusal in general terms. The principle of assessment on the facts is applicable and in certain cases the Council might be required to produce a document with any information requiring protection under Article 4 deleted.

108. The Netherlands Government also states that the Council's reason for refusing access to the various documents is obscure. The contested decision confines itself to repeating the criteria in Article 4 of Decision 93/731 and does not reveal which documents were withheld on the basis of Article 4(1) and which withheld on the basis of Article 4(2). As regards the documents to which access was refused on the ground of confidentiality of the Council's proceedings, it does not appear, moreover, from the contested decision, that the requisite balancing of interests took place.

Findings of the Court

109. Decision 93/731 is a measure which confers on citizens rights of access to documents held by the Council. It is clear from the scheme of the decision that it applies generally to requests for access to documents and that any person is entitled to ask for access to any Council document without being obliged to put forward reasons for the request (see above, paragraph 65).
110. There are two categories of exception to the principle of general access for citizens to Council documents set out in Article 4 of Decision 93/731. These exceptions must be construed and applied restrictively so as not to defeat the general principle enshrined in the decision (see, in relation to the analogous provisions of Decision 94/90, Case T-105/95 WWF UK v Commission [1997] ECR II-313, paragraph 56).
111. The wording of the first category of exceptions, drafted in mandatory terms, provides that access to a Council document cannot be granted if its disclosure could undermine the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations) (see above, paragraph 7). Accordingly, the Council is obliged to refuse access to documents which come within any one of the exceptions in this category once the relevant circumstances are shown to exist (see Case T-194/94 Carvel and Guardian Newspapers v Council, cited above, paragraph 64).
112. Nevertheless, it follows from the use of the verb

- 'could', in the present conditional, that in order to demonstrate that the disclosure of particular documents could undermine the protection of the public interest, the Council is obliged to consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected by this first category of exceptions. If that is the case, the Council is obliged to refuse access to the documents in question (Case T-124/96 *Interporc*, cited above, paragraph 52, and Case T-83/96 *van der Wal v Commission* [1998] ECR II-0000, paragraph 43).
113. By way of contrast, the wording of the second category, drafted in enabling terms, provides that the Council may also refuse access in order to protect the confidentiality of its proceedings (see above, paragraph 8). It follows that the Council enjoys a margin of discretion which enables it, if need be, to refuse access to documents which touch upon its deliberations. It must, nevertheless, exercise this discretion by striking a genuine balance between on the one hand, the interest of the citizen in obtaining access to the documents and, on the other, any interest of its own in maintaining the confidentiality of its deliberations (Case T-194/94 *Carvel and Guardian Newspapers*, cited above, paragraphs 64 and 65).
114. The Council is also entitled to rely jointly on an exception derived from the first category and one relating to the second category in order to refuse to grant access to documents which it holds, there being no provision in Decision 93/731 which precludes it from so doing. The possibility cannot be ruled out that the disclosure of particular documents by the Council could cause damage both to the interest protected by the first category of exception and to the Council's interest in maintaining the confidentiality of its deliberations (Case T-105/95 *WWF UK*, cited above, paragraph 61).
115. In the light of these considerations, it is necessary to consider whether the contested decision satisfies the criteria laid down by Article 190 of the Treaty regarding the statement of reasons.
116. The duty to state reasons in individual decisions has the double purpose of permitting, on the one hand, interested parties to know the reasons for the adoption of the measure so that they can protect their own interests and, on the other hand, enabling the Community court to exercise its jurisdiction to review the validity of the decision (see, in particular, Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 15, and Case T-85/94 *Branco v Commission* [1995] ECR II-45, point 32).
117. The statement of reasons for a decision refusing access to a document must therefore contain - at least for each category of documents concerned - the particular reasons for which the Commission considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Decision 93/731 (Case T-105/95 *WWF UK*, cited above, paragraphs 64 and 74, and Case T-124/96 *Interporc*, cited above, paragraph 54).
118. In the contested decision (see above, paragraph 18) the Council indicated only that the disclosure of the 16 documents in question would prejudice the protection of the public interest (public security) and that the documents related to the proceedings of the Council, particularly the views expressed by members of the Council, and for that reason fell within the scope of the duty of confidentiality.
119. Although the Council was at once invoking both the mandatory exception based upon the protection of the public interest (public security) and also the discretionary exception based upon protection of the confidentiality of its proceedings, it did not specify whether it was invoking both exceptions in respect of all of the documents refused or whether it considered that some documents were covered by the first exception while others were covered by the second.
120. In that respect, the Court notes that although the initial refusal contained in the letter of 1 June 1995 was based only upon 'the principle of confidentiality as set out in Article 4(1) of Decision 93/731' the Council was nevertheless able to grant access to two further documents in the course of its consideration of the confirmatory request, namely a report on the activities of the Europol Drugs Unit (document No 4533/95) and a provisional agenda for a meeting of Committee K.4 (document No 4135/95), documents clearly relating to the activities of the Council within the scope of Title VI of the EU Treaty. If the fact that such documents related to Title VI of the EU Treaty meant that they were automatically covered by the exception based upon the protection of the public interest (public security), the Coun-

cil had no entitlement to grant access to the documents. Moreover, given that the Council considered that it was entitled to grant access to these two documents, having first balanced the interests involved, it follows that the Council must necessarily have considered that all of the documents relating to Title VI did not automatically fall within the scope of the first exception based upon the protection of the public interest (public security). Furthermore, the Council itself admitted that it had not considered that all of the documents connected with Europol were covered by the exception relating to public security.

121. The case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning. Thus, the concept covers both the internal security of a Member State and its external security (see Case C-70/94 *Werner v Germany* [1995] ECR I-3189, paragraph 25), as well as the interruption of supplies of essential commodities such as petroleum products which may threaten the very existence of a country (Case 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727, paragraph 34). The concept could equally well encompass situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities, as the applicant has argued.
122. Mr Elsen's note (see above, paragraph 15) demonstrates that most of the documents to which access was refused were concerned only with negotiations on the adoption of the Europol Convention, in particular the proposals of the Presidency and of other delegations with regard to those negotiations, and not with operational matters of Europol itself. Thus, in the absence of any explanation on the part of the Council as to why the disclosure of these documents would in fact be liable to prejudice a particular aspect of public security, it was not possible for the applicant to know the reasons for the adoption of the measures and therefore to defend its interests. It follows that it is also impossible for the Court to assess why the documents to which access was refused fall within the exception based upon the protection of the public interest (public security) and not within the exception based upon the protection of the confidentiality of the Council's proceedings.
123. Nor can the Council claim that, in this instance, it was unable to explain why the exception applied without undermining the essential pur-

pose of the exception, given the very nature of the interest to be protected and the mandatory character of the exception. In fact, Mr Elsen's note clearly shows that it was possible to give an indication of the reasons why certain documents could not be disclosed to the applicant without at the same time disclosing their contents.

124. Finally, so far as concerns the exception in favour of the protection of the confidentiality of its proceedings, the Council did not specifically indicate in the contested decision that all of the documents included in the applicant's request were covered by the exception based upon the protection of the public interest (see paragraph 119, above). The applicant could not therefore rule out the possibility that access to some of the documents in question was being refused because they were covered only by the exception based upon the protection of the confidentiality of its proceedings.
125. The terms of the contested decision do not, however, permit the applicant and, therefore, the Court to check whether the Council has complied with its duty to carry out a genuine balancing of the interests concerned as the application of Article 4(2) of Decision 93/731 requires. In fact, the contested decision mentions only the fact that the requested documents related to proceedings of the Council, including the views expressed by members of the Council, without saying whether it had made any comparative analysis which sought to balance, on the one hand, the interest of the citizens seeking the information and, on the other hand, the criteria for confidentiality of the proceedings of the Council (see Case T-194/94 *Carvel and Guardian Newspapers*, cited above, paragraph 74).
126. Moreover, the first reply from the Council - sent to the applicant in French although the applicant had written the initial request in German - confined itself to citing the provisions of Article 4(1) of Decision 93/731, in support of its view that the documents were subject to 'the principle of confidentiality'. It did not therefore permit the applicant or the Court to confirm that the Council had genuinely balanced the interests involved at the stage of its consideration of the applicant's first request.
127. It follows from all of the foregoing that the contested decision does not comply with the requirements for reasoning as laid down in Article 190 of the Treaty and must therefore be

annulled without there being any need to consider the other grounds raised by the applicant or to look at the contents of the documents themselves.

The request of the Netherlands Government that the Court of First Instance invite the Court of Justice to produce a note drafted by its services

128. The Netherlands Government requests that the Court of First Instance invite the Court of Justice to produce a note drafted by the Research and Documentation service of the Court for the purposes of that Court's judgment of 30 April 1996 in Case C-58/94 *Netherlands v Council* [1996] ECR I-2169.

129. As the present judgment is not based upon that note, there is no need to rule on this request.

Publication of the defence on the Internet

Arguments of the parties

130. As indicated in paragraph 22 above, by letter received on 3 April 1996 the Council drew the attention of the Court to the fact that certain pertinent documents, including the Council's defence, had been published on the Internet. It considers that the applicant's conduct was prejudicial to the proper course of the procedure. The Council laid particular stress on the fact that the text of the defence had been edited by the applicant before it was placed on the Internet. Furthermore, the names and contact details of the Council's Agents in the case were given and the public encouraged to send their comments on the case to those Agents. The Council requested the Court to take any measures which might be appropriate in order to avoid further such action on the part of the applicant.

131. By letter received on 3 May 1996, the applicant's lawyers explained that they had played no role in the placing of the defence and other documents concerning the case on the Internet. They had no knowledge of those facts before receiving the letter from the Registry of the Court of First Instance. They had immediately asked the applicant to remove all the documents from the Internet, and informed it that they would no longer be able to represent it if that was not done.

132. In its observations received on 24 May 1996,

the applicant confirmed that it had placed the documents on the Internet without informing its lawyers. It explained that the editing of the defence had been carried out for purely practical reasons and that its intention was not to alter its contents or weaken the Council's case. It simply wanted to shorten the defence by not reproducing certain passages in view of the time required to put the defence on the Internet. It had no intention of putting pressure on the Council and added that the names and contact details of the Council's Agents were included simply because they knew about the case, not to encourage the public to contact them directly as individuals.

133. The applicant undertook to refrain from placing on the Internet or in any other way making available to the public any further documents exchanged between the parties in the case. It would thenceforth restrict itself to normal media reports on the case. The applicant further indicated that it had taken the decision to have the defence withdrawn from the Internet. However, the document had been placed on the Internet by an independent organisation, *Grävande Journalister* (an association of Swedish investigative reporters and editors), which refused to withdraw it. Under Swedish law the applicant had no legal means of forcing that association to withdraw the document and the latter was therefore responsible for keeping the defence on the Internet.

134. By letter received on 28 May 1996, the Swedish Government explained that the Legal Director at the Ministry of Justice had received a copy of the defence from the applicant and the Legal Director had subsequently released a copy to a journalist without any objection on the applicant's part. In doing so, the Legal Director had taken into account the fact that the applicant had already published a detailed report on the main elements of the defence and had given the names of the representatives of the Council concerned. Another factor in that decision was that the document had not been transmitted to the Swedish Government by a Community institution, but by a private individual who had the right to dispose of the document and had already demonstrated his willingness to disseminate it. The Ministry was in no way involved in the publication of the defence on the Internet and the newspaper's action in that respect was regarded as a provocation.

Findings of the Court

135. Under the rules which govern procedure in cases before the Court of First Instance, parties are entitled to protection against the misuse of pleadings and evidence. Thus, in accordance with the third subparagraph of Article 5(3) of the Instructions to the Registrar of 3 March 1994 (OJ 1994 L 78, p. 32), no third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President, after the parties have been heard. Moreover, in accordance with Article 116(2) of the Rules of Procedure, the President may exclude secret or confidential documents from those furnished to an intervener in a case.

136. These provisions reflect a general principle in the due administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public.

137. It follows that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing his own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties in the case.

138. In the present case, it is clear that the actions of the applicant in publishing an edited version of the defence on the Internet in conjunction with an invitation to the public to send their comments to the Agents of the Council and in providing the telephone and telefax numbers of those Agents, had as their purpose to bring pressure to bear upon the Council and to provoke public criticism of the Agents of the institution in the performance of their duties.

139. These actions on the part of the applicant involved an abuse of procedure which will be taken into account in awarding costs (see below, paragraph 140), having regard, in particular, to the fact that this incident led to a suspension of the proceedings and made it necessary for the parties in the case to lodge additional submissions in this respect.

Costs

140. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the

successful party's pleadings. In this case the applicant asked that the Council be ordered to pay the costs. However, under Article 87(3) of the Rules, the Court may, where the circumstances are exceptional, order that the costs be shared or that each party bear its own costs. In view of the abuse of procedure found to have been committed by the applicant, the Council will be ordered to pay only two-thirds of the applicant's costs.

141. Pursuant to Article 87(4) of the Rules of Procedure, the interveners will be ordered to pay their own costs.

OPERATIVE PART

On those grounds, THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

hereby:

1. **Annuls the Council's decision of 6 July 1995 refusing the applicant access to certain documents relating to the European Police Office (Europol);**
2. **Orders the Council to pay two-thirds of the applicant's costs as well as its own costs;**
3. **Orders the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

FUNDAMENTAL RIGHTS AND THE COMMUNITY LAW, ECHR AND ECJ, SCOPE OF FREEDOM OF EXPRESSION, LIMITATIONS TO FREEDOM OF EXPRESSION, INTERPRETING LIMITS TO FREEDOM OF EXPRESSION, PUBLIC SERVICES AND FREEDOM OF EXPRESSION, PRIOR PERMISSION FOR PUBLISHING

JUDGMENT OF THE COURT 6 March 2001

CASE C-274/99P BERNARD CONNOLLY v COMMISSION

Bernard Connolly, a former official of the Commission of the European Communities, residing in London, United Kingdom, represented by J. Sambon and P.-P. van Gehuchten, *avocats*, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly v Commission* [1999] ECR-SC I-A-87 and 11-463, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Valsesia and J. Currall, acting as Agents, assisted by D. Waelbroeck, *avocat*, with an address for service in Luxembourg,

defendant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet (Rapporteur), V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissechet, P. Jann, L. Sevón, R. Schintgen and N. Colneric, Judges, Advocate General: D. Ruiz-Jarabo Colomer, Registrar: R. Grass,

having regard to the Report for the Hearing, after hearing oral argument from the parties at the hearing on 12 September 2000, after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following Judgment

1. By an application lodged at the Registry of the

Court of Justice on 20 July 1999, Mr Connolly brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and the EAEC Statutes of the Court of Justice against the judgment of the Court of First Instance of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly v Commission* [1999] ECR-SCI-A-87 and 11-463 ('the contested judgment'), by which the Court of First Instance dismissed, first, his action for annulment of the opinion of the Disciplinary Board of 7 December 1995 and of the decision of the appointing authority of 16 January 1996 removing him from his post without withdrawal of his entitlement to a retirement pension ('the contested decision') and, second, his action for damages.

LEGAL BACKGROUND

2. Article 11 of the Regulations and Rules applicable to officials and other servants of the European Communities ('the Staff Regulations') provides:

'An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution.

An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.'

3. Article 12 of the Staff Regulations provides:

'An official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position.

An official wishing to engage in an outside activity, whether gainful or not, or to carry out any assignment outside the Communities must obtain permission from the appointing authority. Permission shall be refused if the activity or assignment is such as to impair the official's independence or to be detrimental to the work of the Communities.'

4. The second paragraph of Article 17 of the Staff Regulations states:

'An official shall not, whether alone or together

with others, publish or cause to be published without the permission of the appointing authority, any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.'

THE FACTS GIVING RISE TO THE DISPUTE

5. The facts giving rise to the dispute are set out in the contested judgment as follows:

'1 At the material time, the applicant, Mr Connolly, an official of the Commission in Grade A4, Step 4, was Head of Unit 3, "EMS: National and Community Monetary Policies", in Directorate D, "Monetary Affairs" in the Directorate-General for Economic and Financial Affairs (DG II)....

2 On three occasions, dating from 1991, Mr Connolly submitted draft articles relating, respectively, to the application of monetary theories, the development of the European Monetary System and the monetary implications of the white paper on the future of Europe. Permission to publish the articles, which, under the second paragraph of Article 17 of the Staff Regulations, must be obtained prior to publication, was refused.

3 On 24 April 1995, Mr Connolly applied, under Article 40 of the Staff Regulations, for three months' unpaid leave on personal grounds commencing on 3 July 1995, stating as the reasons for his application (a) to assist his

son during the school holidays in his preparation for United Kingdom university entrance; (b) to enable his father to spend some time with his family; (c) to spend some time reflecting on matters of economic theory and policy and to "reestablish acquaintance with the literature". The Commission granted him leave by decision of 2 June 1995.

4 By letter of 18 August 1995, Mr Connolly applied to be reinstated in the Commission service at the end of his leave on personal grounds. The Commission, by decision of 27 September 1995, granted that request and reinstated him in his post with effect from 4 October 1995.

5 Whilst on leave on personal grounds, Mr Connolly published a book entitled *The Rotten Heart of Europe — The Dirty War for Europe's Money* without requesting prior permission.

6 Early in September, more specifically between 4 and 10 September 1995, a series of

articles concerning the book was published in the European and, in particular, the British press.

7 By letter of 6 September 1995, the Director-General for Personnel and Administration, in his capacity as appointing authority... informed the applicant of his decision to initiate disciplinary proceedings against him for infringement of Articles 11, 12 and 17 of the Staff Regulations and, in accordance with Article 87 of those regulations, invited him to a preliminary hearing.

8 The first hearing was held on 12 September 1995. The applicant then submitted a written statement indicating that he would not answer any questions unless he was informed in advance of the specific breaches he was alleged to have committed.

9 By letter of 13 September 1995, the appointing authority informed the applicant that the allegations of misconduct followed publication of his book, serialisation of extracts from it in *The Times* newspaper as well as the statements that he had made in an interview published in that newspaper, without having obtained prior permission. The appointing authority again invited him to attend a hearing regarding those matters in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations.

10 On 26 September 1995, at a second hearing, the applicant refused to answer any of the questions put to him and filed a written statement in which he submitted that it was legitimate for him to have published a work without requesting prior permission because, when he did so, he was on unpaid leave on personal grounds. He added that the serialisation of extracts from his book in the press had been decided on by his publisher and that some of the statements contained in the interview had been wrongly attributed to him. Finally, Mr Connolly expressed doubts as to the objectivity of the disciplinary proceedings commenced against him in view, notably, of statements made about him to the press by the Commission's President and its spokesperson, and as to whether the confidential nature of the proceedings was being respected.

11 On 27 September 1995, the appointing authority decided, pursuant to Article 88 of the Staff Regulations, to suspend Mr Connolly from his duties with effect from 3 October 1995 and to withhold one-half of his basic salary during the period of his suspension.

12 On 4 October 1995, the appointing authority decided to refer the matter to the Disciplinary

nary Board under Article 1 of Annex IX to the Staff Regulations

...

('Annex IX').

16 On 7 December 1995, the Disciplinary Board delivered an opinion, forwarded to the applicant on 15 December 1995, in which it recommended that the disciplinary measure of removal from post without withdrawal or reduction of his entitlement to a retirement pension should be imposed on him....

17 On 9 January 1996, the applicant was heard by the appointing authority pursuant to the third paragraph of Article 7 of Annex IX.

18 By decision of 16 January 1996, the appointing authority imposed on the applicant the disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations, namely removal from post without withdrawal or reduction of his entitlement to a retirement pension....

19 The decision removing Mr Connolly from his post set out the following statement of reasons:

"Whereas on 16 May 1990 Mr Connolly was appointed Head of Unit [II.D.3];

Whereas by virtue of his duties Mr Connolly has been responsible for, *inter alia*, preparing and taking part in the work of the Monetary Committee, the Monetary Policy Sub-Committee and the Committee of [Governors], monitoring monetary policies in the Member States and analysing the monetary implications of the implementation of European economic and monetary union;

Whereas Mr Connolly has written a book, which was published at the beginning of September 1995 entitled *The Rotten Heart of Europe*;

Whereas that book deals with the development in recent years of the process of European integration in the economic and monetary field and has been written by Mr Connolly on the basis of the professional experience he has gained while carrying out his duties at the Commission;

Whereas Mr Connolly has not requested permission from the appointing authority to publish the book in question in accordance with Article 17 of the Staff Regulations, which is binding on all officials;

Whereas Mr Connolly could not have failed to be aware that he would be refused permis-

sion on the same grounds as those on which permission had previously been refused in respect of articles in which he had already outlined the ideas that form the core of the present book;

Whereas Mr Connolly mentions in the preface to *The Rotten Heart of Europe* that the idea for the book arose after he had requested permission to publish a chapter on the EMS in another book; he was refused permission and took the view that it would be worthwhile to work up that chapter and make it into a book in its own right;

Whereas Mr Connolly has approved, and has played an active part in, the promotion of his book, notably granting an interview to *The Times* newspaper on 4 September 1995, on which date *The Times* also published extracts from his book, and writing an article for *The Times*, which was published on 6 September 1995;

Whereas Mr Connolly could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union;

Whereas by his conduct Mr Connolly has seriously prejudiced the interests of the Communities and has damaged the image and reputation of the institution;

Whereas Mr Connolly has admitted receiving royalties paid to him by his publishers as consideration for the publication of his book;

Whereas Mr Connolly's overall conduct has reflected on his position as an official, given that an official is required to conduct himself solely with the interests of the Commission in mind;

Whereas, having frequently been refused permission to publish, a reasonably diligent official of his seniority and with his responsibilities could not have been unaware of the nature and gravity of such breaches of his obligations;

Whereas, in disregard of his duties of good faith and loyalty to the institution, Mr Connolly at no time advised his superiors of his intention to publish the book in question even though he was still bound, as an official on leave on personal grounds, by his duty of confidentiality;

Whereas Mr Connolly's conduct, on account

of its gravity, involves an irremediable breach of the trust which the Commission is entitled to expect from its officials, and, as a consequence, makes it impossible for any employment relationship to be maintained with the institution;

...

20 By letter of 7 March 1996, received at the Secretariat-General of the Commission on 14 March 1996, the applicant submitted a complaint under Article 90(2) of the Staff Regulations against the Disciplinary Board's opinion and against the decision to remove him from his post.

21 By an application lodged at the Registry of the Court of First Instance on 13 March 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion (Case T-34/96).

23 On 18 July 1996 the applicant was informed of the decision expressly dismissing his complaint against the Disciplinary Board's opinion and the decision removing him from his post.

24 By an application lodged at the Registry of the Court of First Instance on 18 October 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion and of the decision removing him from his post and for damages (Case T-163/96).

30 At the hearing, it was formally recorded that the claims and the pleas in law relied on in Case T-34/96 were repeated in their entirety in Case T-163/96 and that, consequently, the applicant was discontinuing the proceedings in Case T-34/96.'

THE CONTESTED JUDGMENT

6. Before the Court of First Instance, the appellant put forward seven pleas in law in support of his claim for annulment of the Disciplinary Board's opinion and the contested decision. First, he alleged that there had been irregularities in the disciplinary proceedings. Second, he alleged that the reasons given were insufficient and that the Disciplinary Board had infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration. By his third, fourth and fifth pleas, the applicant submitted that there had been infringements of, respectively, Articles 11, 12 and 17 of the Staff Regulations. The basis of the sixth plea was manifest error of assessment and breach of the principle of proportionality. Finally, the

seventh plea alleged misuse of powers.

The first plea in law: irregularities in the disciplinary proceedings

7. The applicant complained, inter alia, that the Disciplinary Board and the appointing authority took account of matters which were not dealt with in the disciplinary proceedings, namely, first, the complaint that Mr Connolly's book expressed an opinion which was inconsistent with the Commission's policy of bringing about economic and monetary union and, second, the fact that he had written an article, published on 6 September 1995 in *The Times* newspaper, and taken part in a television programme on 26 September 1995. He also complained that the Disciplinary Board had not prepared a report on the case as a whole and that the Chairman of the Board had taken an active and biased part in its proceedings.

The claim that matters not dealt with in the disciplinary proceedings were taken into account

8. In particular, the Court of First Instance held as follows:

'44 The Court must also reject the applicant's argument that the appointing authority's report to the Disciplinary Board did not include the contents of the book among the facts complained of but was limited to referring to formal infringements of Articles 11, 12 and 17 of the Staff Regulations. In that regard, it must be observed that the report indicated, without any ambiguity, that the contents of the book at issue, in particular its polemical nature, were among the facts alleged against the applicant. In particular, in paragraph 23 et seq. of the report, the appointing authority considered that there had been an infringement of Article 12 of the Staff Regulations on the grounds that "publication of the book in itself reflects on Mr Connolly's position as he has been head of the unit at the Commission... responsible for the matters recounted in the book" and, "furthermore, in the book, Mr Connolly makes certain derogatory and unsubstantiated attacks on Commissioners and other members of the Commission's staff in such a way as to reflect on his position and to bring the Commission into disrepute contrary to his obligations under Article 12." The report went on to cite specifically certain statements made by the applicant in his book and the annex to the report included numerous extracts from it.

45 It follows that, in accordance with Article 1 of Annex IX, the appointing authority's report apprised the applicant of the facts alleged against him with sufficient precision for him to be in a position to exercise his rights of defence.

46 That interpretation is also borne out by the fact that, as is clear from the minutes of the applicant's hearing before it, the Disciplinary Board, on several occasions during the hearing, made its position clear regarding the purpose and content of his book.

47 Furthermore, the applicant, at his final hearing before the appointing authority on 9 January 1996, neither contended that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened (see, to that effect, the judgment of the Court of First Instance in Case T-549/93 D v Commission [1995] ECRSC I-A-13, 11-43, paragraph 55).

48 As to the applicant's argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995, it need merely be noted that, contrary to the applicant's contention, the appointing authority had specifically referred to those facts in paragraph 19 of the report.

49 Accordingly, the first part of the plea must be rejected.'

The Disciplinary Board's failure to draw up a report

9. In particular, the Court of First Instance held as follows:

'73 In the present case, the minutes of the first meeting of the Disciplinary Board show that, in accordance with Article 3 of Annex IX, the Chairman appointed one of the members of the Board as rapporteur to prepare a report on the matter as a whole. Although it appears from the minutes in the file that the rapporteur was not the only member of the Disciplinary Board to question the applicant and the witness at the hearings, it cannot be inferred from that fact that the rapporteur's duties were not performed.

74 Furthermore, as regards the complaint that no report was prepared on the matter as a whole, Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not

prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties. Consequently, there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board. In the present case, the applicant has failed to establish that no report was presented. Furthermore, the applicant has not produced the slightest evidence to show either that the Disciplinary Board failed to undertake an inquiry which was sufficiently complete and which afforded him all the guarantees intended by the Staff Regulations (see Case 228/83 F v Commission [1985] ECR 275, paragraph 30, and Case T-500/93 Y v Court of Justice [1996] ECR-SC I-A-335,II-977, paragraph 52), or, therefore, that it was unable to adjudicate on the matter with full knowledge of the facts. In those circumstances, the applicant's argument must be rejected.

76 Consequently, the third part of the plea must be rejected.'

The inappropriate participation of the Chairman of the Disciplinary Board in the proceedings

10. In particular, the Court of First Instance held as follows:

'82 In the present case, it is clear from the actual wording of the Disciplinary Board's opinion that it was not necessary for its Chairman to take part in the vote on the reasoned opinion and that the opinion was adopted by a majority of the four other members. It is also clear from the minutes on the file that, when the proceedings were opened, the Chairman of the Disciplinary Board confined himself to inviting the members of the Board to consider whether the facts complained of had been proved and to decide on the severity of the disciplinary measure to be imposed, that being within the normal scope of his authority. Therefore, the applicant cannot reasonably plead an infringement of Article 8 of Annex IX on the ground that the Chairman of the Disciplinary Board played an active part in the deliberations.

83 In any event, it must be emphasised that the Chairman of the Disciplinary Board must be present during its proceedings so that, *inter alia*, he can, if necessary, vote with full knowledge of the facts to resolve tied votes or procedural questions.

84 The bias that the Chairman of the Disciplinary Board is alleged to have demonstrated

vis-à-vis the applicant during the hearing is not corroborated by any evidence. Consequently, since it has, moreover, been neither alleged nor established that the Disciplinary Board failed in its duty, as an investigative body, to act in an independent and impartial manner (see, in that regard, *F v Commission*, paragraph 16, and Case T-74/96 *Tzoanos v Commission* [1998] ECR-SC I-A-129, II-343, paragraph 340), the applicant's argument must be rejected.

85 Therefore, the fourth part of the plea cannot be accepted.'

11. The Court of First Instance therefore rejected the first plea in law.

The second plea in law: the reasons given were insufficient and the Disciplinary Board infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration

12. The appellant submitted that, while purporting to set out a formal statement of reasons, the Disciplinary Board's opinion and the contested decision were actually vitiated by insufficient reasoning, inasmuch as the arguments raised by him in his defence remained unanswered. In particular, no answer was given to his claims that the second paragraph of Article 17 of the Staff Regulations does not apply to officials taking leave on personal grounds, that the appointing authority incorrectly interpreted Article 12 of the Staff Regulations and that certain statements made by Commission officials were improper and prejudiced the outcome of the proceedings.
13. The Court of First Instance held, in particular, as follows:

'92 Under Article 7 of Annex IX, the Disciplinary Board must, after consideration of the documents submitted and having regard to any statements made orally or in writing by the official concerned and by witnesses, and also to the results of any inquiry undertaken, deliver a reasoned opinion of the disciplinary measure appropriate to the facts complained of.

93 Furthermore, it is settled case-law that the statement of the reasons on which a decision adversely affecting a person is based must allow the Community Courts to exercise their power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded

(Case C-166/95 P *Commission v Daffix* [1997] ECR I-983, paragraph 23; Case C-188/96 P *Commission v V* [1997] ECR I-6561, paragraph 26; and Case T-144/96 *Y v Parliament* [1998] ECR-SC I-A-405, II-1153, paragraph 21). The question whether the statement of reasons on which the measure at issue is based satisfies the requirements of the Staff Regulations must be assessed in the light not only of its wording but also of its context and all the legal rules regulating the matter concerned (*Y v Parliament*, cited above, paragraph 22). It should be emphasised that, although the Disciplinary Board and the appointing authority are required to state the factual and legal matters forming the legal basis for their decisions and the considerations which have led to their adoption, it is not, however, necessary that they discuss all the factual and legal points which have been raised by the person concerned during the proceedings (see, by analogy, Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, paragraph 22).

94 In the present case, the Disciplinary Board's opinion specifically drew attention to the applicant's contention that the second paragraph of Article 17 of the Staff Regulations did not apply in his case since he had been on leave on personal grounds. The reason given by the Disciplinary Board and the appointing authority for the fact that Article 17 did apply was that "every official remains bound [by it]". The reasons for the application of Article 12 of the Staff Regulations are also stated to the requisite legal standard. The Disciplinary Board's opinion and the decision removing the applicant from his post outline the applicant's duties, draw attention to the nature of the statements made in his book and the manner in which he ensured that it would be published, and conclude that, as a whole, the applicant's conduct adversely reflected on his position. The opinion and the decision removing him from his post thus clearly establish a link between the applicant's conduct and the prohibition in Article 12 of the Staff Regulations and set out the essential reasons why the Disciplinary Board and the appointing authority considered that that article had been infringed. The question whether such an assessment is sufficient entails consideration of the merits of the case rather than consideration of the adequacy or otherwise of the statement of reasons.

95 As regards the applicant's complaint regarding the lack of response to his argument that certain statements made by members of the Commission jeopardised the impartial nature of the proceedings against him, the

documents before the Court show that he confined that argument to a submission to the Disciplinary Board that "this situation call[ed] for an exceptional degree of vigilance and independence [on its part]" (Annex A.1 to the application, page 17). The applicant does not allege that, in the present case, the Disciplinary Board failed in its duty as an investigative body to act in an independent and impartial way. Consequently, that complaint is not relevant.

97 The Court must also reject the applicant's argument that the Disciplinary Board's opinion and the decision removing him from his post contain an insufficient statement of reasons in that they state that the applicant "could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union". The dispute concerned an obvious and well-known difference of opinion between the applicant and the Commission regarding the Union's monetary policy (order in *Connolly v Commission*, cited above, paragraph 36) and the book in question, as is clear from the documents before the Court, is the patent expression of that difference of opinion, the applicant writing in particular that "[his] central thesis is that ERM [the Exchange Rate Mechanism] and EMU are not only inefficient but also undemocratic: a danger not only to our wealth but to our four freedoms and, ultimately, our peace" (page 12 of the book).

98 It should be added that the opinion and the decision removing the applicant from his post constituted the culmination of the disciplinary proceedings, the

details of which were sufficiently familiar to the applicant (*Daffix v Commission*, paragraph 34). As is clear from the Disciplinary Board's opinion, the applicant had himself explained at the hearing on 5 December 1995 that for several years he had been describing in documents prepared in the course of his duties as Head of Unit II.D.3 "contradictions which he had identified in the Commission's policies on economic and monetary matters" and that "since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public". Although in his reply the applicant took exception to those statements in the

Disciplinary Board's opinion, it is none the less the case that they are clearly confirmed by the minutes of the hearing, the contents of which he does not dispute (see, specifically, pages 4 to 7 of the minutes of the hearing).

99 In view of those factors, the statement of reasons in the Disciplinary Board's opinion and in the decision removing the applicant from his post cannot, consequently, be regarded as insufficient in that regard.

...

101 Finally, taking account of the factors set out above, there can be no grounds for alleging breach of the principle of sound administration or of the rights of the defence on the basis that the Disciplinary Board conducted its proceedings on the same day as the applicant was heard, since that fact rather tends to show that, on the contrary, the Board acted diligently. It must also be observed that the Disciplinary Board's opinion was finally adopted two days after that hearing.

102 It follows that the plea must be rejected.'

The third plea in law: infringement of Article 11 of the Staff Regulations

14. The appellant submitted that the purpose of Article 11 of the Staff Regulations is not to prohibit officials from receiving royalties from the publication of their work but to ensure their independence by prohibiting them from taking instructions from persons outside their institution. Moreover, in receiving royalties, the appellant did not take instructions from any person outside the Commission.
15. The Court of First Instance held as follows:

'108 In that regard, it is clear both from the applicant's statements to the Disciplinary Board and from the deposition of his publisher submitted by the applicant at that time that royalties on the sales of his book were actually paid to him by his publisher. Therefore, the applicant's argument that there was no infringement of Article 11 of the Staff Regulations on the basis that receipt of those royalties did not result in any person outside his institution exercising influence over him cannot be accepted. Such an argument takes no account of the objective conditions in which the prohibition laid down by the second paragraph of Article 11 of the Staff Regulations operates, namely acceptance of payment of any kind from any person outside the institution, without the permission of the appointing authority. The

Court finds that those conditions were met in the present case.

109 The applicant cannot reasonably maintain that that interpretation of the second paragraph of Article 11 of the Staff Regulations entails a breach of the right to property as laid down in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter "the ECHR").

110 First, it should be observed that in the present case there has been no infringement of the right to property, since the Commission has not confiscated any sums received by the applicant by way of remuneration for his book.

111 Furthermore, according to the case-law, the exercise of fundamental rights, such as the right to property, may be subject to restrictions, provided that the restrictions correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see Case 265/87 Schröder v Haiiptzollamt Gronau [1989] ECR 2237, paragraph 15 and the case-law cited therein). The rules laid down by Article 11 of the Staff Regulations, under which officials must conduct themselves solely with the interests of the Communities in mind, are a response to the legitimate concern to ensure that officials are not only independent but also loyal vis-à-vis their institution (see, in that regard, Case T-273/94 N v Commission [1997] ECR-SC I-A-97, 11-289, paragraphs 128 and 129), an objective whose pursuit justifies the slight inconvenience of obtaining the appointing authority's permission to receive sums from sources outside the institution to which the official belongs.

...

113 There is no evidence at all of the practice which allegedly existed within the Commission of allowing royalties to be received for services provided by officials on leave on personal grounds. Furthermore, that argument is of no relevance in the absence of any contention that the practice concerned applied to works published without the prior permission provided for in Article 17 of the Staff Regulations. The applicant is not maintaining therefore that he had received any clear assurances which might have given him real grounds for expecting that he would not be required to apply for permission under Article 11 of the Staff Regulations.

114 Accordingly, the plea must be rejected.'

The fourth plea in law: infringement of Article 12 of the Staff Regulations

16. The appellant submitted that the complaint that he had infringed Article 12 of the Staff Regulations was unlawful since it was in breach of the principle of freedom of expression laid down in Article 10 of the ECHR, that the book at issue was a work of economic analysis and was not contrary to the interests of the Community, that the Commission misrepresents the scope of the duty of loyalty and that the alleged personal attacks in the book are merely instances of 'lightness of style' in the context of an economic analysis.

17. So far as this plea in law is concerned, the Court of First Instance held as follows:

'124 According to settled case-law, [the first paragraph of Article 12 of the Staff Regulations] is designed, primarily, to ensure that Community officials, in their conduct, present a dignified image which is in keeping with the particularly correct and respectable behaviour one is entitled to expect from members of an international civil service (Case T-146/94 Williams v Court of Auditors [1996] ECR-SC I-A-103, 11-329, paragraph 65; hereinafter "Williams I"; N v Commission, paragraph 127, and Case T-183/96 E v ESC [1998] ECR-SC I-A-67, 11-159, paragraph 39). It follows, in particular, that where insulting remarks are made publicly by an official, which are detrimental to the honour of the persons to whom they refer, that in itself constitutes a reflection on the official's position for the purposes of the first paragraph of Article 12 of the Staff Regulations (order of 21 January 1997 in Case C-156/96 P Williams v Court of Auditors [1997] ECR I-239, paragraph 21; Case T-146/89 Williams v Court of Auditors [1991] ECR 11-1293, paragraphs 76 and 80 (hereinafter "Williams I"), and Williams II, paragraph 66).

125 In the present case, the documents before the Court and the extracts which the Commission has cited show that the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press. Contrary to the appellant's contention, the statements cited by the Commission, and referred to in the appointing authority's report to the Disciplinary Board, cannot be categorised as mere instances of 'lightness of

style" but must be regarded as, in themselves, reflecting on the official's position.

126 The argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the abovementioned complaint when giving reasons for the dismissal is unfounded. Both of them specifically stated in the opinion and in the decision removing Mr Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position". The fact that extracts from the book are not expressly cited in the decision removing the applicant from his post (as they were in the appointing authority's report to the Disciplinary Board) cannot therefore be interpreted as meaning that the complaint concerning an infringement of the first paragraph of Article 12 of the Staff Regulations had been dropped. That is particularly so since the decision removing the applicant from his post constitutes the culmination of disciplinary proceedings, with whose details the applicant was sufficiently familiar and during which, as is clear from the minutes in the file, the applicant had had an opportunity to give his views on the content of the statements found in his book.

127 Further, the first paragraph of Article 12 of the Staff Regulations specifically sets out, as do Articles 11 and 21, the duty of loyalty incumbent upon every official (see *N v Commission*, paragraph 129, approved on appeal by the Court of Justice's order in *Case C-252/97 P N v Commission* [1998] ECR I-4871). Contrary to the applicant's contention, it cannot be concluded from the judgment in *Williams I* that that duty arises only under Article 21 of the Staff Regulations, since the Court of First Instance drew attention in that judgment to the fact that the duty of loyalty constitutes a fundamental duty owed by every official to the institution to which he belongs and to his superiors, a duty "of which Article 21 of the Staff Regulations is a particular manifestation".

Consequently, the Court must reject the argument that the appointing authority could not legitimately invoke, *vis-à-vis* the applicant, a breach of his duty of loyalty, on the ground that the report to the Disciplinary Board did not cite an infringement of Article 21 of the Staff Regulations.

128 Similarly, the Court must reject the argument that the duty of loyalty does not involve preserving the relationship of trust between the official and his institution but involves only loyalty as regards the Treaties. The duty of loyalty requires not only that the official concerned refrains from conduct which reflects on

his position and is detrimental to the respect due to the institution and its authorities (see, for example, the judgment in *Williams I*, paragraph 72, and *Case T-293/94 Vela Palacios v ESC* [1996] ECR-SC I-A-297, 11-893, paragraph 43), but also that he must conduct himself, particularly if he is of senior grade, in a manner that is beyond suspicion in order that the relationship of trust between that institution and himself may at all times be maintained (*N v Commission*, paragraph 129). In the present case, it should be observed that the book at issue, in addition to including statements which in themselves reflected on his position, publicly expressed, as the appointing authority has pointed out, the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty.

129 In that context, it is not reasonable for the applicant to contend that there has been a breach of the principle of freedom of expression. It is clear from the case-law on the subject that, although freedom of expression constitutes a fundamental right which Community officials also enjoy (*Case C-100/88 Oyowe and Traore v Commission* [1989] ECR 4285, paragraph 16), it is nevertheless the case that Article 12 of the Staff Regulations, as construed above, does not constitute a bar to the freedom of expression of those officials but imposes reasonable limits on the exercise of that right in the interest of the service (*E v ESC*, paragraph 41).

130 Finally, it must be emphasised that that interpretation of the first paragraph of Article 12 of the Staff Regulations cannot be challenged on the ground that, in the present case, publication of the book at issue occurred during a period of leave on personal grounds. In that regard, it is clear from Article 35 of the Staff Regulations that leave on personal grounds constitutes one of the administrative statuses which an official may be assigned, with the result that, during such a period, the person concerned remains bound by the obligations borne by every official, in the absence of express provision to the contrary. Since Article 12 of the Staff Regulations applies to all officials, without any distinction based on their status, the fact that the applicant was on such leave cannot release him from his obligations under that article. That is particularly so since an official's concern for the respect due to his position is not confined to the particular time at which he carries out a specific task but is expected from him under all circumstances

(Williams II, paragraph 68). The same is true of the duty of loyalty which, according to the case-law, applies not only in the performance of specific tasks but extends to the whole relationship between the official and the institution (Williams I, paragraph 72 and *E v ESC*, paragraph 47).

131 Accordingly, the appointing authority was fully entitled to take the view that the applicant's behaviour had reflected on his position and involved an irredeemable breach of the trust which the Commission is entitled to expect from its officials.

132 It follows that the plea must be rejected.'

The fifth plea in law: infringement of Article 17 of the Staff Regulations

18. The appellant submitted, inter alia, that the interpretation of the second paragraph of Article 17 of the Staff Regulations on which the Disciplinary Board's opinion and the contested decision are based is contrary to the principle of freedom of expression laid down in Article 10 of the ECHR, in that it leads, inherently, to the prohibition of any publication. Constraints on freedom of expression are permissible only in the exceptional cases listed in Article 10(2) of the ECHR. Furthermore, Article 17 of the Staff Regulations does not apply to officials who are on leave on personal grounds and die appellant was, in any event, justified in believing that to be the case, having regard to the practice followed by the Commission, at least in DG II.
19. The Court of First Instance rejected this plea for the following reasons:

'147 In the present case, it is not disputed that the applicant went ahead with publication of his book without applying for the prior permission required by the provision cited above. However, the applicant, without expressly raising an objection of illegality to the effect that the second paragraph of Article 17 of the Staff Regulations as a whole is unlawful, submits that the Commission's interpretation of the provision is contrary to the principle of freedom of expression.

148 In that regard, it must be recalled that the right to freedom of expression laid down in Article 10 of the ECHR constitutes, as has already been made clear, a fundamental right, the observance of which is guaranteed by the Community Courts and which Community officials also enjoy (*Oyowe and Traore v Commission*, paragraph 16, and *E v ESC*, paragraph 41).

None the less, it is also clear from settled case-law that fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general public interest pursued by the Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights protected (see *Schräder v Hauptzollamt Gronau*, paragraph 15; *Case C-404/92 P X v Commission* [1994] ECR I-4737, paragraph 18; *Case T-176/94 K v Commission* [1995] ECR-SC I-A-203, II-621, paragraph 33; and *N v Commission*, paragraph 73).

149 In the light of those principles and the case-law on Article 12 of the Staff Regulations (see paragraph 129 above and *E v ESC*, paragraph 41), the second paragraph of Article 17 of the Staff Regulations, as interpreted by the decision removing the applicant from his post, cannot be regarded as imposing an unwarranted restriction on the freedom of expression of officials.

150 First, it must be emphasised that the requirement that permission be obtained prior to publication corresponds to the legitimate aim that material dealing with the work of the Communities should not undermine their interests and, in particular, as in the present case, the reputation and image of one of the institutions.

151 Second, the second paragraph of Article 17 of the Staff Regulations does not constitute a disproportionate measure in relation to the public-interest objective which the article concerned seeks to protect.

152 In that connection, it should be observed at the outset that, contrary to the applicant's contention, it cannot be inferred from the second paragraph of Article 17 of the Staff Regulations that the rules it lays down in respect of prior permission thereby enable the institution concerned to exercise unlimited censorship. First, under that provision, prior permission is required only when the material that the official wishes to publish, or to have published, "[deals] with the work of the Communities". Second, it is clear from that provision that there is no absolute prohibition on publication, a measure which, in itself, would be detrimental to the very substance of the right to freedom of expression. On the contrary, the last sentence of the second paragraph of Article 17 of the Staff Regulations sets out clearly the principles governing the grant of permission, specifically providing that permis-

sion may be refused only where the publication in point is liable to prejudice the interests of the Communities. Moreover, such a decision may be contested under Articles 90 and 91 of the Staff Regulations, so that an official who takes the view that he was refused permission in breach of the Staff Regulations is able to have recourse to the legal remedies available to him with a view to securing review by the Community Courts of the assessment made by the institution concerned.

153 It must also be emphasised that the second paragraph of Article 17 of the Staff Regulations is a preventive measure designed on the one hand, to ensure that the Communities' interests are not jeopardised, and, on the other, as the Commission has rightly pointed out, to make it unnecessary for the institution concerned, after publication of material prejudicing the Communities' interests, to take disciplinary measures against an official who has exercised his right of expression in a way that is incompatible with his duties.

154 In the present case, the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with that provision on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and had damaged the institution's image and reputation.

155 In the light of all those considerations, therefore, it cannot be inferred from the decision removing the applicant from his post that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced. Accordingly there is nothing to indicate that the scope attributed by the appointing authority to that provision goes further than the aim pursued and is therefore contrary to the principle of freedom of expression.

156 In those circumstances, the plea alleging breach of the right to freedom of expression must be rejected.

157 The argument that the second paragraph of Article 17 of the Staff Regulations does not apply to officials who are on leave on personal grounds is also unfounded. As pointed out above (paragraph 130), it follows from Article 35 of the Staff Regulations that an official

on such leave retains his status as an official throughout the period of leave and therefore remains bound by his obligations under the regulations in the absence of express provision to the contrary. The second paragraph of Article 17 of the Staff Regulations applies to all officials and does not draw any distinction based on the status of the person concerned. Consequently, the fact that the applicant was on leave on personal grounds when his book was published does not release him from his obligation under the second paragraph of Article 17 of the Staff Regulations to request permission from the appointing authority prior to publication.

158 That interpretation is not undermined by the fact that, unlike the second paragraph of Article 17 of the Staff Regulations, the first paragraph thereof expressly provides that an official continues to be bound by his duty of confidentiality after leaving the service. An official on leave on personal grounds is not comparable to an official whose service has terminated, as provided in Article 47 of the Staff Regulations, and who, therefore, does not fall within any of the administrative statuses listed in Article 35 of the Staff Regulations.

...

160 Accordingly, the Disciplinary Board and the appointing authority were right to find that the applicant had infringed the second paragraph of Article 17 of the Staff Regulations.

161 Finally, the applicant's allegation that a general practice existed in the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission for publication, is in no way substantiated by the statement cited by him. In that statement, the former Director-General of DG II confines himself to saying that Mr Connolly had taken unpaid leave of one year in 1985 in order to work for a private financial institution and, during that period, he had not considered it necessary to approve the texts prepared by Mr Connolly for that institution or even to comment on them. It follows that there is no basis for the argument.

162 Consequently, the plea must be rejected.'

The sixth plea in law: manifest error of assessment and breach of the principle of proportionality

20. The appellant claimed that the contested decision was vitiated by a manifest error of assess-

ment as to the facts and that it was in breach of the principle of proportionality, in that it failed to take account of various mitigating circumstances.

21. The Court of First Instance held as follows:

'165 It is settled case-law that once the truth of the allegations against the official has been established, the choice of appropriate disciplinary measure is a matter for the appointing authority and the Community Courts may not substitute their own assessment for that of the authority, save in cases of manifest error or a misuse of powers (Case 46/72 *De Greef v Commission* [1973] ECR 543, paragraph 45; *F v Commission*, paragraph 34; *Williams I*, paragraph 83; and *D v Commission*, paragraph 96). It must also be borne in mind that the determination of the penalty to be imposed is based on a comprehensive appraisal by the appointing authority of all the particular facts and circumstances peculiar to each individual case, since Articles 86 to 89 of the Staff Regulations do not specify any fixed relationship between the measures provided for and the various sorts of infringements and do not state the extent to which the existence of aggravating or mitigating circumstances should affect the choice of penalty (Case 403/85 *F v Commission* [1987] ECR 645, paragraph 26; *Williams I*, paragraph 83; and *Y v Parliament*, paragraph 34).

166 In the present case, it must be first be pointed out that the truth of the allegations against the applicant has been established.

167 Second, the penalty imposed cannot be regarded as either disproportionate or as resulting from a manifest error of assessment. Even though it is not disputed that the applicant had a good service record, the appointing authority was nevertheless fully entitled to find that, having regard to the gravity of the facts established and the applicant's grade and responsibilities, such a factor was not capable of mitigating the penalty to be imposed.

168 Furthermore, the applicant's argument that account should have been taken of his good faith regarding what he believed to be the scope of the duties of an official on leave on personal grounds cannot be accepted. It is clear from the case-law that officials are deemed to know the Staff Regulations (Case T-12/94 *D affix v Commission* [1997] ECR-SC I-A-453, II-1197, paragraph 116; *Joined Cases T-116/96, T-212/96 and T-215/96 Telehint and Others v Commission* [1998] ECR-SC I-A-327, II-947, paragraph 59), with the result that their alleged ignorance of their obligations cannot

constitute good faith. That argument has even less force in the present case since the applicant has admitted that his colleagues knew of his intention to work on the book at issue during his leave on personal grounds, whereas, in his request to the appointing authority under Article 40 of the Staff Regulations, he had given reasons unconnected with his book. Given that such statements are contrary to the honesty and trust which should govern relations between the administration and officials and are incompatible with the integrity which each official is required to show (see, to that effect, *Joined Cases 175/86 and 209/86 M v Council* [1988] ECR 1891, paragraph 21), the appointing authority was entitled to treat the applicant's argument concerning his alleged good faith as unfounded.

169 Consequently, the plea must be rejected.'

The seventh plea in law: misuse of powers

22. Finally, the appellant asserted that there was a body of evidence establishing misuse of powers.
23. In rejecting this plea, the Court of First Instance gave the following grounds:

'171 According to the case-law, a misuse of powers consists in an administrative authority using its powers for a purpose other than that for which they were conferred on it. Thus, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent indicia, to have been taken for purposes other than those stated (*Williams I*, paragraphs 87 and 88).

172 As regards the statements made by certain members of the Commission before commencement of the disciplinary proceedings, it need merely be observed that... those statements constituted no more than a provisional assessment by the relevant members of the Commission and could not, in the circumstances of the case, adversely affect the proper conduct of the disciplinary proceedings.

173 Nor can the applicant's argument that the Commission should have warned him of the risks that he was running by publishing his book be accepted. The Commission rightly points out that it cannot be held liable for initiatives which the applicant had taken care to conceal from it when he requested leave on personal grounds. Furthermore, the arguments alleging that there were irregularities in the disciplinary proceedings and that the

applicant acted in good faith must also be rejected for the reasons set out in connection with the first and sixth pleas.

174 As to the argument alleging that the Commission changed the general rules for calculating salary reductions in cases of suspension, it need merely be pointed out that the change was not specifically linked to the applicant's removal from his post and cannot therefore constitute proof of the alleged misuse of powers.

175 Accordingly, it has not been established that, when imposing the disciplinary measure, the appointing authority pursued any aim other than that of safeguarding the internal order of the Community civil service. The seventh plea must therefore be rejected.'

24. The Court of First Instance therefore rejected the pleas for annulment and, consequently, the claim for damages.
25. Accordingly, the Court of First Instance dismissed the application and ordered each of the parties to bear its own costs.

THE APPEAL

26. Mr Connolly claims that the Court of Justice should:
 - set aside the contested judgment;
 - annul so far as necessary the opinion of the Disciplinary Board;
 - annul the contested decision;
 - annul the decision of 12 July 1996 rejecting his administrative complaint;
 - order the Commission to pay him BEF 7 500 000 in respect of material damage and BEF 1 500 000 in respect of non-material damage;
 - order the Commission to pay the costs both of the proceedings before the Court of First Instance and of the present proceedings.
27. The Commission contends that the Court of Justice should
 - dismiss the appeal as partially inadmissible and, in any event, as entirely unfounded;
 - dismiss the claim for damages as inadmissible and unfounded;
 - order Mr Connolly to pay the costs in their entirety.

28. In his appeal the appellant puts forward 13 grounds of appeal.

The first ground of appeal

29. By his first ground of appeal, Mr Connolly complains that the Court of First Instance failed to take account of the fact that Articles 12 and 17 of the Staff Regulations establish a system of prior censorship which is, in principle, contrary to Article 10 of the ECHR as interpreted by the European Court of Human Rights (hereinafter 'the Court of Human Rights').
30. Furthermore, that system does not incorporate the substantive and procedural conditions required by Article 10 of the ECHR whenever a restriction is imposed on freedom of expression as safeguarded by that provision. In particular, it fails to comply with the requirement that any restriction must pursue a legitimate aim, must be prescribed by a legislative provision which makes the restriction foreseeable, must be necessary and appropriate to the aim pursued and must be amenable to effective judicial review.
31. The appellant also complains that the Court of First Instance neither balanced the interests involved nor ascertained whether the contested decision was actually justified by a pressing social need. In that regard, the appellant submits that if that decision was taken in order to safeguard the interests of the institution and the people affected by the book at issue, then, to be effective, it should have been accompanied by measures designed to prevent distribution of the book. Such measures were not, however, adopted by the Commission.
32. The Commission contends, as a preliminary point, that the first ground of appeal should be rejected as inadmissible on the ground that it is concerned with the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations rather than with the Court of First Instance's interpretation thereof. At no time during the proceedings at first instance did the appellant specifically raise an objection of illegality under Article 241 EC.
33. As to the substance, the Commission contends that Article 17 contains all the safeguards needed to meet the requirements of Article 10 of the ECHR and that, as the Court of First Instance held in paragraphs 148 to 154 of the contested judgment, it is confined to imposing reasonable limits on freedom of publication in cases where the interests of the Community

might be adversely affected.

The admissibility of the ground of appeal

34. It is true that, in his first ground of appeal, the appellant appears to be challenging, by reference to Article 10 of the ECHR, the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations, even though before the Court of First Instance, as indicated in paragraph 147 of the contested judgment, he only contested the Commission's 'interpretation' of the second paragraph of Article 17 of the Staff Regulations as being contrary to freedom of expression.
35. Nevertheless, before the Court of First Instance, the appellant, by reference to the requirements of Article 10 of the ECHR, challenged the way in which the second paragraph of Article 17 of the Staff Regulations was applied in his case. Before this Court, he is criticising the reasoning of the contested judgment to justify rejection of his plea alleging failure to observe the principle of freedom of expression.
36. The first ground of appeal must therefore be held to be admissible.

Substance

37. First, according to settled case-law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, in particular, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41).
38. Those principles have, moreover, been restated in Article 6(2) of the Treaty on European Union, which provides: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'
39. As the Court of Human Rights has held, 'Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the ECHR], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"' (Eur. Court H. R. Handyside v United Kingdom judgment of 7 December 1976, Series A no. 24, § 49; Müller and Others judgment of 24 May 1988, Series A no. 133, § 33; and Vogt v Germany judgment of 26 September 1995, Series A no. 323, § 52).
40. Freedom of expression may be subject to the limitations set out in Article 10(2) of the ECHR, in terms of which the exercise of that freedom, 'since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.
41. Those limitations must, however, be interpreted restrictively. According to the Court of Human Rights, the adjective 'necessary' involves, for the purposes of Article 10(2), a 'pressing social need' and, although '[t]he contracting States have a certain margin of appreciation in assessing whether such a need exists', the interference must be 'proportionate to the legitimate aim pursued' and 'the reasons adduced by the national authorities to justify it' must be 'relevant and sufficient' (see, in particular, Vogt v Germany, § 52; and Wille v Liechtenstein judgment of 28 October 1999, no 28396/95, § 61 to § 63). Furthermore, any prior restriction requires particular consideration (see Wingrove v United Kingdom judgment of 25 November 1996, Reports of Judgments and Decisions 1996-V, p. 1957, § 58 and § 60).
42. Furthermore, the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their conduct, taking, if need be, appropriate advice (Eur. Court H. R. Sunday Times v United Kingdom judgment of 26 April 1979, Series A no. 30, § 49).

43. As the Court has ruled, officials and other employees of the European Communities enjoy the right of freedom of expression (see *Oyowe and Traore v Commission*, paragraph 16), even in areas falling within the scope of the activities of the Community institutions. That freedom extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.
44. However, it is also legitimate in a democratic society to subject public servants, on account of their status, to obligations such as those contained in Articles 11 and 12 of the Staff Regulations. Such obligations are intended primarily to preserve the relationship of trust which must exist between the institution and its officials or other employees.
45. It is settled that the scope of those obligations must vary according to the nature of the duties performed by the person concerned or his place in the hierarchy (see, to that effect, *Wille v Liechtenstein*, § 63, and the opinion of the Commission of Human Rights in its report of 11 May 1984 in *Glasesapp v Germany*, Series A no. 104, § 124).
46. In terms of Article 10(2) of the ECHR, specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.
47. That is the aim of the regulations setting out the duties and responsibilities of the European public service. So an official may not, by oral or written expression, act in breach of his obligations under the regulations, particularly Articles 11, 12 and 17, towards the institution that he is supposed to serve. That would destroy the relationship of trust between himself and that institution and make it thereafter more difficult, if not impossible, for the work of the institution to be carried out in cooperation with that official.
48. In exercising their power of review, the Community Courts must decide, having regard to all the circumstances of the case, whether a fair balance has been struck between the individual's fundamental right to freedom of expression and the legitimate concern of the institution to ensure that its officials and agents observe the duties and responsibilities implicit in the performance of their tasks.
49. As the Court of Human Rights has held in that regard, it must '[be borne in mind] that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10(2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim' (see *Eur. Court H. R. Vogt v Germany*, cited above; *Ahmed and Others v United Kingdom* judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2378, § 56; and *Wille v Liechtenstein*, cited above, § 62).
50. The second paragraph of Article 17 of the Staff Regulations must be interpreted in the light of those general considerations, as was done by the Court of First Instance in paragraphs 148 to 155 of the contested judgment.
51. The second paragraph of Article 17 requires permission for publication of any matter dealing with the work of the Communities. Permission may be refused only where the proposed publication is liable to prejudice the interests of the Communities'. That eventuality, referred to in a Council regulation in restrictive terms, is a matter that falls within the scope of the protection of the rights of others', which, according to Article 10(2) of the ECHR as interpreted by the Court of Human Rights, is such as to justify restricting freedom of expression.
- Consequently, the appellant's allegations that the second paragraph of Article 17 of the Staff Regulations does not pursue a legitimate aim and that the restriction of freedom of expression is not prescribed by a legislative provision must be rejected.
52. The fact that the restriction at issue takes the form of prior permission cannot render it contrary, as such, to the fundamental right of freedom of expression, as the Court of First Instance held in paragraph 152 of the contested judgment.
53. The second paragraph of Article 17 of the Staff Regulations clearly provides that, in principle, permission is to be granted, refusal being possible only in exceptional cases. Indeed, in so far as that provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted re-

- strictly and applied in strict compliance with the requirements mentioned in paragraph 41 above. Thus, permission to publish may be refused only where publication is liable to cause serious harm to the Communities' interests.
54. Furthermore, as their scope is restricted to publications dealing with the work of the Communities, the rules are designed solely to allow the institution to keep itself informed of the views expressed in writing by its officials or other employees about its work so as to satisfy itself that they are carrying out their duties and conducting themselves with the interests of the Communities in mind and not in a way that would adversely reflect on their position.
 55. Remedies against a decision refusing permission are available under Articles 90 and 91 of the Staff Regulations. There is thus no basis for the appellant to claim, as he does, that the rules in Article 17 of the Staff Regulations are not amenable to effective judicial review. Review of that kind enables the Community Courts to ascertain whether the appointing authority has exercised its power under the second paragraph of Article 17 of the Staff Regulations in strict compliance with the limitations to which any interference with the right to freedom of expression is subject.
 56. Such rules reflect the relationship of trust which must exist between employers and employees, particularly when they discharge high-level responsibilities in the public service. The way in which the rules are applied can be assessed solely in the light of all the relevant circumstances and the implications thereof for the performance of public duties. In that respect, the rules meet the criteria set out in paragraph 41 above for the acceptability of interference with the right to freedom of expression.
 57. It is also clear from the foregoing that, when applying the second paragraph of Article 17 of the Staff Regulations, the appointing authority must balance the various interests at stake and is in a position to do so by taking account, in particular, of the gravity of the potential prejudice to the interests of the Communities.
 58. In the present case, the Court of First Instance found, in paragraph 154 of the contested judgment, that 'the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with [the second paragraph of Article 17 of the Staff Regulations] on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and damaged the institution's image and reputation.'
 59. In relation to the latter infringement, the Court of First Instance observed first, in paragraph 125 of the contested judgment, that 'the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press.' The Court of First Instance was thus entitled to reach the conclusion, on the basis of an assessment which cannot be challenged on appeal, that those statements constituted an infringement of Article 12 of the Staff Regulations.
 60. The Court of First Instance then referred, in paragraph 128 of the contested judgment, not only to Mr Connolly's high-ranking grade but also to the fact that the book at issue 'publicly expressed... the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty'.
 61. Finally, the Court of First Instance made it clear, in paragraph 155 of the contested judgment, that it had not been established 'that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced'.
 62. The foregoing observations of the Court of First Instance, based on the statement of reasons in the preamble to the contested decision (see, in particular, the fifth, sixth, ninth, tenth, twelfth and fifteenth recitals to that decision), make it clear that Mr Connolly was dismissed not merely because he had failed to apply for prior permission, contrary to the requirements of the second paragraph of Article 17 of the Staff Regulations, or because he had expressed a dissentient opinion, but because he had published, without permission, material in which he had severely criticised, and even insulted, members of the Commission and other superiors and had challenged fundamental aspects

of Community policies which had been written into the Treaty by the Member States and to whose implementation the Commission had specifically assigned him the responsibility of contributing in good faith. In those circumstances, he committed an irremediable breach of the trust which the Commission is entitled to expect from its officials' and, as a result, made it impossible for any employment relationship to be maintained with the institution' (see the 15th recital to the decision removing Mr Connolly from his post).

63. As to the measures intended to prevent distribution of the book, which, the appellant claims, the Commission should have adopted in order to protect its interests effectively, suffice it to say that the adoption of such measures would not have restored the relationship of trust between the appellant and the institution and would have made no difference to the fact that it had become impossible for him to continue to have any sort of employment relationship with the institution.
64. It follows that the Court of First Instance was entitled to conclude, as it did in paragraph 156 of the contested judgment, that the allegation of breach of the right to freedom of expression, resulting from the application thereto of the second paragraph of Article 17 of the Staff Regulations, was unfounded.
65. The first ground of appeal must therefore be rejected.

The second ground of appeal

66. By his second ground of appeal, the appellant claims that the Court of First Instance (in paragraph 157 of the contested judgment) failed to apply the second paragraph of Article 17 and Article 35 of the Staff Regulations correctly by holding that officials on leave on personal grounds were also required to obtain permission prior to publishing material. It is the appellant's contention that, on the contrary, the fact of being on leave on personal grounds releases the official from the requirement of complying with the second paragraph of Article 17 of the Staff Regulations.
67. The appellant also complains that the Court of First Instance did not give reasons for rejecting his offer of evidence as to the practice followed in DG II at the Commission and thus infringed the principle of legitimate expectations.

68. In that regard, paragraph 161 of the contested judgment indicates that, to establish the existence of a general practice within the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission, the appellant relied merely on the fact that in 1985 he had been granted one year's leave in order to work for a private financial institution and that the former Director-General of DG II had not deemed it necessary to approve or comment on the texts prepared by him for that institution. It cannot be concluded from that fact alone that the Court of First Instance has in any way distorted the evidence adduced by the appellant.
69. Moreover, it is patently clear from the wording of Article 35 of the Staff Regulations that an official on leave on personal grounds does not lose his status as an official during the period of leave. He therefore remains subject to the obligations incumbent upon every official, unless express provision is made to the contrary.
70. Consequently, the second ground of appeal must be rejected as manifestly unfounded.

The third ground of appeal

71. By his third ground of appeal, the appellant complains that the Court of First Instance failed to apply the second paragraph of Article 11 of the Staff Regulations correctly in that it equated royalties with remuneration for the purposes of that provision.
72. In the first part of this ground of appeal, the appellant maintains that that interpretation is wrong since royalties do not constitute consideration for services rendered and do not undermine an official's independence.
73. He asserts in the second part of this ground of appeal that the Court of First Instance's interpretation entails a breach of the right to property laid down by Article 1 of the First Protocol to the ECHR.
74. Finally, by the third part of this ground of appeal, the appellant complains that in paragraph 113 of the contested judgment the Court of First Instance misapplied Article 11 in making its application subordinate to the rules on prior permission laid down in Article 17 of the Staff Regulations. He submits that Article 11 applies independently of Article 17.
75. So far as the first two parts of this ground of appeal are concerned, the appellant confines

himself to reproducing the arguments and submissions made before the Court of First Instance without developing any specific argument that identifies the error of law that is said to vitiate the contested judgment.

76. Since the first two parts of the third ground of appeal in reality seek no more than a re-examination of the submissions made before the Court of First Instance, which under Article 51 of the EC Statute of the Court of Justice the Court does not have jurisdiction to undertake, they must be rejected as inadmissible (see Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraph 35).
77. The third part of this ground of appeal, as the Advocate General observed in point 32 of his Opinion, concerns reasoning which the Court of First Instance included only for the sake of completeness in the second sentence of paragraph 113 of the contested judgment. The Court of First Instance ruled principally that the appellant had not proved the existence of the alleged practice of the Commission to permit officials on leave on personal grounds to receive royalties. That reasoning was a sufficient answer in law to the appellant's argument. The complaint concerning the second sentence of paragraph 113 of the contested judgment must, therefore, be held on any view to be ineffectual.
78. Consequently, the third ground of appeal must be rejected in its entirety as manifestly inadmissible.

The fourth ground of appeal

79. The fourth ground of appeal comprises three parts.
80. In the first part, the appellant complains that in paragraphs 125 and 126 of the contested judgment the Court of First Instance itself continued the investigative phase of the disciplinary proceedings and substituted its assessment of the facts for that of the disciplinary authority by accepting outright a number of the complaints concerning the contents of the book which had been made by the Commission during the disciplinary procedure, although neither the Disciplinary Board's opinion nor the contested decision included an express statement of reasons regarding the allegedly insulting nature of the book. Furthermore, the contested judgment merely reproduced those complaints without verifying whether they were well

founded.

81. In paragraph 126 of the contested judgment, the Court of First Instance rejected the appellant's argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the allegations that the book at issue was aggressive, derogatory and insulting. According to the Court of First Instance both bodies specifically stated in the opinion and in the decision removing Mr Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position". That statement must be read in the light of the appointing authority's report to the Disciplinary Board which, as the Advocate General observed in point 35 of his Opinion, includes an appraisal, in essence identical to that made by the Court of First Instance in paragraph 125 of the contested judgment, of the aggressive, derogatory, even insulting, nature of certain passages of the book (see, in particular, paragraphs 25 and 26 of the appointing authority's report).
82. The appellant is therefore mistaken when he claims that the Court of First Instance substituted its own assessment for that of the appointing authority by formulating fresh allegations against him.
83. Furthermore, provided the evidence has not been misconstrued and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, findings of fact are not, in principle, subject to review by the Court of Justice in an appeal (see Case C-7/95 P Deere v Commission [1998] ECR I-3111, paragraph 22).
84. The first part of the fourth ground of appeal must therefore be rejected.
85. By the second part of this ground of appeal, Mr Connolly complains that the Court of First Instance found in paragraph 128 of the contested judgment that the book in question publicly expressed 'his fundamental opposition to the Commission's policy, which it was his responsibility to implement' with the result that the relationship of trust between the appellant and his institution was destroyed.
86. According to the appellant, that charge was not made against him in the disciplinary proceedings. Furthermore, if any expression of dissent from the policy of a Community institution on the part of one of its officials were regarded as a breach of the duty of loyalty, free-

dom of expression as laid down in Article 10 of the ECHR would become meaningless. Besides, Mr Connolly's responsibility was not to implement Commission policy but, as stated in the Disciplinary Board's opinion, was 'monitoring monetary policy in the Member States and analysing progress towards economic and monetary union'.

87. As to that, it is sufficient to note that the finding of the Court of First Instance of which the appellant complains is also, as the Commission rightly points out, to be found, in essence, in the eighth recital to the opinion of the Disciplinary Board and in the tenth recital to the contested decision. Assessment of the nature of Mr Connolly's duties is a question of fact on which the Court of Justice cannot rule in an appeal.
88. The alleged breach of the principle of freedom of expression and the restrictions which may exceptionally be imposed on it are dealt with at paragraphs 37 to 64 of the present judgment, relating to the first ground of appeal.
89. The second part of the fourth ground of appeal must therefore also be rejected.
90. By the third part of this ground of appeal, the appellant asserts that in paragraph 126 of the contested judgment the Court of First Instance was wrong to hold that the Disciplinary Board and the appointing authority had not abandoned their complaint relating to an infringement of Article 12 of the Staff Regulations, since the Commission has acknowledged, in its defence, that it had decided not to proceed with the allegation of breach of confidentiality.
91. Irrespective of the arguments relied on by the Commission in this appeal — and it disputes the appellant's interpretation thereof — it is clear from the grounds set out by the Court of First Instance in paragraph 126 of the contested judgment and approved in paragraph 81 of the present judgment, that neither the Disciplinary Board nor the appointing authority abandoned the allegation of infringement of Article 12 of the Staff Regulations.
92. Therefore, the third part of this ground of appeal cannot be upheld.
93. Consequently, the fourth ground of appeal must be dismissed as being partly inadmissible and partly unfounded.

The fifth ground of appeal

94. By his fifth ground of appeal, the appellant complains that in paragraph 44 of the contested judgment the Court of First Instance held that the appointing authority's report included 'the contents of the book among the facts complained of' in that they expounded economic theories which were at odds with the policy adopted by the Commission and that the Court thus failed to give the requisite credence to the appointing authority's report, paragraph 25 of which referred solely to 'derogatory and unsubstantiated attacks'.
95. The appellant's claim that the Court of First Instance was confused cannot be upheld since in paragraph 44, having cited certain passages from the appointing authority's report for the Disciplinary Board, it confined itself to stating that the very contents of the book at issue, in particular its polemical nature, were among the facts alleged against the appellant.
96. The fifth ground of appeal is therefore completely unfounded.

The sixth ground of appeal

97. The sixth ground of appeal comprises two parts.
98. By the first part, the appellant accuses the Court of First Instance of having, in paragraphs 97 and 98 of the contested judgment, failed to give due credence to the documents in the case by dealing with a complaint which had not been established in the course of the disciplinary proceedings, namely that a difference of opinion had been expressed between Mr Connolly and the Commission regarding the introduction of economic and monetary union, and by relying for that purpose on a quotation from the book at issue — in this instance, page 12 — which does not appear in the documents in the case.
99. It must be pointed out, as the Court of First Instance did in paragraphs 97 and 98 of the contested judgment, that the appellant's disagreement with the Commission's policy was obvious, as evidenced by the passage cited from the book, which was manifestly part of the case-file, and that the appellant himself gave an explanation of it before the Disciplinary Board (see the minutes of the hearing on 5 December 1995, pages 4 to 7).

100. In any event purely factual appraisals of that kind are not subject to review by the Court of Justice in an appeal.
101. In the second part of the fifth ground of appeal, the appellant maintains that in paragraph 98 of the contested judgment the Court of First Instance wrongly attributed to him certain statements which he had not made, to the effect that: 'since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public'.
102. The material accuracy of that statement, which is taken verbatim from the Disciplinary Board's opinion on which the Court of First Instance's assessment is based, cannot be challenged solely on the basis of a mere affirmation unsupported by precise and coherent evidence to the contrary. As the Court of First Instance observed in paragraph 98 of the contested judgment, that statement is, furthermore, confirmed by the minutes of the hearing on 5 December 1995 (pages 4 to 7), the contents of which were not disputed by the appellant.
103. Consequently, the sixth ground of appeal must be rejected as partially inadmissible and partially unfounded.

The seventh ground of appeal

104. By his seventh ground of appeal, Mr Connolly disputes the Court of First Instance's finding in paragraph 47 of the contested judgment that, at his final hearing before the appointing authority on 9 January 1996, he neither claimed that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened. According to the appellant, it is clear from the minutes of the hearing that in the course of it his adviser provided the appointing authority with the submissions lodged with the Disciplinary Board, in which he applied for the proceedings to be stayed and for the case to be referred back to the appointing authority for a rehearing in the event of the Board seeking to rely on a material breach of Article 12 of the Staff Regulations.
105. Irrespective of whether this ground of appeal is admissible, the appellant's argument does

not, in any event, prove that paragraph 47 of the contested judgment is vitiated by an error of assessment. That paragraph merely states that at the hearing on 9 January 1996 the appellant neither contended that the opinion of the Disciplinary Board was founded on new complaints nor applied for the disciplinary proceedings to be reopened. The Court of First Instance's finding cannot be challenged on the basis that the appellant produced at that hearing the submissions lodged with the Disciplinary Board, in which he generally reserved his position in the event of new complaints being put forward in the future.

106. The seventh ground of appeal must therefore be rejected. The eighth ground of appeal
107. By his eighth ground of appeal, the appellant claims that in paragraph 48 of the contested judgment the Court of First Instance failed to respond adequately to his plea alleging that the second paragraph of Article 87 of the Staff Regulations had not been complied with in that he had not previously been heard in relation to two matters, namely the article published by The Times newspaper on 6 September 1995 and the interview given to a television journalist on 26 September 1995.
108. In that regard, it is clear from paragraph 48 of the contested judgment that the Court of First Instance addressed the argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995'. Furthermore, as regards the arguments put forward in support of the eighth ground of appeal, it need merely be pointed out that paragraph 19 of the report to the Board specifically refers to the facts on which the appellant relies.
109. Even if the appellant's plea at first instance, whose terms were indeed not particularly clear, be taken as meaning that, contrary to the requirements of the second paragraph of Article 87 of the Staff Regulations, he had not been heard on the two matters in question before the report for the Disciplinary Board was drawn up, suffice it to note that in paragraph 9 of the contested judgment the Court of First Instance stated that, by letter of 13 September 1995, the appointing authority invited the appellant to attend a hearing on the facts at issue in the light of his obligations under Articles 11, 12 and

17 of the Staff Regulations and that at the hearing on 26 September 1995 he refused to answer any of the questions put to him and filed a written statement, the contents of which are summarised in paragraph 10 of the contested judgment. It was only after that second hearing, that is to say on 4 October 1995, that the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX.

110. The eighth ground of appeal must therefore be rejected as manifestly unfounded.

The ninth ground of appeal

111. By his ninth ground of appeal, the appellant criticises the Court of First Instance for stating in paragraph 74 of the contested judgment that it was permissible for the rapporteur to present his report orally to other members of the Disciplinary Board and that at several points (in paragraphs 74, 84, 95 and 101 of the contested judgment) the Court objected that the appellant had not provided any proof to support his allegation that the Disciplinary Board and its Chairman had performed their task in a superficial and biased manner, despite the offers of proof in both his application and reply.

112. As regards the fact that the Disciplinary Board did not produce a report, the Court must reiterate the finding made by the Court of First Instance in paragraph 74 of the contested judgment that 'Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties.' The Court of First Instance was therefore correct to infer that 'there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board'.

113. As to the allegation that the Court of First Instance failed to comply with the rules relating to the burden of proof and the taking of evidence, an allegation intended in the present case to establish a lack of independence and impartiality on the part of the Disciplinary Board, it must be pointed out that, as a general rule, in order to satisfy the Court as to a party's claims or, at the very least, as to the need for the Court itself to take evidence, it is not sufficient merely to refer to certain facts in support

of the claim. There must also be adduced sufficiently precise, objective and consistent indicia of their truth or probability.

114. The Court of First Instance's appraisal of the evidence produced to it does not constitute, save where the sense of the evidence has been distorted — and no such distortion has been proved by Mr Connolly in this case — a point of law which is subject, as such, to review by the Court of Justice (Case C-362/95 P *Blackspur DIY and Others v Council and Commission* [1997] ECR I-4775, paragraph 29).

115. Consequently, the ninth ground of appeal must be rejected. The tenth ground of appeal

116. By his tenth ground of appeal the appellant claims that the Court of First Instance, first, refused in paragraph 174 of the contested judgment to grant his application for production of a memorandum dated 28 July 1995 on the calculation of salary reductions in cases of suspension although that memorandum would have helped him to establish that the Commission had misused its powers and, second, held that the memorandum did not 'specifically' concern Mr Connolly's dismissal, even though neither of the parties had produced the memorandum in the proceedings. The Court of First Instance infringed the rights of the defence and unlawfully made use of a fact of which it had 'special knowledge'.

117. In the absence of objective, relevant and consistent indicia, which it is for the Court of First Instance alone to assess, that Court was entitled to refuse the application for production of the Commission's memorandum altering the general rules for calculating salary reductions in cases in which officials are suspended, which, by reason of its very subject-matter, did not concern either dismissals in general or the appellant's particular situation following the measure removing him from his post.

118. The tenth ground of appeal must therefore be rejected as manifestly unfounded.

The eleventh ground of appeal

119. By his eleventh ground of appeal, the appellant disputes paragraphs 172 to 175 of the contested judgment on the ground that the Court of First Instance failed to answer various arguments capable of establishing that the disciplinary proceedings were vitiated by a misuse of powers. The arguments relied on

- concerned 'parallel proceedings', the failure to reply to the question concerning the exact scope of the disciplinary proceedings in relation to Articles 11, 12 and 17 of the Staff Regulations', the absence of a logical connection between the premisses and the conclusions drawn in relation to the disciplinary proceedings', the fact that 'the Commission maintained in its pleadings that the Disciplinary Board was not even obliged to read the contested book' and 'the deliberate and provocative appointment of the Secretary-General as Chairman of the Disciplinary Board'.
120. In that regard, it is clear from paragraphs 171 to 175 of the contested judgment that the Court of First Instance did not regard the appellant's arguments as objective, relevant and consistent *indicia* 'capable of supporting his argument that the disciplinary measure imposed on him pursued an aim other than that of safeguarding the internal order of the Community public service. The grounds set out in the contested judgment must, in light of the circumstances of the case, be regarded as a proper response to the appellant's arguments and, therefore, as being sufficient to enable the Court of Justice to exercise its power of review.
121. As the Advocate General observed in point 61 of his Opinion, although the Court of First Instance is required to give reasons for its decisions, it is not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence. In that regard, the appellant has not proved, or even asserted, that the arguments referred to in paragraph 119 of this judgment meet those requirements or that they were supported by evidence which was distorted by the Court of First Instance, or that in its assessment of that evidence the Court of First Instance contravened the rules of procedure or general legal principles concerning the burden of proof or the taking of evidence.
122. In those circumstances, the eleventh ground of appeal must be rejected. The twelfth ground of appeal
123. By his twelfth ground of appeal, the appellant asserts that the reasoning in paragraph 155 of the contested judgment is logically flawed in that the Court of First Instance inferred a previously unknown fact from one that was uncertain, whereas a properly drawn presumption involves an unknown fact being inferred from one that is certain. Furthermore, a negative inference, ('it cannot be inferred from...'), cannot serve as a basis for sound reasoning.
124. This ground of appeal cannot be upheld since it is based on an inaccurate reading, taken out of context, of the abovementioned paragraph of the contested judgment.
125. As the Advocate General has correctly pointed out in point 64 of his Opinion, paragraph 155 of the contested judgment answers the appellant's objection that the system of prior permission in the second paragraph of Article 17 of the Staff Regulations entailed unlimited censorship contrary to Article 10 of the ECHR. The Court of First Instance began by stating in paragraph 152 that permission is refused only exceptionally and that refusal may be justified only where the publication concerned is likely to prejudice the interests of the Communities, and went on to say (paragraph 154) that the contested decision was based, amongst other things, on the fact that the appellant's behaviour caused serious prejudice to the interests of the Communities, and damaged the reputation and image of the Commission. It concluded (paragraph 155) that there was nothing to suggest that the appellant would have been found to have infringed the second paragraph of Article 17 if the Communities' interests had not been prejudiced, for which reason there can be no basis for speaking of 'unlimited censorship'.
126. The twelfth ground of appeal must therefore be rejected as manifestly unfounded.

The thirteenth ground of appeal

127. By his thirteenth ground of appeal, the appellant submits that it is apparent from a review of his other grounds of appeal that the charges against him have not been proved, with the result that the Court of First Instance's assessment of the proportionality of the disciplinary measure is invalid, since it is based on the premiss in paragraph 166 of the contested judgment that 'the truth of the allegations against the applicant has been established'.
128. Since none of the other grounds of appeal put forward by the appellant can be upheld, the thirteenth ground of appeal must also be rejected as unfounded.
129. As the pleas for annulment of the disputed

decision were held to be either inadmissible or unfounded, the Court of First Instance, in paragraphs 178 and 179 of the contested judgment, properly rejected the appellant's claim for compensation for the material and non-material damage allegedly suffered by him, since that claim was closely linked with the earlier pleas. The appellant has not put forward any argument capable of undermining that reasoning and accordingly his claim for damages before the Court of Justice is manifestly inadmissible.

130. The appeal must therefore be dismissed in its entirety.

Costs

131. Under Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 70 of those Rules, in proceedings between the Communities and their servants, institutions are to bear their own costs. However, by virtue of the second paragraph of Article 122 of the Rules of Procedure, Article 70 does not apply to appeals brought by officials or other servants of an institution against the latter. Since the appellant has been unsuccessful in his appeal, he must therefore be ordered to pay the costs.

On those grounds, THE COURT hereby:

1. **Dismisses the appeal;**
2. **Orders Mr Connolly to pay the costs.**

Rodríguez Iglesias Gulmann La Pergola

Wathelet Skouris Edward

Puissochet Jann Sevón

Schintgen Colneric

Delivered in open court in Luxembourg on 6 March 2001.

R. Grass, *Registrar*

G.C. Rodríguez Iglesias, *President*

CONSULTING OF DATABASES, DISCLOSURE OF DATA TO THIRD PARTIES, INTEREST AND LEGITIMATE OBJECTIVE, RECONCILIATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Judgment of the Court (Fourth Chamber) of 14 September 2000

CASE C-369/98 THE QUEEN v MINISTER OF AGRICULTURE, FISHERIES AND FOOD, EX PARTE TREVOR ROBERT FISHER AND PENNY FISHER

Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) - United Kingdom. - Aid schemes - Computerised database - Disclosure of information

KEYWORDS

1. Agriculture - Common agricultural policy - Integrated administration and control system for certain aid schemes - Computerised database of a Member State - Disclosure by the competent authority to a new operator of information relating to the data provided by a previous applicant for compensatory payments - Conditions (Council Regulation No 3508/92, Arts 3(1) and 9)
2. Agriculture - Common agricultural policy - Integrated administration and control system for certain aid schemes - Refusal by the competent authority to disclose the information necessary to ensure the proper submission of an application for aid - Imposition of penalties on the basis of undisclosed information - Not permissible (Commission Regulation No 3887/92, Art. 9)

SUMMARY

3. Articles 3(1) and 9 of Regulation No 3508/92 establishing an integrated administration and control system for certain Community aid schemes, coupled with the general principles of Community law, allow the competent au-

thorities, after balancing the respective interests of the persons concerned, to disclose data relating to crops sown during the preceding years, and which have been supplied by or on behalf of a former claimant for payment under the arable area payment scheme, to a new farmer who has need of those data in order to be able to apply for such payments in respect of the same fields and who is unable otherwise to obtain them. (see para. 39 and operative part 1)

4. In the event of refusal to disclose the information necessary to ensure that an application for aid is valid, the competent authority cannot, on the basis of the information which it did not provide to the applicant at the time of the request for information, impose penalties on him under Article 9 of Regulation No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes. (see para. 47 and operative part 2)

PARTIES

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between The Queen and

Minister of Agriculture, Fisheries and Food, ex parte Trevor Robert Fisher and Penny Fisher, trading as TR & P Fisher,

on the interpretation of Articles 3(1) and 9 of Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355, p. 1) and of Article 9 of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391, p. 36),

THE COURT (Fourth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr and Mrs Fisher, by H. Mercer, Barrister, instructed by P. Till, Solicitor,
- the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, and P. Watson, Barrister,
- the Commission of the European Communities, by X. Lewis, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr and Mrs Fisher, of the United Kingdom Government and of the Commission at the hearing on 16 December 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2000, gives the following Judgment

GROUNDS

1. By order of 13 March 1998, received at the Court on 16 October 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions concerning the interpretation of Articles 3(1) and 9 of Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355, p. 1) and of Article 9 of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391, p. 36).
2. Those questions have been raised in judicial-review proceedings before the High Court of Justice, seeking an order for certiorari to quash a decision by the Ministry of Agriculture, Fisheries and Food (hereinafter MAFF) confirming penalties imposed on Mr and Mrs Fisher, trading as TR & P Fisher (hereinafter Fisher), a declaration that that decision was unlawful and invalid, and payment of damages.

The legal framework

The Community provisions

3. Council Regulation (EEC) No 1765/92 of 30 June 1992 (OJ 1992 L 181, p. 12) establishes a support system for producers of certain arable crops as defined in Annex I thereto. Under that system, compensatory payments are to be

made for each specified category of crop when grown on eligible land and provided that certain conditions are met (arable area payments). Each applicant under the main arable area payment scheme must undertake to set aside a minimum part of the land which is included in the application; for the relevant year, that was set at 10%. Land eligible to be set aside must have been either sown the previous year or allocated to a set-aside scheme.

4. Regulation No 3508/92 establishes the integrated administration and control system (IACS). That system seeks to prevent fraud by imposing effective penalties in the event of irregularities or fraudulent conduct. It also seeks to limit the administrative formalities imposed on farmers and on the authorities responsible for the administration of the different aid schemes by having only one system to administer all the aid schemes and by requiring each Member State to set up a computerised database for recording the data contained in aid applications.
5. The provisions of Regulation No 3508/92 relevant to the main proceedings are as follows:

Article 2

The integrated system shall comprise the following elements:

- a. a computerised database;
- b. an alphanumeric identification system for agricultural parcels;
- c. an alphanumeric system for the identification and registration of animals;
- d. aid applications;
- e. an integrated control system.

Article 3

1. The computerised database shall record, for each agricultural holding, the data obtained from the aid applications. This database shall in particular allow direct and immediate consultation, through the competent authority of the Member State, of the data relating at least to the previous three consecutive calendar and/or marketing years.

...

Article 4

The alphanumeric identification system for agricultural parcels shall be established on the

basis of land registry maps and documents, other cartographic references or of aerial photographs or satellite pictures or other equivalent supporting references or on the basis of more than one of these elements.

...

Article 9

The Member States shall take the measures necessary to ensure protection of the data collected.

6. Article 9(2) of Regulation No 3887/92 provides:

If the area actually determined is found to be less than that declared in an "area" aid application, the area actually determined on inspection shall be used for calculation of the aid. However, except in cases of force majeure, the area actually determined on inspection shall be reduced:

- by twice the difference found if this is more than 2% or two hectares but not more than 10% of the determined area;

- by 30% if the difference found is more than 10% but not more than 20% of the determined area.

If the difference is more than 20% of the determined area no area-linked aid shall be granted.

However, in the case of a false declaration made intentionally or as a result of serious negligence:

- the farmer in question shall be excluded from the aid scheme concerned for the calendar year in question, and

- in the case of a false declaration intentionally made, from any aid scheme referred to in Article 1(1) of Regulation (EEC) No 3508/92 for the following calendar year, in respect of an area equal to that for which his aid application was rejected.

These reductions shall not be applied if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority.

...

The national provisions

7. According to the order for reference, applications for arable area payments in the United Kingdom must be made on an IACS form, which consists of two parts: a Base Form and

a Field Data Printout. The Field Data Printout lists each of the applicant's fields separately; for each field, the farmer must state what crop is growing in it or whether it has been set aside. Each year MAFF sends to all applicants for arable area payments who continue to farm the same land a computerised printout containing all the data provided by them in their application from the previous year. The farmer, therefore, need only make the necessary changes when completing his IACS application.

8. Every Base Form used by MAFF requires the applicant to declare that the information contained therein is accurate and that it may be passed by the relevant Agricultural Department(s) in confidence to duly authorised agents for the purposes of verifying its accuracy, evaluating the Scheme(s) covered by this application, or to assist in the wider areas of work within the relevant Agricultural Departments.
9. Because of that requirement on the United Kingdom Base Form, a farmer receives, in the first year of farming a particular parcel of land, a blank Field Data Printout and is expected to obtain the information which would have been included on the Printout from sources other than MAFF. In the event that a farmer is able to satisfy MAFF that there are exceptional circumstances and that he has exhausted all conventional means of obtaining the information which is normally contained on the Field Data Printout, MAFF may disclose some of the information on that Printout to the farmer.

The dispute in the main proceedings

10. Fisher works three farms: Glebe Farm, Castle Hill Farm and Carlam Hill Farm. Castle Hill Farm and Carlam Hill Farm are owned by Flint Co. Ltd (Flint) and, until 1995, were let to a Mr Nicholson. In 1994, bankruptcy proceedings were commenced against Mr Nicholson and he was given notice to quit by Flint.
11. In the summer of 1995, Flint's agents asked Mr Fisher to inspect the crops on Castle Hill Farm and Carlam Hill Farm in order to see what was harvestable. The inspection was carried out by Mr Fisher, who was accompanied by a crop consultant. In late October 1995, Flint obtained possession of the farms in question, whereupon its agent, Fisher, started to work them.
12. The national court points out that neither Mr Nicholson nor anyone acting on his behalf

- was willing to provide Fisher with information concerning the previous farming history of the two farms. Accordingly, at the beginning of November 1995, Fisher asked MAFF for that information on the ground that Fisher had been unable to obtain it elsewhere, a fact which MAFF has not disputed. Particulars were requested as to which fields were eligible for set-aside compensatory payments and the Field Data Printouts from previous years.
13. Relying on the Data Protection Act 1984, MAFF, by letter of 7 November 1995, declined to provide the information requested, stating at the same time that if under exceptional circumstances you are unable to obtain the necessary information from the sources suggested we will be able to consider releasing basic information relating to the land.
 14. By letter of 21 November 1995, MAFF accepted that Fisher had exhausted all the conventional means of obtaining the information requested and supplied it with basic details of the land on the two farms and information as to which land had been set aside in previous years. However, no information was given as to the cropping history, that is to say, the crops which had been grown in the various fields in the preceding years according to the Field Data Printouts.
 15. By the time that information reached Fisher, it had already sown some of the land, with the remainder to be sown the following spring. At the hearing before the Court, however, it was pointed out and accepted by all the parties that all of the fields sown in the autumn of 1995 were eligible for set-aside.
 16. On 3 May 1996, Fisher submitted its IACS form to MAFF. On 26 November 1996, it was informed that, during the processing of its application, it had been discovered that two parcels of land on Castle Hill Farm and Carlam Hill Farm were not eligible for set-aside payments by reason of their previous cropping history, and that, accordingly, such payments had to be disallowed.
 17. Penalties were also imposed on Fisher under Article 9 of Regulation No 3887/92.
 18. Fisher appealed against the decision imposing those penalties. Its appeal was rejected and it therefore initiated proceedings for judicial review before the High Court, seeking an order for certiorari to quash MAFF's decision confirming the penalties, a declaration that that decision was unlawful and invalid, and damages.
 19. Fisher argued before the national court that the error made in setting aside non-eligible land resulted from MAFF's refusal to provide it with details of the previous cropping history of the land in question. It claimed that MAFF had acted unlawfully in two respects. First, had the necessary information requested in November 1995 been provided, Fisher would have known which fields were eligible for set-aside and would therefore not have set aside ineligible land the following spring when carrying out its spring sowing. Second, MAFF acted unlawfully inasmuch as, in penalising Fisher for errors made in its IACS application, it relied on information which it had previously refused to supply to Fisher, despite having been requested to do so. MAFF should not, therefore, have used against Fisher information which it had refused to disclose to it.
 20. Before the national court, MAFF argued in response to the first submission that it could not have provided the requested information on the previous cropping history without infringing its obligations vis-à-vis Mr Nicholson and a receiver, who had provided that information in confidence in accordance with the above-mentioned declaration on the Base Form. With respect to the second submission, MAFF stated that it was entitled, indeed bound, to use the information in its submissions as to the cropping history in order to verify whether the land set aside was eligible.
 21. MAFF further argued, and the national court accepted, that Fisher could have ensured that the land set aside was land eligible to be set aside had it used the information which it obtained from its own inspection in the summer of 1995 and the information given to it by MAFF in November 1995. The national court found, however, that this was not an answer to Fisher's submissions and held it to be a fact that, if the additional information sought by Fisher had been supplied to it before the sowing in the spring of 1996, Fisher would have chosen to set aside only eligible land. In the view of the national court, the fact that Fisher did not do so is therefore directly attributable to its not having been given the additional information sought.
- The questions submitted for preliminary ruling**
22. In those circumstances, the High Court of Justice of England and Wales, Queen's Bench

Division (Divisional Court), decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) (i) Do Articles 3(1) and 9 of Regulation (EEC) No 3508/92, coupled with the general principles of Community law, permit information held on a computerised database set up under Article 2, relating to data supplied by or on behalf of a former claimant for payments under AAPs [arable area payments], to be disclosed to third parties?

(ii) If the answer to Question 1(i) is "yes", is the disclosure which the competent authority is lawfully required to provide limited, as regards the persons to whom disclosure can be made:

- a. to persons authorised by the former claimant on the UK Base Form; and/or
- b. to persons who require the information in connection with their application for agricultural aid in respect of the same land as the former claimant even where the former claimant refuses to disclose the information;

and as regards the information to be disclosed:

- c. to that information which does not constitute commercially confidential information; and/or
- d. to that information which it is necessary to disclose to ensure that the person requesting the information can, by taking reasonable steps, avoid incurring penalties in connection with his own application for agricultural aid?

(2) If the answer to Question 1(i) is "yes", and the competent authorities have unlawfully failed to disclose information requested in circumstances where, had the person received the information, he would have set aside only eligible land, is the imposition of penalties under Article 9 of Regulation (EEC) No 3887/92 for this reason alone rendered unlawful?

(3) Whether or not the failure by the competent authorities to disclose the information referred to in Question 1(i) above was lawful or unlawful, are they entitled to use against a person information which, despite requests for same, they had refused to supply to that person?

Question 1

23. In Question 1, the national court is asking, es-

entially, whether Articles 3(1) and 9 of Regulation No 3508/92, coupled with the general principles of Community law, allow the competent authority to disclose data relating to the arable fields sown during previous years, and supplied by or on behalf of a former claimant for arable area payments, to a new farmer who has need of those data in order to be able to apply for such payments in respect of the same fields.

24. The first point to note is that it follows from Article 3(1) of Regulation No 3508/92 that, by providing expressly for consultation, through the competent authority, of the database holding the information derived from aid applications, Regulation No 3508/92 does not rule out the possibility that that database may be consulted by persons other than the competent authority itself.
25. Next, Article 9 of Regulation No 3508/92 requires Member States to take the measures necessary to ensure protection of the data collected, but does not give any particulars in this regard.
26. Consequently, while it is for the Member States, in the absence of precise indications in that regard, to determine the scope of and detailed arrangements for such protection, the fact none the less remains that the national measures must not go beyond what is necessary to ensure the proper application of Regulation No 3508/92 and must not adversely affect the scope or effectiveness of that regulation.
27. In this regard, it is clear from the second and third recitals in the preamble to Regulation No 3508/92 that it is designed to make administrative and control mechanisms more effective. As the Advocate General has noted in point 42 of his Opinion, an efficient procedure presupposes that the information to be provided by an applicant for aid under Article 6 of the regulation is complete and accurate from the outset and that consequently the applicant is in a position to obtain the information necessary to ensure that the applications which he must submit to the competent authority are valid.
28. It must be observed, furthermore, that an applicant for aid has, in the context of the application of Regulation No 3508/92, an essential and legitimate interest in being able to procure the information necessary to make a proper application for the grant of compensatory payments and to avoid the imposition of penalties.

29. The measures taken by Member States for the protection of data collected cannot therefore leave that interest out of account.
 30. Contrary to the argument submitted by the United Kingdom Government, that requirement is not satisfied by a general rule under which the data collected can be disclosed to a third party only with the agreement of the person who provided the information in question and only if, and to the extent to which, a mandatory interest so requires, in so far as that rule excludes account being taken of the legitimate interest which an applicant for aid may have in accessing certain of those data.
 31. In order to answer the question whether certain information contained in the database may be disclosed, the competent authority must balance, on the one hand, the interest of the person who provided the information and, on the other, the interest of the person who has need of that information in order to meet a legitimate objective.
 32. However, the respective interests of the persons concerned in regard to data of a personal nature must be assessed in a manner which ensures protection of fundamental freedoms and rights.
 33. In that connection, the provisions of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281 p. 31) (the Directive) provide criteria that are suitable for application by the competent authority in making that assessment.
 34. Even though the Directive had not yet entered into force at the material time in the case in the main proceedings, it is clear from the 10th and 11th recitals in its preamble that it adopts, at Community level, the general principles which already formed part of the law of the Member States in the area in question.
 35. With regard, in particular, to the disclosure of data, Article 7(f) of the Directive authorises such disclosure if it is necessary for the purposes of the legitimate interests pursued by a third party to whom personal data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection.
 36. So far as concerns the application of such criteria to the case in the main proceedings, there is nothing in the documents before the Court to justify the conclusion that Fisher was pursuing any interest other than the essential and legitimate one of being able to procure the data which it needed in order to discharge its obligations under Regulation No 3508/92 and which it could not otherwise obtain.
 37. Nor does it appear from the documents before the Court that disclosure to Fisher of the data requested was liable to affect adversely any interest whatever of the owner of those data or his fundamental rights and freedoms.
 38. It is, however, for the national court, which alone is familiar with all of the relevant facts of the dispute in the main proceedings, to assess the interests of the persons concerned in order to be able to determine whether the data requested could be disclosed to Fisher.
 39. The answer to Question 1 must therefore be that Articles 3(1) and 9 of Regulation No 3508/92, coupled with the general principles of Community law, allow the competent authority, after balancing the respective interests of the persons concerned, to disclose data relating to crops sown during the preceding years, and which have been supplied by or on behalf of a former claimant for payment under the arable area payment scheme, to a new farmer who has need of those data in order to be able to apply for such payments in respect of the same fields and who is unable otherwise to obtain them.
- Questions 2 and 3*
40. By Questions 2 and 3, which it is appropriate to consider together, the national court is asking, essentially, whether, in the event of a refusal to disclose the requested information, the competent authority is entitled, or even required, to impose penalties on the applicant pursuant to Article 9 of Regulation No 3887/92, and whether, in so doing, it may rely on information which it did not supply to that person when he made his request.
 41. According to the United Kingdom Government, the competent authority was required to impose the penalties set out in Article 9 of Regulation No 3887/92 in the event of false declarations, since Fisher could not rely on the single exception provided for in the fourth subparagraph of Article 9(2) of that regulation, that is to say, the case in which the farmer can show

that his determination of the area was accurately based on information recognised by the competent authority.

42. It must first be observed in this regard that, in the case in the main proceedings, the national court has found that the imposition of the penalties was unquestionably attributable to the refusal to disclose the information requested from the competent authority.
43. Next, it is important to note that penalties cannot be imposed where the declaration is false as a result of inaccurate information emanating from the competent authority. It follows that the exception set out at the end of Article 9(2) of Regulation No 3887/92 is justified by the fact that the false declaration by the applicant concerning determination of the area is attributable to the competent authority.
44. The same is true where the declaration is false as a result of the lack of information from the competent authority. It is common ground that, where that authority has simply refused to disclose to a new farmer the collected data which that farmer required and which he could not otherwise obtain, the erroneous nature of the declaration will be attributable to the competent authority.
45. In those circumstances, the competent authority cannot impose penalties on the new farmer if it was aware that that person did not, because of the authority's own refusal to disclose at the time of the application, have the information necessary to ensure that his application for aid would be valid.
46. Article 9(2) of Regulation No 3887/92 must therefore be construed as not allowing penalties to be imposed where the inaccuracy of the declaration is attributable to the refusal by the competent authority to disclose collected data to a new farmer who has need of those data in order to ensure that his application for aid will be valid and who cannot otherwise obtain those data.
47. The answer to Questions 2 and 3 must therefore be that, in the event of refusal to disclose the information requested, the competent authority cannot, on the basis of the information which it did not provide to the applicant at the time of the application, impose penalties on

him under Article 9 of Regulation No 3887/92.

Costs

48. The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

OPERATIVE PART

On those grounds, THE COURT (Fourth Chamber), *ma olen 14, ma saan ise asjadega väga hästi hakkama* in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), by order of 13 March 1998, hereby rules:

1. **Articles 3(1) and 9 of Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes, coupled with the general principles of Community law, allow the competent authority, after balancing the respective interests of the persons concerned, to disclose data relating to crops sown during the preceding years, and which have been supplied by or on behalf of a former claimant for payment under the arable area payment scheme, to a new farmer who has need of those data in order to be able to apply for such payments in respect of the same fields and who is unable otherwise to obtain them.**
2. **In the event of refusal to disclose the information requested, the competent authority cannot, on the basis of the information which it did not provide to the applicant at the time of the application, impose penalties on him under Article 9 of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes.**

FREE MOVEMENT OF DATA, PROCESSING PERSONAL DATA, PRIVATE LIFE, DISCLOSURE OF INFORMATION TO THIRD PARTIES, DIRECT APPLICABILITY OF ARTICLES 6(1)(C) AND 7(C) AND (E) OF DIRECTIVE 95/46

Judgment of the Court, 20 May 2003

JOINED CASES C-465/00, C-138/01 AND C-139/01 RECHNUNGSHOF v ÖSTERREICHISCHER RUNDFUNK AND OTHERS AND CHRISTA NEUKOMM AND JOSEPH LAUERMANN v ÖSTERREICHISCHER RUNDFUNK

(References for a preliminary ruling from the Verfassungsgerichtshof and the Oberster Gerichtshof (Austria))

«(Protection of individuals with regard to the processing of personal data – Directive 95/46/EC – Protection of private life – Disclosure of data on the income of employees of bodies subject to control by the Rechnungshof)»

Opinion of Advocate General Tizzano delivered on 14 November 2002.

KEYWORDS

1. Approximation of laws – Directive 95/46 – Scope – Determination in accordance with the subject-matter of the directive – Abolition of barriers to the functioning of the internal market (Directive 95/46 of the European Parliament and of the Council)
2. Approximation of laws – Directive 95/46 – Interpretation in the light of fundamental rights (Directive 95/46 of the European Parliament and of the Council)
3. Community law – Principles – Fundamental rights – Respect for private life – Interference within the meaning of Article 8 of the European Convention on Human Rights (European Convention on Human Rights, Art. 8)
4. Community law – Principles – Fundamental rights – Respect for private life – Restriction – National legislation requiring a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by bodies subject to that control where the income exceeds a certain threshold – Justification under Article 8(2) of the European Convention on Human Rights – Objective of public interest – Management of public funds – Proportionality (European Convention on Human Rights, Art. 8(2))
5. Approximation of laws – Directive 95/46 – National legislation requiring a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by bodies subject to that control where the income exceeds a certain threshold – Permissible – Condition – Disclosure necessary with regard to the objective of proper management of public funds – Proportionality (Directive 95/46 of the European Parliament and of the Council, Arts 6(1)(c) and 7(c) and (e))
6. Acts of the institutions – Directives – Effect – Non-implementation by a Member State – Right of individuals to rely on the directive – Conditions (Art. 249, third para., EC; Directive 95/46 of the European Parliament and of the Council, Arts 6(1)(c) and 7(c) and (e))

SUMMARY OF THE JUDGMENT

1. The applicability of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data cannot depend on whether the specific situations at issue have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations. see para. 42
2. The provisions of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right

to privacy, must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures. see para. 68

3. While the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the European Convention on Human Rights. To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way. It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party. see paras 74-75
4. The interference with private life resulting from the application of national legislation which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold, may be justified under Article 8(2) of the European Convention on Human Rights only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine. see para. 90
5. Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not preclude national legislation requiring a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold

of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain. see para. 94, operative part 1

6. Wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State. Such a character may be attributed to Article 6(1)(c) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, under which personal data must be... adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed, and to Article 7(c) or (e) of that directive, under which personal data may be processed only if inter alia processing is necessary for compliance with a legal obligation to which the controller is subject or is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed. see paras 98, 100-101, operative part 2

JUDGMENT OF THE COURT

20 May 2003¹

((Protection of individuals with regard to the processing of personal data – Directive 95/46/EC – Protection of private life – Disclosure of data on the income of employees of bodies subject to control by the Rechnungshof))

In Joined Cases C-465/00, C-138/01 and C-139/01,

REFERENCES to the Court under Article 234 EC by the Verfassungsgerichtshof (C-465/00) and the Oberster Gerichtshof (C-138/01 and C-139/01) (Austria) for preliminary rulings in the proceedings pending before those courts between Rechnungshof (C-465/00)

and

¹ Language of the case: German

Österreichischer Rundfunk, Wirtschaftskammer Steiermark, Marktgemeinde Kaltenleutgeben, Land Niederösterreich, Österreichische Nationalbank, Stadt Wiener Neustadt, Austrian Airlines, Österreichische Luftverkehrs-AG,

and between Christa Neukomm (C-138/01), Joseph Lauerermann (C-139/01)

and

Österreichischer Rundfunk,

on the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31),

THE COURT, composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges, Advocate General: A. Tizzano, Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Rechnungshof, by F. Fiedler, acting as Agent (C-465/00),
- Österreichischer Rundfunk, by P. Zöchbauer, Rechtsanwalt (C-465/00),
- Wirtschaftskammer Steiermark, by P. Mühlbacher and B. Rupp, acting as Agents (C-465/00),
- Marktgemeinde Kaltenleutgeben, by F. Nistelberger, Rechtsanwalt (C-465/00),
- Land Niederösterreich, by E. Pröll, C. Kleiser and L. Staudigl, acting as Agents (C-465/00),
- Österreichische Nationalbank, by K. Liebischer and G. Tumpel-Gugerell, acting as Agents (C-465/00),
- Stadt Wiener Neustadt, by H. Linhart, acting as Agent (C-465/00),
- Austrian Airlines, Österreichische Luftverkehrs-AG, by H. Jarolim, Rechtsanwalt (C-465/00),
- the Austrian Government, by H. Dossi, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the Danish Government, by J. Molde, acting as Agent (C-465/00),
- the Italian Government, by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato

dello Stato (C-465/00) and O. Fiumara, avvocato generale dello Stato (C-138/01 and C-139/01),

- the Netherlands Government, by H.G. Sevensen, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the Finnish Government, by E. Bygglin, acting as Agent (C-465/00),
- the Swedish Government, by A. Kruse, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the United Kingdom Government, by R. Magrill, acting as Agent, and J. Coppel, Barrister (C-465/00, C-138/01 and C-139/01),
- the Commission of the European Communities, by U. Wölker and X. Lewis, acting as Agents (C-465/00, C-138/01 and C-139/01),

having regard to the Report for the Hearing,

after hearing the oral observations of Marktgemeinde Kaltenleutgeben, represented by F. Nistelberger; Land Niederösterreich, represented by C. Kleiser; Österreichische Nationalbank, represented by B. Gruber, Rechtsanwalt; Austrian Airlines, Österreichische Luftverkehrs-AG, represented by H. Jarolim; the Austrian Government, represented by W. Okresek, acting as Agent; the Italian Government, represented by M. Fiorilli, avvocato dello Stato; the Netherlands Government, represented by J. van Bakel, acting as Agent; the Finnish Government, represented by T. Pynnä, acting as Agent; the Swedish Government, represented by A. Kruse and B. Hernqvist, acting as Agent; and the Commission, represented by U. Wölker and C. Docksey, acting as Agent, at the hearing on 18 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following Judgment

1. By orders of 12 December 2000 and 28 and 14 February 2001, the first of which was received at the Court on 28 December 2000 and the other two on 27 March 2001, the Verfassungsgerichtshof (Constitutional Court) (C-465/00) and the Oberster Gerichtshof (Supreme Court) (C-138/01 and C-139/01) each referred to the Court under Article 234 EC two questions, formulated in substantially the same way, on the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2. Those questions were raised in proceedings between, first, the Rechnungshof (Court of Audit) and a large number of bodies subject to its control and, second, Ms Neukomm and Mr Lauer mann and their employer Österreichischer Rundfunk (ÖRF), a broadcasting organisation governed by public law, concerning the obligation of public bodies subject to control by the Rechnungshof to communicate to it the salaries and pensions exceeding a certain level paid by them to their employees and pensioners together with the names of the recipients, for the purpose of drawing up an annual report to be transmitted to the Nationalrat, the Bundesrat and the Landtage (the lower and upper chambers of the Federal Parliament and the provincial assemblies) and made available to the general public (the Report).

Legal context

National provisions

3. Under Paragraph 8 of the Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre (Federal constitutional law on the limitation of salaries of public officials, BGBl. I 1997/64, as amended, the BezBegrBVG):
 1. Bodies subject to control by the Rechnungshof must, within the first three months of each second calendar year, inform the Rechnungshof of the salaries or pensions of persons who in at least one of the two previous calendar years drew salaries or pensions greater annually than 14 times 80% of the monthly reference amount under Paragraph 1 [for 2000, 14 times EUR 5 887.87]. The bodies must also state the salaries and pensions of persons who draw an additional salary or pension from a body subject to audit by the Rechnungshof. Persons who draw a salary or pension from two or more bodies subject to control by the Rechnungshof must inform the bodies of this. If this duty of disclosure is not complied with by the body, the Rechnungshof must inspect the relevant documents and draw up its report on the basis thereof.
 2. In the application of subparagraph 1, social benefits and benefits in kind are also to be taken into account, unless they are benefits from sickness or accident insurance or on the basis of comparable provisions of Land law. Where several salaries or pensions are paid by bodies subject to control by the Rechnungshof, they

are to be aggregated.

3. The Rechnungshof shall summarise that information — for each year separately — in a report. The report shall include all persons whose total yearly salaries and pensions from bodies subject to control by the Rechnungshof exceed the amount stated in subparagraph 1. The report shall be transmitted to the Nationalrat, the Bundesrat and the Landtage.
4. It appears from the orders of reference that, in the light of the travaux préparatoires of the BezBegrBVG, legal commentators deduce from the latter provision that the Report must give the names of the persons concerned and against each name the amount of annual remuneration received.
5. The Verfassungsgerichtshof states that, in accordance with the legislature's intention, the Report must be made available to the general public, so as to provide them with comprehensive information. It states that through this information pressure is brought to bear on the bodies concerned to keep salaries at a low level, so that public funds are used thriftily, economically and efficiently.
6. The bodies subject to audit by the Rechnungshof are the Federation, the Länder (Federal provinces), large municipalities and — where a reasoned request has been made by the government of a Land — municipalities with fewer than 20 000 inhabitants, associations of municipalities, social security institutions, statutory professional bodies, Österreichischer Rundfunk, institutions, funds and foundations managed by organs of the Federation or the Länder or by persons appointed by them for that purpose, and undertakings managed by the Federation, a Land or a municipality or (alone or jointly with other bodies subject to control by the Rechnungshof) controlled through a company-law holding of not less than 50% or otherwise.

Community legislation

7. Recitals 5 to 9 in the preamble to Directive 95/46 show that it was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC) to encourage the free movement of personal data through the harmonisation of the laws, regulations and administrative provisions of the Member States on the protection of individuals with regard to the processing of such data.

8. According to Article 1 of Directive 95/46:
1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.
9. In this connection, recitals 2 and 3 of Directive 95/46 read as follows:
- (2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;
 - (3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded
10. Recital 10 of Directive 95/46 adds: (10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law;...
11. Under Article 6(1) of Directive 95/46, personal data (that is, in accordance with Article 2(a), any information relating to an identified or identifiable natural person) must be:
- (a) processed fairly and lawfully;
 - (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes...
 - (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
 - ...
12. Article 2(b) of Directive 95/46 defines processing of personal data as: any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.
13. Under Article 7 of Directive 95/46, personal data may be processed only if one of the six conditions it sets out is satisfied, and in particular if:
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
 - ...
 - (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed
14. According to recital 72 of Directive 95/46, the directive allows for the principle of public access to official documents to be taken into account when implementing the principles set out in the directive.
15. As regards the scope of Directive 95/46, Article 3(1) provides that it is to apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. However, under Article 3(2), the directive shall not apply to the processing of personal data:
- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law;
 - by a natural person in the course of a purely personal or household activity
16. In addition, Article 13 of Directive 95/46 authorises Member States to derogate from certain of its provisions, in particular Article 6(1), where this is necessary to safeguard *inter alia* an important economic or financial interest

of a Member State or of the European Union, including monetary, budgetary and taxation matters (Article 13(1)(e)) or a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in certain cases referred to, including that in subparagraph (e) (Article 13(1)(f)).

The main proceedings and the questions referred for preliminary rulings

Case C-465/00

17. Differences of opinion as to the interpretation of Paragraph 8 of the BezBegrBVG arose between the Rechnungshof and a large number of bodies under its control with respect to salaries and pensions paid in 1998 and 1999.
18. The defendants in the main proceedings, which include local and regional authorities (a Land and two municipalities), public undertakings, some of which are in competition with other Austrian or foreign undertakings not subject to control by the Rechnungshof, and a statutory professional body (Wirtschaftskammer Steiermark), did not communicate the data on the income of the employees in question, or communicated the data, to a greater or lesser extent, in anonymised form. They refused access to the relevant documents or made access subject to conditions which the Rechnungshof did not accept. The Rechnungshof therefore brought proceedings before the Verfassungsgerichtshof pursuant to Article 126a of the Bundes-Verfassungsgesetz (Federal Constitutional Law), which gives that court jurisdiction to rule on differences of opinion concerning the interpretation of the statutory provisions governing the jurisdiction of the Rechnungshof.
19. The Rechnungshof infers from Paragraph 8 of the BezBegrBVG an obligation to list in the Report the names of the persons concerned and show their annual income. The defendants in the main proceedings take a different view and consider that they are not obliged to communicate personal data relating to that income, such as the names or positions of the persons concerned, with an indication of the emoluments received by them. They rely principally on Directive 95/46, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (the Convention), which guarantees respect for private life, and on the argument that the obligation of publicity creates a barrier to the movement of workers, contrary to Article 39 EC.
20. The Verfassungsgerichtshof wishes essentially to know whether Paragraph 8 of the BezBegrBVG, as interpreted by the Rechnungshof, is compatible with Community law, so that it can interpret it consistently with Community law or declare it (partly) inapplicable, as the case may be.
21. It points out, in this connection, that the provisions of Directive 95/46, in particular Articles 6(1)(b) and (c) and 7(c) and (e), must be interpreted in the light of Article 8 of the Convention. It considers that comprehensive information for the public, as intended by the national legislature with respect to the income of employees of bodies subject to control by the Rechnungshof whose annual remuneration exceeds a certain threshold (ATS 1 127 486 in 1999 and ATS 1 120 000 in 1998), has to be regarded as an interference with private life, which can be justified under Article 8(2) of the Convention only if that information contributes to the economic well-being of the country. An interference with fundamental rights cannot be justified by the existence of a mere public interest in information. The court doubts that the disclosure, by means of the Report, of data on personal income promotes the economic well-being of the country. In any event, it constitutes a disproportionate interference with private life. The audit carried out by the Rechnungshof is indubitably sufficient to ensure the proper use of public funds.
22. The national court is also uncertain as to whether the scope of Community law varies according to the nature of the body which is required to contribute to the disclosure of the individual income of some of its employees.
23. In those circumstances, the Verfassungsgerichtshof decided to stay proceedings and refer the following two questions to the Court for a preliminary ruling:
 1. Are the provisions of Community law, in particular those on data protection, to be interpreted as precluding national legislation which requires a State body to collect and transmit data on income for the purpose of publishing the names and income of employees of:
 - e. a regional or local authority,

- f. a broadcasting organisation governed by public law,
- g. a national central bank,
- h. a statutory representative body,
- i. a partially State-controlled undertaking which is operated for profit?

2. If the answer to at least part of the above question is in the affirmative: Are the provisions precluding such national legislation directly applicable, in the sense that the persons obliged to make disclosure may rely on them to prevent the application of contrary national provisions?

Cases C-138/01 and C-139/01

- 24. Ms Neukomm and Mr Lauer mann, who are employees of ÖRF, a body subject to control by the Rechnungshof, brought proceedings in the Austrian courts for interim orders to prevent ÖRF from acceding to the Rechnungshof's request to communicate data.
- 25. The applications for interim orders were dismissed at first instance. The Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) (Austria) (C-138/01), distinguishing between the transmission of the data to the Rechnungshof and its inclusion in the Report, considered that the Report had to be anonymous, while the mere transmission of the data to the Rechnungshof, even including names, did not infringe Article 8 of the Convention or Directive 95/46. The Landesgericht St Pölten (Regional Court, St Pölten) (Austria) (C-139/01), on the other hand, held that the inclusion of data with names in the Report was lawful, since an anonymised report would not enable the Rechnungshof to exercise adequate control.
- 26. The Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria) upheld on appeal the dismissal of the applications for interim orders by the courts at first instance. While stating, in connection with Case C-138/01, that in communicating the data in question the employer is merely performing a task imposed on him by law and that the subsequent processing of the data by the Rechnungshof is not carried out under the control of the employer, the Oberlandesgericht held, in the context of Case C-139/01, that Paragraph 8 of the BezBegrBVG was consistent with fundamental rights and with Directive 95/46, even in the case of a list by name of the persons concerned.
- 27. Ms Neukomm and Mr Lauer mann appealed on a point of law (Revision) to the Oberster Gerichtshof.
- 28. The Oberster Gerichtshof, referring to the reference for a preliminary ruling in Case C-465/00 and adopting the points of law raised by the Verfassungsgerichtshof, decided to stay proceedings and refer the following two questions to the Court, using the same wording in Cases C-138/01 and C-139/01:
 - 1. Are the provisions of Community law, in particular those on data protection (Articles 1, 2, 6, 7 and 22 of Directive 95/46/EC in conjunction with Article 6 (formerly Article F) of the Treaty on European Union and Article 8 of the Convention), to be interpreted as precluding national legislation which requires a public broadcasting organisation, as a legal body, to communicate, and a State body to collect and transmit, data on income for the purpose of publishing the names and income of employees of a broadcasting organisation governed by public law?
 - 2. If the Court of Justice of the European Communities answers the above question in the affirmative: Are the provisions precluding national legislation of the kind described above directly applicable, in the sense that an organisation obliged to make disclosure may rely on them to prevent the application of contrary national legislation, and may not therefore rely on an obligation under national law against the employees concerned by the disclosure?
- 29. By order of the President of the Court of 17 May 2001, Cases C-138/01 and C-139/01 were joined for the purposes of the written procedure, the oral procedure and judgment. Case C-465/00 and Cases C-138/01 and C-139/01 should also be joined for the purposes of judgment.
- 30. The questions put by the Verfassungsgerichtshof and the Oberster Gerichtshof are essentially the same, and should therefore be examined together.

Applicability of Directive 95/46

- 31. To answer the questions as put would presuppose that Directive 95/46 is applicable in the main proceedings. That applicability is, however, disputed before the Court. This point must be decided as a preliminary issue.

Observations submitted to the Court

32. The defendants in the main proceedings in Case C-465/00 consider essentially that the control activity exercised by the Rechnungshof falls within the scope of Community law and hence of Directive 95/46. In particular, in that it relates to the remuneration received by the employees of the bodies concerned, that activity touches aspects covered by Community provisions in social matters, such as Articles 136 EC, 137 EC and 141 EC, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), and Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).
33. They further submit that the control exercised by the Rechnungshof, first, affects the possibility for employees of the bodies concerned to seek employment in another Member State, because of the publicity attaching to their salaries which limits their power of negotiation with foreign companies, and, second, deters nationals of other Member States from seeking employment with the bodies subject to that control.
34. Austrian Airlines, Österreichische Luftverkehrs-AG states that the interference with the freedom of movement of workers is particularly serious in its case because it competes with companies of other Member States which are not subject to such control.
35. The Rechnungshof and the Austrian and Italian Governments, and to a certain extent the Commission, on the other hand, consider that Directive 95/46 is not applicable in the main proceedings.
36. According to the Rechnungshof and the Austrian and Italian Governments, the control activity referred to in Paragraph 8 of the BezBegrBVG, which pursues objectives in the public interest in the field of public accounts, does not fall within the scope of Community law.
37. After observing that the directive, which was adopted on the basis of Article 100a of the Treaty, has the objective of establishing the internal market, an aspect of which is the protection of the right to privacy, the Rechnungshof and the Austrian and Italian Governments submit that the control in question is not such as to obstruct the freedom of movement of workers, since it does not in any way prevent the employees of the bodies concerned from going to work in another Member State or those of other Member States from working for those bodies. In any event, the link between the control activity and the freedom of movement of workers, even supposing that workers do seek to avoid working for a body subject to control by the Rechnungshof because of the publicity attaching to the salaries received, is too uncertain and indirect to constitute an infringement of freedom of movement and thereby to allow a link to be made with Community law.
38. The Commission adopts a similar position. At the hearing, it nevertheless submitted that the collection of data by the bodies subject to control by the Rechnungshof with a view to communication to the latter and inclusion in the report is itself within the scope of Directive 95/46. Collection serves not only the function of auditing but also, primarily, the payment of remuneration, which constitutes an activity covered by Community law, having regard to the existence of various relevant social provisions in the Treaty, such as Article 141 EC, and to the possible effect of that activity on the freedom of movement of workers.

Findings of the Court

39. Directive 95/46, adopted on the basis of Article 100a of the Treaty, is intended to ensure the free movement of personal data between Member States through the harmonisation of national provisions on the protection of individuals with regard to the processing of such data. Article 1, which defines the object of the directive, provides in paragraph 2 that Member States may neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection of the fundamental rights and freedoms of natural persons, in particular their private life, with respect to the processing of that data.
40. Since any personal data can move between Member States, Directive 95/46 requires in principle compliance with the rules for protection of such data with respect to any processing of data as defined by Article 3.
41. It may be added that recourse to Article 100a of the Treaty as legal basis does not presuppose the existence of an actual link with free

movement between Member States in every situation referred to by the measure founded on that basis. As the Court has previously held (see Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paragraph 85, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60), to justify recourse to Article 100a of the Treaty as the legal basis, what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market. In the present case, that fundamental attribute was never in dispute before the Court with respect to the provisions of Directive 95/46, in particular those in the light of which the national court raises the question of the compatibility of the national legislation in question with Community law.

42. In those circumstances, the applicability of Directive 95/46 cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular, in those cases, the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations.
43. Moreover, the applicability of Directive 95/46 to situations where there is no direct link with the exercise of the fundamental freedoms of movement guaranteed by the Treaty is confirmed by the wording of Article 3(1) of the directive, which defines its scope in very broad terms, not making the application of the rules on protection depend on whether the processing has an actual connection with freedom of movement between Member States. That is also confirmed by the exceptions in Article 3(2), in particular those concerning the processing of personal data in the course of an activity... provided for by Titles V and VI of the Treaty on European Union or in the course of a purely personal or household activity. Those exceptions would not, at the very least, be worded in that way if the directive were applicable exclusively to situations where there is a sufficient link with the exercise of freedoms of

movement.

44. The same observation may be made with regard to the exceptions in Article 8(2) of Directive 95/46, which concern the processing of specific categories of data, in particular those in Article 8(2)(d), which refers to processing carried out by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim.
45. Finally, the processing of personal data at issue in the main proceedings does not fall within the exception in the first indent of Article 3(2) of Directive 95/46. That processing does not concern the exercise of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union. Nor is it a processing operation concerning public security, defence, State security or the activities of the State in areas of criminal law.
46. The purposes set out in Articles 7(c) and (e) and 13(e) and (f) of Directive 95/46 show, moreover, that it is intended to cover instances of data processing such as those at issue in the main proceedings.
47. It must therefore be considered that Directive 95/46 is applicable to the processing of personal data provided for by legislation such as that at issue in the main proceedings.

The first question

48. By their first question, the national courts essentially ask whether Directive 95/46 is to be interpreted as precluding national legislation such as that at issue in the main proceedings which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold.

Observations submitted to the Court

49. The Danish Government considers that Directive 95/46 does not, strictly speaking, govern the right of third parties to obtain access to documents on request. In particular, Article 12 of the directive refers only to the right of any person to obtain data concerning him. According to the Government, the protection of personal data which appear not to be sensitive must give way to the principle of transparency, which holds an essential place in the Community legal order. The Danish Government,

- with the Swedish Government, observes in this respect that, according to recital 72 of the directive, the principle of public access to official documents may be taken into account when implementing the directive.
50. The Rechnungshof, the Austrian, Italian, Netherlands, Finnish and Swedish Governments and the Commission consider that the national provisions at issue in the main proceedings are compatible with Directive 95/46, by reason, generally, of the wide discretion the Member States have in implementing it, in particular where a task in the public interest provided for by law is to be carried out, under Articles 6(b) and (c) and 7(c) or (e) of the directive. Both the principles of transparency and of the proper management of public funds and the prevention of abuses are relied on in this respect.
 51. Those objectives in the public interest can justify an interference with private life, protected by Article 8(2) of the Convention, if it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued.
 52. The Austrian Government notes in particular that, when reviewing proportionality, the extent to which the data affect private life must be taken into account. Data relating to personal intimacy, health, family life or sexuality must therefore be protected more strongly than data relating to income and taxes, which, while also personal, concern personal identity to a lesser extent and are thereby less sensitive (see, to that effect, *Fressoz and Roire v. France* [GC], no. 29183/95, § 65, ECHR 1999-I).
 53. The Finnish Government likewise considers that protection of private life is not absolute. Data relating to a person acting in the course of a public office or public functions relating thereto do not fall within the protection of private life.
 54. The Italian Government submits that data such as that at issue in the main proceedings are already by their nature public in most Member States, since they are visible from salary scales or remuneration brackets laid down by statute, regulation or collective agreements. In those circumstances, it is not contrary to the principle of proportionality to provide for diffusion of that data with the identities of the various people in receipt of the salaries in question. That diffusion, being thus intended to clarify a situation that is already apparent from data available to the public, constitutes the minimum measure which would ensure realisation of the objectives of transparency and sound administration.
 55. The Netherlands Government adds, however, that the national courts must ascertain, for each public body concerned, whether the objective of public interest can be attained by processing the personal data in a way that interferes less with the private lives of the persons concerned.
 56. The United Kingdom Government submits that, in answering the first question, the provisions of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 18 December 2000 (OJ 2000 C 364, p. 1), to which the *Verfassungsgericht* briefly refers, are of no relevance.
 57. In Cases C-138/01 and C-139/01, the Commission questions whether, in the context of examining proportionality under Article 6(1)(b) of Directive 95/46, it might not suffice for attaining the objective pursued by the *BezBegrBVG* to transmit the data in an anonymised form, for example by indicating the function of the person concerned rather than his name. Even if it is admitted that the *Rechnungshof* needs details of names in order to carry out a more exact check, it is questionable whether the inclusion of that data in the Report, giving the name of the person concerned, is really necessary for performing that check, especially as the Report is not only submitted to the parliamentary assemblies but must also be widely published.
 58. Moreover, the Commission observes that under Article 13 of Directive 95/46 the Member States may *inter alia* derogate from Article 6(1)(b) of the directive in order to safeguard a number of objectives in the public interest, in particular an important economic or financial interest of a Member State (Article 13(1)(e)). However, in the Commission's view, the derogating measures must also comply with the principle of proportionality, which calls for the same considerations as those stated in the preceding paragraph with reference to Article 6(1)(b) of the directive.
 59. The defendants in the main proceedings in Case C-465/00 consider that the national legislation at issue is incompatible with Article 6(1)(b) and (c) of Directive 95/46 and cannot be justified under Article 7(c) or (e) of the directive, since it constitutes an interference which is not justified under Article 8(2) of the Convention,

and is in any event disproportionate. The audit performed by the Rechnungshof is sufficient to guarantee the thrifty use of public funds.

60. More particularly, it has not been shown that publication of the names and the amount of the income of all persons employed by public bodies where that amount exceeds a certain level constitutes a measure aimed at the economic well-being of the country. The aim of the legislature was to exert pressure on the bodies in question to maintain salaries at a low level. The defendants also submit that that measure is aimed, in the present case, at persons who for the most part are not public figures.
61. Moreover, even if the drawing up by the Rechnungshof of a report containing personal data on income intended for public debate were to be regarded as an interference with private life justified under Article 8(2) of the Convention, Land Niederösterreich and ÖRF consider that that measure also violates Article 14 of the Convention. Persons receiving the same income are treated unequally, depending on whether or not they are employed by a body subject to control by the Rechnungshof.
62. ÖRF points out a further example of unequal treatment that cannot be justified under Article 14 of the Convention. Among the employees of bodies subject to control by the Rechnungshof, only those whose income exceeds the threshold fixed in Paragraph 8 of the BezBegrBVG have to suffer an interference with their private life. If the legislature attaches real importance to the reasonableness of the remuneration received by the employees of certain bodies, it is then necessary to publish the income of all employees, regardless of its amount.
63. Finally, ÖRF, Marktgemeinde Kaltenleutgeben and Austrian Airlines, Österreichische Luftverkehrs-AG submit that the wording of Paragraph 8 of the BezBegrBVG lends itself to an interpretation consistent with Community law, under which the salaries in question are required to be communicated to the Rechnungshof and included in the Report only in anonymised form. That interpretation should prevail, as it resolves the contradiction between that provision and Directive 95/46.

Findings of the Court

64. It should be noted, to begin with, that the data at issue in the main proceedings, which relate both to the monies paid by certain bodies and

the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46, being information relating to an identified or identifiable natural person. Their recording and use by the body concerned, and their transmission to the Rechnungshof and inclusion by the latter in a report intended to be communicated to various political institutions and widely diffused, constitute processing of personal data within the meaning of Article 2(b) of the directive.

65. Under Directive 95/46, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, second, with one of the criteria for making data processing legitimate listed in Article 7.
66. More specifically, the data must be collected for specified, explicit and legitimate purposes (Article 6(1)(b) of Directive 95/46) and must be adequate, relevant and not excessive in relation to those purposes (Article 6(1)(c)). In addition, under Article 7(c) and (e) of the directive respectively, the processing of personal data is permissible only if it is necessary for compliance with a legal obligation to which the controller is subject or is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed.
67. However, under Article 13(e) and (f) of the directive, the Member States may derogate *inter alia* from Article 6(1) where this is necessary to safeguard respectively an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters or a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in particular cases including that referred to in subparagraph (e).
68. It should also be noted that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures (see, *inter alia*, Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37).

69. Those principles have been expressly restated in Article 6(2) EU, which states that [t]he Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
70. Directive 95/46 itself, while having as its principal aim to ensure the free movement of personal data, provides in Article 1(1) that Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Several recitals in its preamble, in particular recitals 10 and 11, also express that requirement.
71. In this respect, it is to be noted that Article 8 of the Convention, while stating in paragraph 1 the principle that the public authorities must not interfere with the right to respect for private life, accepts in paragraph 2 that such an interference is possible where it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
72. So, for the purpose of applying Directive 95/46, in particular Articles 6(1)(c), 7(c) and (e) and 13, it must be ascertained, first, whether legislation such as that at issue in the main proceedings provides for an interference with private life, and if so, whether that interference is justified from the point of view of Article 8 of the Convention.
- Existence of an interference with private life
73. First of all, the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 of the Convention. The European Court of Human Rights has held in this respect that the expression private life must not be interpreted restrictively and that there is no reason of principle to justify excluding activities of a professional... nature from the notion of private life (see, inter alia, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000-V).
74. It necessarily follows that, while the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the Convention.
75. To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way (see, to that effect, *Amann v. Switzerland*, § 70). It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party.
- Justification of the interference
76. An interference such as that mentioned in paragraph 74 above violates Article 8 of the Convention unless it is in accordance with the law, pursues one or more of the legitimate aims specified in Article 8(2), and is necessary in a democratic society for achieving that aim or aims.
77. It is common ground that the interference at issue in the main proceedings is in accordance with Paragraph 8 of the *BezBegrBVG*. However, the question arises whether that paragraph is formulated with sufficient precision to enable the citizen to adjust his conduct accordingly, and so complies with the requirement of foreseeability laid down in the case-law of the European Court of Human Rights (see, inter alia, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).
78. In this respect, Paragraph 8(3) of the *BezBegrBVG* states that the report drawn up by the Rechnungshof is to include all persons whose total yearly salaries and pensions from bodies... exceed the amount stated in subparagraph 1, without expressly requiring the names of the persons concerned to be disclosed in relation to the income they receive. According to the orders for reference, it is legal commentators who, on the basis of the travaux préparatoires, interpret the constitutional law in that way.
79. It is for the national courts to ascertain whether the interpretation to the effect that Paragraph 8(3) of the *BezBegrBVG* requires disclosure of the names of the persons concerned in relation

to the income received complies with the requirement of foreseeability referred to in paragraph 77 above.

80. However, that question need not arise until it has been determined whether such an interpretation of the national provision at issue is consistent with Article 8 of the Convention, as regards its required proportionality to the aims pursued. That question will be examined below.
81. It appears from the order for reference in Case C-465/00 that the objective of Paragraph 8 of the *BezBegrBVG* is to exert pressure on the public bodies concerned to keep salaries within reasonable limits. The Austrian Government observes, more generally, that the interference provided for by that provision is intended to guarantee the thrifty and appropriate use of public funds by the administration. Such an objective constitutes a legitimate aim within the meaning both of Article 8(2) of the Convention, which mentions the economic well-being of the country, and Article 6(1)(b) of Directive 95/46, which refers to specified, explicit and legitimate purposes.
82. It must next be ascertained whether the interference in question is necessary in a democratic society to achieve the legitimate aim pursued.
83. According to the European Court of Human Rights, the adjective necessary in Article 8(2) of the Convention implies that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim pursued (see, *inter alia*, the *Gillow v. the United Kingdom* judgment of 24 November 1986, Series A no. 109, § 55). The national authorities also enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, § 59).
84. The interest of the Republic of Austria in ensuring the best use of public funds, and in particular keeping salaries within reasonable limits, must be balanced against the seriousness of the interference with the right of the persons concerned to respect for their private life.
85. On the one hand, in order to monitor the proper use of public funds, the *Rechnungshof* and the various parliamentary bodies undoubtedly need to know the amount of expenditure on human resources in the various public bodies.

In addition, in a democratic society, taxpayers and public opinion generally have the right to be kept informed of the use of public revenues, in particular as regards expenditure on staff. Such information, put together in the Report, may make a contribution to the public debate on a question of general interest, and thus serves the public interest.

86. The question nevertheless arises whether stating the names of the persons concerned in relation to the income received is proportionate to the legitimate aim pursued and whether the reasons relied on before the Court to justify such disclosure appear relevant and sufficient.
87. It is plain that, according to the interpretation adopted by the national courts, Paragraph 8 of the *BezBegrBVG* requires disclosure of the names of the persons concerned, in relation to income above a certain level, with respect not only to persons filling posts remunerated by salaries on a published scale, but to all persons remunerated by bodies subject to control by the *Rechnungshof*. Moreover, such information is not only communicated to the *Rechnungshof* and via the latter to the various parliamentary bodies, but is also made widely available to the public.
88. It is for the national courts to ascertain whether such publicity is both necessary and proportionate to the aim of keeping salaries within reasonable limits, and in particular to examine whether such an objective could not have been attained equally effectively by transmitting the information as to names to the monitoring bodies alone. Similarly, the question arises whether it would not have been sufficient to inform the general public only of the remuneration and other financial benefits to which persons employed by the public bodies concerned have a contractual or statutory right, but not of the sums which each of them actually received during the year in question, which may depend to a varying extent on their personal and family situation.
89. With respect, on the other hand, to the seriousness of the interference with the right of the persons concerned to respect for their private life, it is not impossible that they may suffer harm as a result of the negative effects of the publicity attached to their income from employment, in particular on their prospects of being given employment by other undertakings, whether in Austria or elsewhere, which are not subject to control by the *Rechnung-*

shof.

90. It must be concluded that the interference resulting from the application of national legislation such as that at issue in the main proceedings may be justified under Article 8(2) of the Convention only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

Consequences with respect to the provisions of Directive 95/46

91. If the national courts conclude that the national legislation at issue is incompatible with Article 8 of the Convention, that legislation is also incapable of satisfying the requirement of proportionality in Articles 6(1)(c) and 7(c) or (e) of Directive 95/46. Nor could it be covered by any of the exceptions referred to in Article 13 of that directive, which likewise requires compliance with the requirement of proportionality with respect to the public interest objective being pursued. In any event, that provision cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life contrary to Article 8 of the Convention.
92. If, on the other hand, the national courts were to consider that Paragraph 8 of the *BezBegr-BVG* is both necessary for and appropriate to the public interest objective being pursued, they would then, as appears from paragraphs 77 to 79 above, still have to ascertain whether, by not expressly providing for disclosure of the names of the persons concerned in relation to the income received, Paragraph 8 of the *BezBegr-BVG* complies with the requirement of foreseeability.
93. Finally, it should be noted, in the light of the above considerations, that the national court must also interpret any provision of national law, as far as possible, in the light of the wording and the purpose of the applicable directive, in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).
94. In the light of all the above considerations, the answer to the first question must be that Arti-

cles 6(1)(c) and 7(c) and (e) of Directive 95/46 do not preclude national legislation such as that at issue in the main proceedings, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

The second question

95. By their second question, the national courts ask whether the provisions of Directive 95/46 which preclude national legislation such as that at issue in the main proceedings are directly applicable, in that they may be relied on by individuals before the national courts to oust the application of that legislation.
96. The defendants in the main proceedings in Case C-465/00 and the Netherlands Government consider that Articles 6(1) and 7 of Directive 95/46 fulfil the criteria stated in the Court's case-law for having such direct effect. They are sufficiently precise and unconditional for the bodies required to disclose the data relating to the income of the persons concerned to be able to rely on them to prevent application of the national provisions contrary to those provisions.
97. The Austrian Government submits, on the other hand, that the relevant provisions of Directive 95/46 are not directly applicable. In particular, Articles 6(1) and 7 are not unconditional, since their implementation requires the Member States, which have a wide discretion, to adopt special measures to that effect.
98. On this point, it should be noted that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State (see, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51).
99. In the light of the answer to the first question,

the second question seeks to know whether such a character may be attributed to Article 6(1)(c) of Directive 95/46, under which personal data must be... adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed, and to Article 7(c) or (e), under which personal data may be processed only if inter alia processing is necessary for compliance with a legal obligation to which the controller is subject or is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed.

100. Those provisions are sufficiently precise to be relied on by individuals and applied by the national courts. Moreover, while Directive 95/46 undoubtedly confers on the Member States a greater or lesser discretion in the implementation of some of its provisions, Articles 6(1)(c) and 7(c) or (e) for their part state unconditional obligations.

101. The answer to the second question must therefore be that Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.

Costs

102. The costs incurred by the Austrian, Danish, Italian, Netherlands, Finnish, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decisions on costs are a matter for those courts.

On those grounds, THE COURT,

in answer to the questions referred to it by the Verfassungsgerichtshof by order of 12 December 2000 and by the Oberster Gerichtshof by orders of 14 and 28 February 2001, hereby rules:

1. **Articles 6(1)(c) and 7(c) and (e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not preclude national legislation such as that at issue in the main**

proceedings, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

2. **Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.**

Rodríguez Iglesias Puissochet
Wathelet

Schintgen Gulmann Edward

La Pergola Jann Skouris

Macken Colneric von Bahr

Cunha Rodrigues

Delivered in open court in Luxembourg on 20 May 2003.

R. Grass, Registrar

G.C. Rodríguez Iglesias, President

PERSONAL DATA, PROCESSING PERSONAL DATA, LOADING PERSONAL DATA ONTO AN INTERNET PAGE, TRANSFER OF DATA, HOSTING PROVIDER, TRANSFER OF DATA TO THIRD COUNTRIES, DATA ACCESSIBLE TO PEOPLE IN A THIRD COUNTRY, INTERPRETATION OF COMMUNITY LEGISLATION IN THE LIGHT OF FUNDAMENTAL RIGHTS

Judgment of the Court, 6 November 2003

CASE C-101/01 CRIMINAL PROCEEDINGS AGAINST BODIL LINDQVIST

(Reference for a preliminary ruling from the Göta hovrätt (Sweden))

«(Directive 95/46/EC – Scope – Publication of personal data on the internet – Place of publication – Definition of transfer of personal data to third countries – Freedom of expression – Compatibility with Directive 95/46 of greater protection for personal data under the national legislation of a Member State)»

Opinion of Advocate General Tizzano delivered on 19 September 2002

KEYWORDS

1. Approximation of laws – Directive 95/46 – Scope – Definition of processing of personal data wholly or partly by automatic means – Act of referring, on an internet page, to various persons and identifying them by name or by other means – Included – Exceptions – Activities of the State or of State authorities unrelated to the fields of activity of individuals – Activities carried out in the course of private or family life of individuals – Processing of personal data consisting in publication on the internet in the exercise of charitable or religious activities – Not included (Directive 95/46 of the European Parliament and of the Council, Art. 3(1) and Art. 2, first and second indents)
2. Approximation of laws – Directive 95/46 – Scope – Definition of personal data concerning health – Reference to foot injury resulting in part-time sick leave – Included (Directive 95/46 of the European Parliament and of the Council, Art. 8(1))
3. Approximation of laws – Directive 95/46 –

Transfer of personal data to a third country – Definition – Loading of data on an internet page accessible to those with the technical means to access it, including those in third countries – Not included (Directive of the European Parliament and of the Council 95/46, Art. 25)

4. Approximation of laws – Directive 95/46 – Respect for fundamental rights – Freedom of expression – Obligation of national authorities responsible for applying national legislation implementing the directive to ensure a fair balance between the rights and interests in question (European Convention for Human Rights, Art. 10; Directive of the European Parliament and of the Council 95/46)
5. Approximation of laws – Directive 95/46 – National legislation for the protection of personal data – Need for consistency with provisions of directive and its objective – Possibility of a Member State's extending its scope to areas not included in the scope of the directive – Limits (Directive 95/46 of the Parliament and of the Council)

SUMMARY OF THE JUDGMENT

1. The act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Such processing of personal data in the exercise of charitable or religious activity is not covered by any of the exceptions in paragraph 2 of that article. The first exception, provided for by the first indent of paragraph 2, concerns the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union, and in any case processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law. The activities mentioned by way of example in that provision are, in any event, activities of the State or of State authorities unrelated to

the fields of activity of individuals and intended to define the scope of the exception provided for there, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category. Charitable or religious activities cannot be considered equivalent to the activities listed in that provision and are thus not covered by that exception. The second exception, provided for by the second indent of paragraph 2, relates only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people. see paras 27, 38, 43-48, operative part 1-2

2. Reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. In the light of the purpose of the directive, the expression data concerning health used in that provision must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual. see paras 50-51, operative part 3
3. There is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country. Given, first, the state of development of the internet at the time Directive 95/46 was drawn up and, second, the absence of criteria applicable to use of the internet in Chapter IV in which Article 25 appears, and which is intended to allow the Member States to monitor transfers of personal data to third countries and to prohibit such transfer where they do not offer an adequate level of protection, one cannot presume that the Community legislature intended the expression transfer [of data] to a third country

to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them. see paras 63-64, 68, 71, operative part 4

4. The provisions of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not, in themselves, bring about a restriction which conflicts with the general principle of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the European Convention for the Protection of Human Rights. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order. see para. 90, operative part 5
5. Measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it. see para. 99, operative part 6

JUDGMENT OF THE COURT

6 November 2003²

((Directive 95/46/EC – Scope – Publication of personal data on the internet – Place of publication – Definition of transfer of personal data to third countries – Freedom of expression – Compatibility with Directive 95/46 of greater protection for personal data under the national legislation of a Member State))

In Case C-101/01,

REFERENCE to the Court under Article 234 EC by the

² Language of the case: Swedish.

Göta hovrätt (Sweden) for a preliminary ruling in the criminal proceedings before that court against Bodil Lindqvist,

on, *inter alia*, the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31),

THE COURT, composed of: P. Jann, President of the First Chamber, acting for the President, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward (Rapporteur), J.-P. Puissechet, F. Macken and S. von Bahr, Judges, Advocate General: A. Tizzano, Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mrs Lindqvist, by S. Larsson, advokat,
- the Swedish Government, by A. Kruse, acting as Agent,
- the Netherlands Government, by H.G. Sevensen, acting as Agent,
- the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by J. Stratford, barrister,
- the Commission of the European Communities, by L. Ström and X. Lewis, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Lindqvist, represented by S. Larsson, of the Swedish Government, represented by A. Kruse and B. Hernqvist, acting as Agents, of the Netherlands Government, represented by J. van Bakel, acting as Agent, of the United Kingdom Government, represented by J. Stratford, of the Commission, represented by L. Ström and C. Docksey, acting as Agent, and of the EFTA Surveillance Authority, represented by D. Sif Tynes, acting as Agent, at the hearing on 30 April 2002,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2002,

gives the following Judgment

1. By order of 23 February 2001, received at the Court on 1 March 2001, the Göta hovrätt (Göta Court of Appeal) referred to the Court for a preliminary ruling under Article 234 EC seven questions concerning *inter alia* the interpretation of Directive 95/46/EC of the European Par-

liament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2. Those questions were raised in criminal proceedings before that court against Mrs Lindqvist, who was charged with breach of the Swedish legislation on the protection of personal data for publishing on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Swedish Protestant Church.

Legal background

Community legislation

3. Directive 95/46 is intended, according to the terms of Article 1(1), to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data.
4. Article 3 of Directive 95/46 provides, regarding the scope of the directive: 1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.² This Directive shall not apply to the processing of personal data:
 - in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,
 - by a natural person in the course of a purely personal or household activity.
5. Article 8 of Directive 95/46, entitled The processing of special categories of data, provides: 1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.² Paragraph 1 shall not apply where:
 - j. the data subject has given his explicit consent to the processing of those data, ex-

cept where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or

- k. processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorised by national law providing for adequate safeguards; or
- l. processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or
- m. processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or
- n. the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.⁴ Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.⁵ Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of

criminal convictions may be kept only under the control of official authority. Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.⁶ Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission.⁷ Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.

- 6. Article 9 of Directive 95/46, entitled Processing of personal data and freedom of expression, provides: Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.
- 7. Article 13 of Directive 95/46, entitled Exemptions and restrictions, provides that Member States may adopt measures restricting the scope of some of the obligations imposed by the directive on the controller of the data, inter alia as regards information given to the persons concerned, where such a restriction is necessary to safeguard, for example, national security, defence, public security, an important economic or financial interest of a Member State or of the European Union, or the investigation and prosecution of criminal offences or of breaches of ethics for regulated professions.
- 8. Article 25 of Directive 95/46, which is part of Chapter IV entitled Transfer of personal data to third countries, reads as follows: 1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.² The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in

question and the professional rules and security measures which are complied with in that country.³ The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.4. Where the Commission finds, under the procedure provided for in Article 31(2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.⁵ At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.6. The Commission may find, in accordance with the procedure referred to in Article 31(2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals. Member States shall take the measures necessary to comply with the Commission's decision.

9. At the time of the adoption of Directive 95/46, the Kingdom of Sweden made the following statement on the subject of Article 9, which was entered in the Council minutes (document No 4649/95 of the Council, of 2 February 1995): The Kingdom of Sweden considers that artistic and literary expression refers to the means of expression rather than to the contents of the communication or its quality.
10. The European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (the ECHR), provides, in Article 8, for a right to respect for private and family life and, in Article 10, contains provisions concerning freedom of expression.

The national legislation

11. Directive 95/46 was implemented in Swedish law by the Personuppgiftslag (SFS 1998:204) (Swedish law on personal data, the PUL).

THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

12. In addition to her job as a maintenance worker, Mrs Lindqvist worked as a catechist in the parish of Alseda (Sweden). She followed a data processing course on which she had *inter alia* to set up a home page on the internet. At the end of 1998, Mrs Lindqvist set up internet pages at home on her personal computer in order to allow parishioners preparing for their confirmation to obtain information they might need. At her request, the administrator of the Swedish Church's website set up a link between those pages and that site.
13. The pages in question contained information about Mrs Lindqvist and 18 colleagues in the parish, sometimes including their full names and in other cases only their first names. Mrs Lindqvist also described, in a mildly humorous manner, the jobs held by her colleagues and their hobbies. In many cases family circumstances and telephone numbers and other matters were mentioned. She also stated that one colleague had injured her foot and was on half-time on medical grounds.
14. Mrs Lindqvist had not informed her colleagues of the existence of those pages or obtained their consent, nor did she notify the Datainspektionen (supervisory authority for the protection of electronically transmitted data) of her activity. She removed the pages in question as soon as she became aware that they were not appreciated by some of her colleagues.
15. The public prosecutor brought a prosecution against Mrs Lindqvist charging her with breach of the PUL on the grounds that she had:
 - processed personal data by automatic means without giving prior written notification to the Datainspektionen (Paragraph 36 of the PUL);
 - processed sensitive personal data (injured foot and half-time on medical grounds) without authorisation (Paragraph 13 of the PUL);
 - transferred processed personal data to a third country without authorisation (Paragraph 33 of the PUL).
16. Mrs Lindqvist accepted the facts but disputed that she was guilty of an offence. Mrs Lindqvist was fined by the Eksjö tingsrätt (District Court) (Sweden) and appealed against that sentence

to the referring court.

17. The amount of the fine was SEK 4 000, which was arrived at by multiplying the sum of SEK 100, representing Mrs Lindqvist's financial position, by a factor of 40, reflecting the severity of the offence. Mrs Lindqvist was also sentenced to pay SEK 300 to a Swedish fund to assist victims of crimes.

18. As it had doubts as to the interpretation of the Community law applicable in this area, *inter alia* Directive 95/46, the Göta hovrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Is the mention of a person — by name or with name and telephone number — on an internet home page an action which falls within the scope of [Directive 95/46]? Does it constitute the processing of personal data wholly or partly by automatic means to list on a self-made internet home page a number of persons with comments and statements about their jobs and hobbies etc.?

(2) If the answer to the first question is no, can the act of setting up on an internet home page separate pages for about 15 people with links between the pages which make it possible to search by first name be considered to constitute the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system within the meaning of Article 3(1)?

If the answer to either of those questions is yes, the hovrätt also asks the following questions:

(3) Can the act of loading information of the type described about work colleagues onto a private home page which is none the less accessible to anyone who knows its address be regarded as outside the scope of [Directive 95/46] on the ground that it is covered by one of the exceptions in Article 3(2)?

(4) Is information on a home page stating that a named colleague has injured her foot and is on half-time on medical grounds personal data concerning health which, according to Article 8(1), may not be processed?

(5) [Directive 95/46] prohibits the transfer of personal data to third countries in certain cases. If a person in Sweden uses a computer to load personal data onto a home page stored on a server in Sweden — with the result that personal data become accessible to people in

third countries — does that constitute a transfer of data to a third country within the meaning of the directive? Would the answer be the same even if, as far as known, no one from the third country had in fact accessed the data or if the server in question was actually physically in a third country?

(6) Can the provisions of [Directive 95/46], in a case such as the above, be regarded as bringing about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the EU and are enshrined in *inter alia* Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms?

Finally, the hovrätt asks the following question:

(7) Can a Member State, as regards the issues raised in the above questions, provide more extensive protection for personal data or give it a wider scope than the directive, even if none of the circumstances described in Article 13 exists?

The first question

19. By its first question, the referring court asks whether the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of Directive 95/46.

Observations submitted to the Court

20. Mrs Lindqvist submits that it is unreasonable to take the view that the mere mention by name of a person or of personal data in a document contained on an internet page constitutes automatic processing of data. On the other hand, reference to such data in a keyword in the meta tags of an internet page, which makes it possible to create an index and find that page using a search engine, might constitute such processing.
21. The Swedish Government submits that the term the processing of personal data wholly or partly by automatic means in Article 3(1) of Directive 95/46, covers all processing in computer format, in other words, in binary format. Consequently, as soon as personal data are

processed by computer, whether using a word processing programme or in order to put them on an internet page, they have been the subject of processing within the meaning of Directive 95/46.

22. The Netherlands Government submits that personal data are loaded onto an internet page using a computer and a server, which are essential elements of automation, so that it must be considered that such data are subject to automatic processing.
23. The Commission submits that Directive 95/46 applies to all processing of personal data referred to in Article 3 thereof, regardless of the technical means used. Accordingly, making personal data available on the internet constitutes processing wholly or partly by automatic means, provided that there are no technical limitations which restrict the processing to a purely manual operation. Thus, by its very nature, an internet page falls within the scope of Directive 95/46.

Reply of the Court

24. The term personal data used in Article 3(1) of Directive 95/46 covers, according to the definition in Article 2(a) thereof, any information relating to an identified or identifiable natural person. The term undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies.
25. According to the definition in Article 2(b) of Directive 95/46, the term processing of such data used in Article 3(1) covers any operation or set of operations which is performed upon personal data, whether or not by automatic means. That provision gives several examples of such operations, including disclosure by transmission, dissemination or otherwise making data available. It follows that the operation of loading personal data on an internet page must be considered to be such processing.
26. It remains to be determined whether such processing is wholly or partly by automatic means. In that connection, placing information on an internet page entails, under current technical and computer procedures, the operation of loading that page onto a server and the operations necessary to make that page accessible to people who are connected to the internet. Such operations are performed, at least in part, automatically.

27. The answer to the first question must therefore be that the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of Directive 95/46.

The second question

28. As the first question has been answered in the affirmative, there is no need to reply to the second question, which arises only in the event that the first question is answered in the negative.

The third question

29. By its third question, the national court essentially seeks to know whether processing of personal data such as that described in the first question is covered by one of the exceptions in Article 3(2) of Directive 95/46.

Observations submitted to the Court

30. Mrs Lindqvist submits that private individuals who make use of their freedom of expression to create internet pages in the course of a non-profit-making or leisure activity are not carrying out an economic activity and are thus not subject to Community law. If the Court were to hold otherwise, the question of the validity of Directive 95/46 would arise, as, in adopting it, the Community legislature would have exceeded the powers conferred on it by Article 100a of the EC Treaty (now, after amendment, Article 95 EC). The approximation of laws, which concerns the establishment and functioning of the common market, cannot serve as a legal basis for Community measures regulating the right of private individuals to freedom of expression on the internet.
31. The Swedish Government submits that, when Directive 95/46 was implemented in national law, the Swedish legislature took the view that processing of personal data by a natural person which consisted in publishing those data to an indeterminate number of people, for example through the internet, could not be described as a purely personal or household activity within the meaning of the second indent of Article 3(2) of Directive 95/46. However, that Government does not rule out that the exception pro-

vided for in the first indent of that paragraph might cover cases in which a natural person publishes personal data on an internet page solely in the exercise of his freedom of expression and without any connection with a professional or commercial activity.

32. According to the Netherlands Government, automatic processing of data such as that at issue in the main proceedings does not fall within any of the exceptions in Article 3(2) of Directive 95/46. As regards the exception in the second indent of that paragraph in particular, it observes that the creator of an internet page brings the data placed on it to the knowledge of a generally indeterminate group of people.
33. The Commission submits that an internet page such as that at issue in the main proceedings cannot be considered to fall outside the scope of Directive 95/46 by virtue of Article 3(2) thereof, but constitutes, given the purpose of the internet page at issue in the main proceedings, an artistic and literary creation within the meaning of Article 9 of that Directive.
34. It takes the view that the first indent of Article 3(2) of Directive 95/46 lends itself to two different interpretations. The first consists in limiting the scope of that provision to the areas cited as examples, in other words, to activities which essentially fall within what are generally called the second and third pillars. The other interpretation consists in excluding from the scope of Directive 95/46 the exercise of any activity which is not covered by Community law.
35. The Commission argues that Community law is not limited to economic activities connected with the four fundamental freedoms. Referring to the legal basis of Directive 95/46, to its objective, to Article 6 EU, to the Charter of fundamental rights of the European Union proclaimed in Nice on 18 December 2000 (OJ 2000 C 364, p. 1), and to the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, it concludes that that directive is intended to regulate the free movement of personal data in the exercise not only of an economic activity, but also of social activity in the course of the integration and functioning of the common market.
36. It adds that to exclude generally from the scope of Directive 95/46 internet pages which contain no element of commerce or of provision of services might entail serious problems of demarcation. A large number of internet

pages containing personal data intended to disparage certain persons with a particular end in view might then be excluded from the scope of that directive.

Reply of the Court

37. Article 3(2) of Directive 95/46 provides for two exceptions to its scope.
38. The first exception concerns the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union, and in any case processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.
39. As the activities of Mrs Lindqvist which are at issue in the main proceedings are essentially not economic but charitable and religious, it is necessary to consider whether they constitute the processing of personal data in the course of an activity which falls outside the scope of Community law within the meaning of the first indent of Article 3(2) of Directive 95/46.
40. The Court has held, on the subject of Directive 95/46, which is based on Article 100a of the Treaty, that recourse to that legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis (see Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 41, and the case-law cited therein).
41. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations (*Österreichischer Rundfunk and Others*, cited above, paragraph 42).
42. Against that background, it would not be appropriate to interpret the expression activity which falls outside the scope of Community law as having a scope which would require it to be determined in each individual case

whether the specific activity at issue directly affected freedom of movement between Member States.

43. The activities mentioned by way of example in the first indent of Article 3(2) of Directive 95/46 (in other words, the activities provided for by Titles V and VI of the Treaty on European Union and processing operations concerning public security, defence, State security and activities in areas of criminal law) are, in any event, activities of the State or of State authorities and unrelated to the fields of activity of individuals.
44. It must therefore be considered that the activities mentioned by way of example in the first indent of Article 3(2) of Directive 95/46 are intended to define the scope of the exception provided for there, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category (*eiusdem generis*).
45. Charitable or religious activities such as those carried out by Mrs Lindqvist cannot be considered equivalent to the activities listed in the first indent of Article 3(2) of Directive 95/46 and are thus not covered by that exception.
46. As regards the exception provided for in the second indent of Article 3(2) of Directive 95/46, the 12th recital in the preamble to that directive, which concerns that exception, cites, as examples of the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, correspondence and the holding of records of addresses.
47. That exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.
48. The answer to the third question must therefore be that processing of personal data such as that described in the reply to the first question is not covered by any of the exceptions in Article 3(2) of Directive 95/46.

The fourth question

49. By its fourth question, the referring court seeks to know whether reference to the fact that an individual has injured her foot and is on half-

time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

50. In the light of the purpose of the directive, the expression data concerning health used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual.
51. The answer to the fourth question must therefore be that reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

The fifth question

52. By its fifth question the referring court seeks essentially to know whether there is any transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person (the hosting provider) who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country. The referring court also asks whether the reply to that question would be the same if no one from the third country had in fact accessed the data or if the server where the page was stored was physically in a third country.

Observations submitted to the Court

53. The Commission and the Swedish Government consider that the loading, using a computer, of personal data onto an internet page, so that they become accessible to nationals of third countries, constitutes a transfer of data to third countries within the meaning of Directive 95/46. The answer would be the same if no one from the third country had in fact accessed the data or if the server where it was stored was physically in a third country.
54. The Netherlands Government points out that the term transfer is not defined by Directive 95/46. It takes the view, first, that that term must be understood to refer to the act of intentionally transferring personal data from the territory of a Member State to a third country

and, second, that no distinction can be made between the different ways in which data are made accessible to third parties. It concludes that loading personal data onto an internet page using a computer cannot be considered to be a transfer of personal data to a third country within the meaning of Article 25 of Directive 95/46.

55. The United Kingdom Government submits that Article 25 of Directive 95/46 concerns the transfer of data to third countries and not their accessibility from third countries. The term transfer connotes the transmission of personal data from one place and person to another place and person. It is only in the event of such a transfer that Article 25 of Directive 95/46 requires Member States to ensure an adequate level of protection of personal data in a third country.

Reply of the Court

56. Directive 95/46 does not define the expression transfer to a third country in Article 25 or any other provision, including Article 2.
57. In order to determine whether loading personal data onto an internet page constitutes a transfer of those data to a third country within the meaning of Article 25 of Directive 95/46 merely because it makes them accessible to people in a third country, it is necessary to take account both of the technical nature of the operations thus carried out and of the purpose and structure of Chapter IV of that directive where Article 25 appears.
58. Information on the internet can be consulted by an indefinite number of people living in many places at almost any time. The ubiquitous nature of that information is a result inter alia of the fact that the technical means used in connection with the internet are relatively simple and becoming less and less expensive.
59. Under the procedures for use of the internet available to individuals like Mrs Lindqvist during the 1990s, the author of a page intended for publication on the internet transmits the data making up that page to his hosting provider. That provider manages the computer infrastructure needed to store those data and connect the server hosting the site to the internet. That allows the subsequent transmission of those data to anyone who connects to the internet and seeks access to it. The computers which constitute that infrastructure may be located, and indeed often are located, in one or more countries other than that where the hosting provider is established, without its clients being aware or being in a position to be aware of it.
60. It appears from the court file that, in order to obtain the information appearing on the internet pages on which Mrs Lindqvist had included information about her colleagues, an internet user would not only have to connect to the internet but also personally carry out the necessary actions to consult those pages. In other words, Mrs Lindqvist's internet pages did not contain the technical means to send that information automatically to people who did not intentionally seek access to those pages.
61. It follows that, in circumstances such as those in the case in the main proceedings, personal data which appear on the computer of a person in a third country, coming from a person who has loaded them onto an internet site, were not directly transferred between those two people but through the computer infrastructure of the hosting provider where the page is stored.
62. It is in that light that it must be examined whether the Community legislature intended, for the purposes of the application of Chapter IV of Directive 95/46, to include within the expression transfer [of data] to a third country within the meaning of Article 25 of that directive activities such as those carried out by Mrs Lindqvist. It must be stressed that the fifth question asked by the referring court concerns only those activities and not those carried out by the hosting providers.
63. Chapter IV of Directive 95/46, in which Article 25 appears, sets up a special regime, with specific rules, intended to allow the Member States to monitor transfers of personal data to third countries. That Chapter sets up a complementary regime to the general regime set up by Chapter II of that directive concerning the lawfulness of processing of personal data.
64. The objective of Chapter IV is defined in the 56th to 60th recitals in the preamble to Directive 95/46, which state inter alia that, although the protection of individuals guaranteed in the Community by that Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection, the adequacy of such protection must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations. Where a third

country does not ensure an adequate level of protection the transfer of personal data to that country must be prohibited.

65. For its part, Article 25 of Directive 95/46 imposes a series of obligations on Member States and on the Commission for the purposes of monitoring transfers of personal data to third countries in the light of the level of protection afforded to such data in each of those countries.
66. In particular, Article 25(4) of Directive 95/46 provides that, where the Commission finds that a third country does not ensure an adequate level of protection, Member States are to take the measures necessary to prevent any transfer of personal data to the third country in question.
67. Chapter IV of Directive 95/46 contains no provision concerning use of the internet. In particular, it does not lay down criteria for deciding whether operations carried out by hosting providers should be deemed to occur in the place of establishment of the service or at its business address or in the place where the computer or computers constituting the service's infrastructure are located.
68. Given, first, the state of development of the internet at the time Directive 95/46 was drawn up and, second, the absence, in Chapter IV, of criteria applicable to use of the internet, one cannot presume that the Community legislature intended the expression transfer [of data] to a third country to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them.
69. If Article 25 of Directive 95/46 were interpreted to mean that there is transfer [of data] to a third country every time that personal data are loaded onto an internet page, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the internet. The special regime provided for by Chapter IV of the directive would thus necessarily become a regime of general application, as regards operations on the internet. Thus, if the Commission found, pursuant to Article 25(4) of Directive 95/46, that even one third country did not ensure adequate protection, the Member States would be obliged to prevent any personal data being placed on the internet.

70. Accordingly, it must be concluded that Article 25 of Directive 95/46 is to be interpreted as meaning that operations such as those carried out by Mrs Lindqvist do not as such constitute a transfer [of data] to a third country. It is thus unnecessary to investigate whether an individual from a third country has accessed the internet page concerned or whether the server of that hosting service is physically in a third country.
71. The reply to the fifth question must therefore be that there is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.

The sixth question

72. By its sixth question the referring court seeks to know whether the provisions of Directive 95/46, in a case such as that in the main proceedings, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined in inter alia Article 10 of the ECHR.

Observations submitted to the Court

73. Citing inter alia Case C-274/99 P Connolly v Commission [2001] ECR I-1611, Mrs Lindqvist submits that Directive 95/46 and the PUL, in so far as they lay down requirements of prior consent and prior notification of a supervisory authority and a principle of prohibiting processing of personal data of a sensitive nature, are contrary to the general principle of freedom of expression enshrined in Community law. More particularly, she argues that the definition of processing of personal data wholly or partly by automatic means does not fulfil the criteria of predictability and accuracy.
74. She argues further that merely mentioning a natural person by name, revealing their telephone details and working conditions and giving information about their state of health and hobbies, information which is in the public domain, well-known or trivial, does not constitute a significant breach of the right to respect for private life. Mrs Lindqvist considers that, in any event, the constraints imposed by Direc-

- tive 95/46 are disproportionate to the objective of protecting the reputation and private life of others.
75. The Swedish Government considers that Directive 95/46 allows the interests at stake to be weighed against each other and freedom of expression and protection of private life to be thereby safeguarded. It adds that only the national court can assess, in the light of the facts of each individual case, whether the restriction on the exercise of the right to freedom of expression entailed by the application of the rules on the protection of the rights of others is proportionate.
 76. The Netherlands Government points out that both freedom of expression and the right to respect for private life are among the general principles of law for which the Court ensures respect and that the ECHR does not establish any hierarchy between the various fundamental rights. It therefore considers that the national court must endeavour to balance the various fundamental rights at issue by taking account of the circumstances of the individual case.
 77. The United Kingdom Government points out that its proposed reply to the fifth question, set out in paragraph 55 of this judgment, is wholly in accordance with fundamental rights and avoids any disproportionate restriction on freedom of expression. It adds that it is difficult to justify an interpretation which would mean that the publication of personal data in a particular form, that is to say, on an internet page, is subject to far greater restrictions than those applicable to publication in other forms, such as on paper.
 78. The Commission also submits that Directive 95/46 does not entail any restriction contrary to the general principle of freedom of expression or other rights and freedoms applicable in the European Union corresponding *inter alia* to the right provided for in Article 10 of the ECHR.
- individuals. Those objectives may of course be inconsistent with one another.
80. On the one hand, the economic and social integration resulting from the establishment and functioning of the internal market will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States, whether businesses or public authorities of the Member States. Those so involved will, to a certain extent, need to have access to personal data to perform their transactions or carry out their tasks within the area without internal frontiers which the internal market constitutes.
 81. On the other hand, those affected by the processing of personal data understandably require those data to be effectively protected.
 82. The mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 95/46 itself, in that it provides for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for. Second, they result from the adoption, by the Member States, of national provisions implementing that directive and their application by the national authorities.
 83. As regards Directive 95/46 itself, its provisions are necessarily relatively general since it has to be applied to a large number of very different situations. Contrary to Mrs Lindqvist's contentions, the directive quite properly includes rules with a degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options.
 84. It is true that, in many respects, the Member States have a margin for manoeuvre in implementing Directive 95/46. However, there is nothing to suggest that the regime it provides for lacks predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order.
 85. Thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved.

Reply of the Court

79. According to the seventh recital in the preamble to Directive 95/46, the establishment and functioning of the common market are liable to be seriously affected by differences in national rules applicable to the processing of personal data. According to the third recital of that directive the harmonisation of those national rules must seek to ensure not only the free flow of such data between Member States but also the safeguarding of the fundamental rights of

86. In that context, fundamental rights have a particular importance, as demonstrated by the case in the main proceedings, in which, in essence, Mrs Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious life have to be weighed against the protection of the private life of the individuals about whom Mrs Lindqvist has placed data on her internet site.
87. Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.
88. Whilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46, such sanctions must always respect the principle of proportionality. That is so a fortiori since the scope of Directive 95/46 is very wide and the obligations of those who process personal data are many and significant.
89. It is for the referring court to take account, in accordance with the principle of proportionality, of all the circumstances of the case before it, in particular the duration of the breach of the rules implementing Directive 95/46 and the importance, for the persons concerned, of the protection of the data disclosed.
90. The answer to the sixth question must therefore be that the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

The seventh question

91. By its seventh question, the referring court

essentially seeks to know whether it is permissible for the Member States to provide for greater protection for personal data or a wider scope than are required under Directive 95/46.

Observations submitted to the Court

92. The Swedish Government states that Directive 95/46 is not confined to fixing minimum conditions for the protection of personal data. Member States are obliged, in the course of implementing that directive, to attain the level of protection dictated by it and are not empowered to provide for greater or less protection. However, account must be taken of the discretion which the Member States have in implementing the directive to lay down in their domestic law the general conditions for the lawfulness of the processing of personal data.
93. The Netherlands Government submits that Directive 95/46 does not preclude Member States from providing for greater protection in certain areas. It is clear, for example, from Article 10, Article 11(1), subparagraph (a) of the first paragraph of Article 14, Article 17(3), Article 18(5) and Article 19(1) of that directive that the Member States may make provision for wider protection. Moreover, the Member States are free to apply the principles of Directive 95/46 also to activities which do not fall within its scope.
94. The Commission submits that Directive 95/46 is based on Article 100a of the Treaty and that, if a Member State wishes to maintain or introduce legislation which derogates from such a harmonising directive, it is obliged to notify the Commission pursuant to Article 95(4) or 95(5) EC. The Commission therefore submits that a Member State cannot make provision for more extensive protection for personal data or a wider scope than are required under the directive.

Reply of the Court

95. Directive 95/46 is intended, as appears from the eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.

96. The harmonisation of those national laws is

therefore not limited to minimal harmonisation but amounts to harmonisation which is generally complete. It is upon that view that Directive 95/46 is intended to ensure free movement of personal data while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data relate.

97. It is true that Directive 95/46 allows the Member States a margin for manoeuvre in certain areas and authorises them to maintain or introduce particular rules for specific situations as a large number of its provisions demonstrate. However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life.
98. On the other hand, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included within the scope thereof, provided that no other provision of Community law precludes it.
99. In the light of those considerations, the answer to the seventh question must be that measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

Costs

100. The costs incurred by the Swedish, Netherlands and United Kingdom Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, THE COURT, in answer to the questions referred to it by the Göta hovrätt by order of 23 February 2001, hereby rules:

1. The act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
2. Such processing of personal data is not covered by any of the exceptions in Article 3(2) of Directive 95/46.
3. Reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.
4. There is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.
5. The provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined *inter alia* in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.
6. Measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private

life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

Jann Timmermans Gulmann

Cunha RodriguesRosas Edward

Puissochet Macken von Bahr

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass, *Registrar*

V. Skouris, *President*

GAMBLING, FREEDOM TO PROVIDE AND RECEIVE SERVICES, RESTRICTIONS UNDER ARTICLE 46(1) EC

Judgment of the Court, 6 November 2003

CASE C-243/01 CRIMINAL PROCEEDINGS AGAINST PIERGIORGIO GAMBELLI AND OTHERS

(Reference for a preliminary ruling from the Tribunale di Ascoli Piceno (Italy))

«(Right of establishment – Freedom to provide services – Collection of bets on sporting events in one Member State and transmission by internet to another Member State – Prohibition enforced by criminal penalties – Legislation in a Member State which reserves the right to collect bets to certain bodies)»

Opinion of Advocate General Alber delivered on 13 March 2003

SUMMARY OF THE JUDGMENT

Freedom of establishment – Freedom to provide services – Restrictions – National legislation prohibiting, on pain of criminal penalty, the collection of bets without a licence or authorisation – Not permissible – Justification in the public interest – Compliance with the principles of proportionality and non-discrimination – Investigation by the national courts (Arts 43 EC and 49 EC)

National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively, which, to be justified, must be based on imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it and be applied without discrimination. In that connection, it is for the national court to de-

termine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives. In particular, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings. Furthermore, where a criminal penalty was imposed on any person who from his home in a Member State connects by internet to a bookmaker established in another Member State the national court must consider whether this constitutes a disproportionate penalty. see paras 65, 69, 72, 76, operative part

JUDGMENT OF THE COURT

6 November 2003³

((Right of establishment – Freedom to provide services – Collection of bets on sporting events in one Member State and transmission by internet to another Member State – Prohibition enforced by criminal penalties – Legislation in a Member State which reserves the right to collect bets to certain bodies))

In Case C-243/01,

REFERENCE to the Court under Article 234 EC by the Tribunale di Ascoli Piceno (Italy) for a preliminary ruling in the criminal proceedings before that court against

Piergiorgio Gambelli and Others,

on the interpretation of Articles 43 EC and 49 EC, THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans and J.N. Cunha Rodrigues (Presidents of Chambers), D.A.O. Edward (Rapporteur), R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges, Advocate General: S. Alber, Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Gambelli and Others, by D. Agnello, avvocato,
- Mr Garrisi, by R.A. Jacchia, A. Terranova and I.

³ Language of the case: Italian.

- Picciano, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,
 - the Belgian Government, by F. van de Craen, acting as Agent, assisted by P. Vlaemminck, avocat,
 - the Greek Government, by M. Apessos and D. Tsagkaraki, acting as Agent,
 - the Spanish Government, by L. Fraguas Gadea, acting as Agent,
 - the Luxembourg Government, by N. Mackel, acting as Agent,
 - the Portuguese Government, by L. Fernandes and A. Barros, acting as Agents,
 - the Finnish Government, by E. Bygglin, acting as Agent,
 - the Swedish Government, by B. Hernqvist, acting as Agent,
 - the Commission of the European Communities, by A. Aresu and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gambelli and others, represented by D. Agnello; of Mr Garisi, represented by R.A. Jacchia and A. Terranova; of the Italian Government, represented by A. Cingolo, avvocato dello Stato; of the Belgian Government, represented by P. Vlaemminck; of the Greek Government, represented by M. Apessos; of the Spanish Government, represented by L. Fraguas Gadea; of the French Government, represented by P. Bous-saroque, acting as Agent; of the Portuguese Government, represented by A. Barros; of the Finnish Government, represented by E. Bygglin; and of the Commission, represented by A. Aresu and M. Patakia, at the hearing on 22 October 2003,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following Judgment

1. By order of 30 March 2001, received at the Court on 22 June 2001, the Tribunale di Ascoli Piceno referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 43 and 49 EC.
2. The question was raised in criminal proceedings brought against Mr Gambelli and 137 other defendants (hereinafter Gambelli and others), who are accused of having unlawfully organised clandestine bets and of being the

proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State.

Legal background

Community legislation

3. Article 43 EC provides as follows:- Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.
4. The first paragraph of Article 48 EC provides that companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall... be treated in the same way as natural persons who are nationals of Member States.
5. Article 46(1) EC provides that the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
6. The first paragraph of Article 49 EC provides that within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.
National legislation
7. Under Article 88 of the Regio Decreto No 773,

Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931, hereinafter the Royal Decree), no licence is to be granted for the taking of bets, with the exception of bets on races, regatta, ball games or similar contests where the taking of the bets is essential for the proper conduct of the competitive event.

8. Under Legge Finanziaria No 388 (Finance Law No 388) of 23 December 2000 (ordinary supplement to the GURI of 29 December 2000, hereinafter Law No 388/00), authorisation to organise betting is granted exclusively to licence holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organise or carry on betting. Bets can relate to the outcome of sporting events taking place under the supervision of the Comitato olimpico nazionale italiano (Italian National Olympic Committee, hereinafter the CONI), or its subsidiary organisations, or to the results of horse races organised through the Unione nazionale per l'incremento delle razze equine (National Union for the Betterment of Horse Breeds, hereinafter the UNIRE).
9. Articles 4, 4a and 4b of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989 as amended by Law No 388/00, (hereinafter Law No 401/89), Article 37(5) of which inserted Articles 4a and 4b into Law No 410/89, provide as follows: Unlawful participation in the organisation of games or bets Article 4

1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall

be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

...Article 4a The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad. Article 4b... the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.

The main proceedings and the question referred for a preliminary ruling

10. The order for reference states that the Public Prosecutor and the investigating judge at the Tribunale di Fermo (Italy) established the existence of a widespread and complex organisation of Italian agencies linked by the internet to the English bookmaker Stanley International Betting Ltd (Stanley), established in Liverpool (United Kingdom), and to which Gambelli and others, the defendants in the main proceedings, belong. They are accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State, thus infringing Law No 401/89.
11. Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offence under Article 4 of Law No 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker

- by internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which sum is then transferred to the bookmaker into a foreign account specially designated for this purpose.
12. Stanley is an English capital company registered in the United Kingdom which carries on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It is authorised to carry on its activity in the United Kingdom and abroad. It organises and manages bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley pays the winnings and the various duties payable in the United Kingdom, as well as taxes on salaries and so on. It is subject to rigorous controls in relation to the legality of its activities, which are carried out by a private audit company and by the Inland Revenue and Customs and Excise.
 13. Stanley offers an extensive range of fixed sports bets on national, European and world sporting events. Individuals may participate from their own home, using various methods such as the internet, fax or telephone, in the betting organised and marketed by it.
 14. Stanley's presence as an undertaking in Italy is consolidated by commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres. Those centres make electronic means of communication available to users, collect and register the intentions to bet and forward them to Stanley.
 15. The defendants in the main proceedings are registered at the Camera di Commercio (Chamber of Commerce) as proprietors of undertakings which run data transfer centres and have received due authorisation from the Ministero delle Poste e delle Comunicazioni (Minister of Post and Communications) to transmit data.
 16. The judge in charge of the preliminary investigations at the Tribunale di Fermo made an order for provisional sequestration and the defendants were also subjected to personal checks and to searches of their agencies, homes and vehicles. Mr Garrisi, who is on the Board of Stanley, was taken into police custody.
 17. The defendants in the main proceedings brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the data transmission centres of which they are the proprietors.
 18. The Tribunale di Ascoli Piceno makes reference to the case-law of the Court, in particular its judgment in Case C-67/98 Zenatti [1999] ECR I-7289. However, it considers that the questions raised in the case before it do not quite correspond to the facts already considered by the Court in Zenatti. Recent amendments to Law No 401/89 demand re-examination of the issue by the Court of Justice.
 19. The Tribunale di Ascoli Piceno refers in this context to the parliamentary working papers relating to Law No 388/00 which show that the restrictions inserted by that law into Law No 401/89 were dictated chiefly by the need to protect sports Totoricevitori, a category of private sector undertakings. The court states that it cannot find in those restrictions any public policy concern able to justify a limitation of the rights guaranteed by Community or constitutional rules.
 20. The court emphasises that the apparent legality of collecting and forwarding bets on foreign sporting events, on the initial wording of Article 4 of Law No 401/89, had led to the creation and development of a network of operators who have invested capital and created infrastructures in the gaming and betting sector. Those operators suddenly find the legitimacy of their position called in question following amendments to the rules in Law No 388/00 prohibiting on pain of criminal penalties the carrying on of activities by any person anywhere involving the collection, acceptance, registration and transmission of offers to bet, in particular on sporting events, without a licence or permit from the State.
 21. The national court questions whether the principle of proportionality is being observed, having regard first to the severity of the prohibition, breach of which attracts criminal penalties which may make it impossible in practice for lawfully constituted undertakings or Community operators to carry on economic activities in the betting and gaming sector in Italy, and secondly to the importance of the national public interest protected and for which the Community freedoms are sacrificed.
 22. The Tribunale di Ascoli Piceno also considers that it cannot ignore the extent of the apparent discrepancy between national legislation

severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other.

23. The court observes that the proceedings before it raise, first, questions of national law relating to the compatibility of the statutory amendments to Article 4 of Law No 401/89 with the Italian constitution, which protects private economic initiative for activities which are not subject to taxes levied by the State, and secondly questions relating to the incompatibility of the rule laid down in that article with the freedom of establishment and the freedom to provide cross-border services. The questions of national law raised have been referred by the Tribunale di Ascoli Piceno to the Corte costituzionale (the Italian Constitutional Court).
24. In those circumstances, the Tribunale di Ascoli Piceno has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling: Is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorisations prescribed by domestic law have been complied with?

The question

Observations submitted to the Court

25. Gambelli and others consider that by prohibiting Italian citizens from linking up with foreign companies in order to place bets and thus to receive the services offered by those companies by internet, by prohibiting Italian intermediaries from offering the bets managed by Stanley, by preventing Stanley from establishing itself in Italy with the assistance of those intermediaries and thus offering its services in

Italy from another Member State and, in sum, by creating and maintaining a monopoly in the betting and gaming sector, the legislation at issue in the main proceedings amounts to a restriction on both freedom of establishment and freedom to provide services. No justification for the restriction is to be found in the case-law of the Court of Justice stemming from Case C-275/92 Schindler [1994] ECR I-1039, Case C-124/97 Läära and Others [1999] ECR I-6067 and Zenatti, cited above, because the Court has not had occasion to consider the amendments made to that legislation by Law No 388/00 and it has not examined the issue from the point of view of freedom of establishment.

26. The defendants in the main proceedings emphasise in that regard that the Italian State is not pursuing a consistent policy whose aim is to restrict, or indeed abolish, gaming activities within the meaning of the judgments in Läära, paragraph 37, and Zenatti, paragraph 36. The concerns cited by the national authorities relating to the protection of bettors against the risk of fraud, the preservation of public order and reducing both opportunities for gaming in order to avoid the damaging consequences of betting at both individual and social level and the incitement to spend inherent therein are groundless because Italy is increasing the range of betting and gaming available, and even inciting people to engage in such activities by facilitating collection in order to increase tax revenue. The fact that the organising of bets is regulated by financial laws shows that the true motivation of the national authorities is economic.
27. The purpose of the Italian legislation is also to protect licensees under the national monopoly by making that monopoly impenetrable for operators from other Member States, since the invitations to tender contain criteria relating to ownership structures which cannot be met by a capital company quoted on the stock exchange but only by natural persons, and since they require applicants to own premises and to have been a licence holder over a substantial period.
28. The defendants in the main proceedings argue that it is difficult to accept that a company like Stanley, which operates entirely legally and is duly regulated in the United Kingdom, should be treated by the Italian legislation in the same way as an operator who organises clandestine gaming, when all the public-interest concerns

- are protected by the United Kingdom legislation and the Italian intermediaries in a contractual relationship with Stanley as secondary or subsidiary establishments are registered as official suppliers of services and with the Ministry of Post and Telecommunications with which they operate, and which subjects them to regular checks and inspections.
29. That situation, which falls within the scope of freedom of establishment, contravenes the principle of mutual recognition in sectors which have not yet been harmonised. It is also contrary to the principle of proportionality, a fortiori because criminal penalties ought to constitute a last resort for a Member State in cases where other measures and instruments are not able to provide adequate protection of the interests concerned. Under the Italian legislation, bettors in Italy are not only deprived of the possibility of using bookmakers established in another Member State, even through the intermediary of operators established in Italy, but are also subject to criminal penalties.
 30. The Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments, as well as the Commission, cite the case-law of the Court of Justice, in particular the judgments in *Schindler*, *Läärä* and *Zenatti*.
 31. The Italian Government relies on the judgment in *Zenatti* to show that Law No 401/89 is compatible with the Community legislation in the sphere of freedom to provide services, and even in that of freedom of establishment. Both the matter considered by the Court in that case, namely administrative authorisation to pursue the activity of collecting and managing bets in Italy, and the question raised in the main proceedings, namely the existence of a criminal penalty prohibiting that activity where it is carried on by operators who are not part of the State monopoly on betting, pursue the same aim, which is to prohibit such activities and to reduce gaming opportunities in practice, other than in situations which are expressly provided for by law.
 32. The Belgian Government observes that a single market for gaming will only incite consumers to squander more and will have significant damaging effects for society. The level of protection introduced by Law No 401/89 and the restrictive authorisation scheme serve to ensure the attainment of objectives which are in the general interest, namely limiting and strictly controlling the supply of gaming and betting, is proportionate to those objectives and involves no discrimination on grounds of nationality.
 33. The Greek Government considers that the organisation of games of chance and bets on sporting events must remain within the control of the State and be operated by means of a monopoly. If it is engaged in by private entities, that will have direct consequences such as disturbance of the social order and incitement to commit offences, as well as exploitation of bettors and consumers in general.
 34. The Spanish Government submits that both the grant of special or exclusive rights under a strict authorisation or licensing regime and the prohibition on opening foreign branches to process bets in other Member States are compatible with the policy of limiting supply, provided that those measures are adopted with a view to reducing opportunities for gaming and stimulation of supply.
 35. The French Government maintains that the fact that in the main proceedings the collection of bets is effected at a distance by electronic means and the sporting events to which the bets relate take place exclusively in Italy — which was not the case in *Zenatti* — does not affect the Court's case-law under which national laws which limit the pursuit of activities relating to gaming or lotteries and cash machines are compatible with the principle of the freedom to provide services where they pursue an objective that is in the general interest, such as the prevention of fraud or the protection of bettors against themselves. Member States are therefore justified in regulating the activities of operators in the area of betting in non-discriminatory ways, since the degree and scope of the restrictions are within the discretion enjoyed by the national authorities. It is thus for the courts of the Member States to determine whether the national authorities have acted proportionately in their choice of means, having regard to the principle of freedom to provide services.
 36. As regards freedom of establishment, the French Government considers that the restrictions on the activities of the independent Italian companies in a contractual relationship with Stanley do not undermine Stanley's right to establish itself freely in Italy.
 37. The Luxembourg Government considers that the Italian legislation constitutes an obstacle

to the pursuit of the activity of organising bets in Italy because it prohibits Stanley from carrying on its activities in Italy either directly, under the freedom to provide cross-border services, or indirectly through the intermediary of Italian agencies linked by internet. It also constitutes a restriction on the freedom of establishment. However, those obstacles are justified in so far as they pursue objectives which are in the general interest, such as the need to channel and control the desire to engage in gaming, and are appropriate and proportionate for the attainment of those objectives inasmuch as they do not discriminate on grounds of nationality, because both Italian entities and those established abroad have to obtain the same permit from the Minister for Finance to be allowed to engage in the organisation, taking and collecting of bets in Italy.

38. The Portuguese Government notes that the main proceedings have serious implications as regards the maintenance not only in Italy but in all the Member States of a system for running lotteries by public monopoly and as regards the need to preserve a significant source of revenue for the States, which replaces the compulsory levying of taxes and serves to finance social, cultural and sporting policies. In the activity of gaming, the market economy and free competition operate a redistribution of sums levied in the context of that activity which is contrary to the social order, because they are likely to move from countries where overall involvement is low to countries where it is higher and the amount of winnings more attractive. Bettors in the small Member States would therefore be financing the social, cultural and sporting budgets of the large Member States and the reduction in revenue from gaming would force governments in the smaller Member States to finance public initiatives of a social nature and other State social, sporting and cultural activities by other means, which would mean an increase in taxes in those Member States and a reduction in taxes in the big States. Furthermore, dividing up the State betting, gaming and lotteries market between three or four large operators in the European Union would produce structural changes in distribution networks for gaming lawfully carried on by those States, destroying an enormous number of jobs and distorting unemployment levels in the various Member States.
39. The Finnish Government cites in particular the judgment in *Läärä*, in which the Court acknowledged that the need for and proportion-

ality of provisions adopted by a Member State are to be assessed solely in the light of the objectives pursued by the national authorities in that State and the level of protection they seek to provide, so that it is for the national court to determine whether, in the light of the specific detailed rules for its application, national legislation enables the aims relied on to justify it to be attained and whether the restrictions are proportionate to those aims, having regard to the fact that the legislation must be applied to all operators alike, whether they are from Italy or another Member State.

40. The Swedish Government observes that the fact that restrictions on the free movement of services are introduced for tax purposes is not sufficient to support the conclusion that those restrictions are contrary to Community law, provided that they are proportionate and do not involve discrimination as between operators, a matter for the national court to determine. The amendments to the Italian legislation made by Law No 388/00 enable an entity which has been refused authorisation to collect bets in Italy to circumvent the legislation by carrying on its activity from another Member State and prohibit foreign entities which organise bets in their own country from pursuing their activities in Italy. As the Court held at paragraph 36 of the judgment in *Läärä* and at paragraph 34 of the judgment in *Zenatti*, the mere fact that a Member State has opted for a protection scheme which is not the same as that adopted in another Member State cannot influence the assessment of the need for and proportionality of the provisions adopted in that area.
41. The Commission of the European Communities takes the view that the legislative amendments effected by Law No 388/00 merely make explicit what was already contained in Law No 401/89 and do not introduce a genuinely new category of offences. The public-order grounds for limiting the damaging effects of betting activities relating to football matches which are relied on to justify the fact that the national legislation reserves the right to collect those bets to certain organisations are the same regardless of the Member State in which those activities take place. The fact that the sporting events to which the bets related in the case of *Zenatti* took place abroad whereas in the main proceedings here the football matches take place in Italy is irrelevant. The Commission adds that Directive No 2000/31/EC of the European Parliament and of the Council of 8 June 2000

on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1) does not apply to bets, so that the outcome should be no different to that in *Zenatti*.

42. The Commission considers that the issue is not to be examined from the point of view of freedom of establishment because the agencies run by the defendants in the main proceedings are independent and act as collection centres for bets and as intermediaries in relations between their Italian customers and Stanley, and are not in any way subordinate to the latter. However, even if the right of establishment were to apply, the restrictions in the Italian legislation are justified on the same grounds of social policy as those accepted by the Court in *Schindler, Läärä and Zenatti* with regard to the restriction on the freedom to provide services.
43. At the hearing the Commission informed the Court that it had initiated the procedure against the Italian Republic for failure to fulfil obligations in regard to the liberalisation of the horse-race betting sector managed by the UNIRE. As regards the lottery sector, which is liberalised, the Commission referred to the judgment in *Case C-272/91 Commission v Italy* [1994] ECR I-1409, in which the Court held that by restricting participation in an invitation to tender for the concession of a lottery computerisation system to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector, the Italian Republic had failed to fulfil its obligations *inter alia* under the EC Treaty.

The Court's reply

44. The first point to consider is whether legislation such as that at issue in the main proceedings (Law No 401/89) constitutes a restriction on the freedom of establishment.
45. It must be remembered that restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries, are prohibited by Article 43 EC.
46. Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.
47. Furthermore, in reply to the questions put to it by the Court at the hearing, the Italian Government acknowledged that the Italian legislation on invitations to tender for betting activities in Italy contains restrictions. According to that Government, the fact that no entity has been licensed for such activities apart from the monopoly-holder is explained by the fact that the way in which the Italian legislation is conceived means that the licence can only be awarded to certain persons.
48. In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute *prima facie* a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.
49. It is therefore possible that the conditions imposed by the legislation for submitting invitations to tender for the award of these licences also constitute an obstacle to the freedom of establishment.
50. The second point to consider is whether the Italian legislation in that respect constitutes a restriction on the freedom to provide services.
51. Article 49 EC prohibits restrictions on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Article 50 EC defines services as services which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.
52. The Court has already held that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a service (*Schindler*, paragraph 37). By analogy, the activity of enabling nationals of one Member State to engage in betting activities organised

in another Member State, even if they concern sporting events taking place in the first Member State, relates to a service within the meaning of Article 50 EC.

53. The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 22).
54. Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet — and so without moving — to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.
55. In addition, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraphs 33 and 34).
56. In reply to the questions put by the Court at the hearing, the Italian Government confirmed that an individual in Italy who from his home connects by internet to a bookmaker established in another Member State using his credit card to pay is committing an offence under Article 4 of Law No 401/89.
57. Such a prohibition, enforced by criminal penalties, on participating in betting games organised in Member States other than in the country where the bettor is established constitutes a restriction on the freedom to provide services.
58. The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.
59. It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.
60. In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.
61. With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services (see, to that effect, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56).
62. As stated in paragraph 36 of the judgment in *Zenatti*, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.
63. On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in *Schindler, Läärä and Zenatti* that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.
64. In any event, in order to be justified the restrictions on freedom of establishment and on free-

- dom to provide services must satisfy the conditions laid down in the case-law of the Court (see, *inter alia*, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37).
65. According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.
 66. It is for the national court to decide whether in the main proceedings the restriction on the freedom of establishment and on the freedom to provide services instituted by Law No 401/89 satisfy those conditions. To that end, it will be for that court to take account of the issues set out in the following paragraphs.
 67. First of all, whilst in *Schindler, Läära and Zenatti* the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.
 68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.
 69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.
 70. Next, the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike.
 71. It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination.
 72. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court's case-law (see Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraphs 34 to 39, and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 89 to 91), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.
 73. The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.
 74. As to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.
 75. It is for the national court to determine whether

the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

76. In the light of all those considerations the reply to the question referred must be that national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

Costs

77. The costs incurred by the Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, THE COURT,

in answer to the question referred to it by the Tribunale di Ascoli Piceno by an order of 30 March 2001, hereby rules:

Skouris	Jann	Timmermans
Cunha Rodrigues	Edward	Schintgen
Macken	Colneric	von Bahr

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass, *Registrar*

V. Skouris, *President*

MEASURES RELATING TO BOTH THE FREE MOVEMENT OF GOODS AND FREEDOM TO PROVIDE SERVICES, FREEDOM OF EXPRESSION, LIMITS TO FREEDOM OF EXPRESSION, FUNDAMENTAL RIGHTS AS AN INTEGRAL PART OF COMMUNITY LAW, REFERENCES TO ECHR CASE-LAW, NATIONAL COURT TO ASSESS THE COMPATIBILITY OF LEGISLATION WITH THE FUNDAMENTAL RIGHTS

CASE C-71/02 HERBERT KARNER INDUSTRIE-AUKTIONEN GMBH v TROOSTWIJK GMBH

(Reference for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Free movement of goods – Article 28 EC – Measures having equivalent effect – Advertising restrictions – Reference to the commercial origin of goods – Goods from an insolvent company – Directive 84/450/EEC – Fundamental rights – Freedom of expression – Principle of proportionality)

KEYWORDS

1. *Preliminary rulings – Jurisdiction of the Court – Interpretation of Article 28 EC requested in relation to facts confined to national territory – Not inadmissible – Conditions – Individual case (Arts 28 EC and 234 EC)*
2. *Free movement of goods – Quantitative restrictions – Measures having equivalent effect – National legislation prohibiting references in advertisements to the commercial origin of goods from an insolvent estate when they no longer constitute part of that estate – Measure regulating selling arrangements in a non-discriminatory manner – Measure not caught by the prohibition laid down in Article 28 EC – No breach of the fundamental right to freedom of expression – Pursuance of legitimate goals of consumer protection and fair trading (Art. 28 EC; Council Directive 84/450, Art. 7)*

SUMMARY OF THE JUDGMENT

1. A reference for a preliminary ruling relating to the interpretation of Article 28 EC is not inadmissible simply because all the facts of the specific case before the national court are confined to a single Member State, if it is not ob-

vious that the interpretation requested is not necessary for the national court. Such a reply might help it to determine whether national legislation such as a prohibition on references in advertisements to the commercial origin of goods from an insolvent estate when they no longer constitute part of that estate is likely to constitute a potential impediment to intra-Community trade falling within the scope of application of Article 28 EC. (see paras 19, 21)

2. Article 28 EC does not preclude national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate, where, in public announcements or notices intended for a larger circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Such a restriction on advertisements, which is likely to come within the scope of application of Directive 84/450 concerning misleading advertising, which allows the Member States to ensure more extensive consumer protection than that provided for by the directive provided that that power is exercised in a way that is consistent with the fundamental principle of free movement of goods, must be viewed as relating to selling arrangements and is not caught by the prohibition laid down in Article 28 EC because it applies without distinction to all the operators concerned and affects the marketing of domestic and imported products in the same manner.

Nor does that restriction infringe the fundamental right of freedom of expression, recognised by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because it is reasonable and proportionate, in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.

(see paras 31, 33-34, 39, 41-43, 50, 52-53, operative part)

JUDGMENT OF THE COURT (FIFTH CHAMBER)

25 March 2004⁴

(Free movement of goods – Article 28 EC – Measures having equivalent effect – Advertising re-

⁴ Language of the case: German.

strictions – Reference to the commercial origin of goods – Goods from an insolvent company – Directive 84/450/EEC – Fundamental rights – Freedom of expression – Principle of proportionality)

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Herbert Karner Industrie-Auktionen GmbH

and

Troostwijk GmbH,

on the interpretation of Article 28 EC,

THE COURT (Fifth Chamber),

composed of C.W.A. Timmermans, acting as President of the Fifth Chamber, A. Rosas (Rapporteur) and S. von Bahr, Judges, Advocate General: S. Alber, Registrar: F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Herbert Karner Industrie-Auktionen GmbH, by M. Kajaba, Rechtsanwalt,
- Troostwijk GmbH, by A. Frauenberger, Rechtsanwalt,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Swedish Government, by A. Falk, acting as Agent,
- the Commission of the European Communities, by U. Wölker and J.C. Schieferer, acting as Agents,

after hearing the oral observations of Herbert Karner Industrie-Auktionen GmbH, represented by M. Kajaba; of Troostwijk GmbH, represented by A. Frauenberger; of the Austrian Government, represented by T. Kramler, acting as Agent; of the Swedish Government, represented by A. Falk; and of the Commission, represented by J.C. Schieferer, at the hearing on 26 February 2003, after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following Judgment

1. By order of 29 January 2002, received at the Court on 4 March 2002, the Oberster Gerichtshof referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 28 EC.

2. The question was raised in proceedings between Herbert Karner Industrie-Auktionen GmbH ('Karner') and Troostwijk GmbH ('Troostwijk'), companies authorised to auction moveable property, concerning advertising by Troostwijk for the sale of stock on insolvency.

Legal framework

Community rules

3. Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Article 30 EC allows such prohibitions and restrictions, however, where they are justified on certain grounds which are recognised as fundamental requirements under Community law and they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
4. Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18) ('Directive 84/450'), defines its purpose in Article 1 as follows:

'The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof ...'.

5. Article 2(2) of Directive 84/450 defines 'misleading advertising' as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'.
6. Article 3 of Directive 84/450 provides that, in determining whether advertising is misleading, account is to be taken of all its features. The provision goes on to list a number of factors to be taken into account, such as, inter alia, the geographical or commercial origin of the goods in question.
7. Article 7 of Directive 84/450 states that the Directive is not to preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with re-

gard to misleading advertising, for consumers and other persons referred to by that directive.

National rules

8. Paragraph 2(1) of the Bundesgesetz gegen den unlauteren Wettbewerb (Law on unfair competition) of 16 November 1984 (BGBl, 1984/448, UWG), lays down a general prohibition on the provision, in the course of trade, of information likely to mislead the public.
9. Paragraph 30(1) of the UWG prohibits any public announcements or notices intended for a large circle of persons from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question, even though that was their origin, no longer form part of the insolvent estate.

Main proceedings and question referred for a preliminary ruling

10. The companies Karner and Troostwijk are engaged in the sale by auction of industrial goods and the purchase of the stock of insolvent companies.
11. By a sales contract of 26 March 2001, Troostwijk acquired, with the authorisation of the insolvency court, the stock of an insolvent construction company. Karner had also indicated its interest in the purchase of those goods.
12. Troostwijk intended to sell the stock from the insolvent estate in an auction sale which was to take place on 14 May 2001. It advertised the auction in a sales catalogue, stating that it was an insolvency auction and that the goods were from the insolvent estate of the company in question. The advertising notice was also posted on the internet.
13. In Karner's view, Troostwijk's advertising is contrary to Paragraph 30(1) of the UWG because it gives the public concerned the impression that it is the insolvency administrator who is selling the insolvent company's assets. Irrespective of any risk that the public will be misled, such advertising is both contrary to the competition rules laid down in the EC Treaty and misleading within the meaning of Paragraph 2 of the UWG.
14. On 10 May 2001, on application by Karner, the Handelsgericht Wien (Commercial Court, Vienna) (Austria) issued an interim injunction ordering Troostwijk, first, to refrain from referring in its advertising for the sale of the goods to the fact that the goods were from an insolvent

company in so far as they no longer constituted part of the insolvent estate and, second, to make a public statement to potential buyers at the auction, informing them in particular that the auction was not being held on behalf or on the instructions of the insolvency administrator.

15. Troostwijk appealed against that injunction to the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria), on several grounds and questioned, in particular, the compatibility of Paragraph 30(1) of the UWG with Article 28 EC.
16. Following the dismissal of its appeal, on 14 November 2001 Troostwijk brought an action before the Oberster Gerichtshof (Supreme Court). It maintains that the prohibition in Paragraph 30(1) of the UWG is contrary to Article 28 EC and incompatible with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('ECHR'), concerning freedom of expression.
17. Taking the view that the Court had not yet ruled on the question of the compatibility of a national provision such as Paragraph 30(1) of the UWG with Article 28 EC, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 28 EC to be interpreted as precluding national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate where, in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate?'

Admissibility

Observations submitted to the Court

18. Karner submits that the reference for a preliminary ruling is inadmissible. In its view, the facts giving rise to the dispute in the main proceedings relate to a purely internal situation because the parties thereto are established in Austria, the goods in question were acquired following a case of insolvency which occurred in the territory of that Member State and Paragraph 30(1) of the UWG concerns forms of advertising in Austria.

Findings of the Court

19. It should be borne in mind that Article 28 EC cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State (see Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraph 44).
20. That principle has been upheld by the Court not only in cases where the national rule in question gave rise to direct discrimination against goods imported from other Member States (*Pistre and Others*, cited above, paragraph 44), but also in situations where the national rule applied without distinction to national and imported products and was thus likely to constitute a potential impediment to intra-Community trade covered by Article 28 EC (see, to that effect, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraphs 21 and 22).
21. In this case, it is not obvious that the interpretation of Community law requested is not necessary for the national court (see *Guimont*, cited above, paragraph 23). Such a reply might help it to determine whether a prohibition such as that provided for in Paragraph 30(1) of the UWG is likely to constitute a potential impediment to intra-Community trade falling within the scope of application of Article 28 EC (see also Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 14).
22. It follows from the foregoing considerations that the reference for a preliminary ruling is admissible.

Substance

Observations submitted to the Court

23. Karner, the Austrian and Swedish Governments and the Commission submit that the prohibition in Paragraph 30(1) of the UWG is a selling arrangement within the meaning of that term as described in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. The provision applies without distinction to domestic and imported products and is not by nature such as to impede the latter's access to the market any more than it impeded the access of domestic products. It therefore falls outside the scope of application of Article 28 EC.
24. If the Court should nevertheless find that Paragraph 30(1) of the UWG does constitute a measure having equivalent effect within the meaning of Article 28 EC, Karner, supported by the Austrian and Swedish Governments, considers that it is justified by the mandatory requirement of consumer protection within the meaning of the line of case-law initiated in 'Cassis de Dijon' (Case 120/78 *Rewe-Zentral* [1979] ECR 649). The Swedish Government also refers to the principle of fair trading.
25. Referring to the wording of Article 7 of Directive 84/450, the Austrian Government states that Paragraph 30(1) of the UWG is aimed at combatting misleading advertising in the interests of consumers, competing undertakings and the general public.
26. Troostwijk maintains that Paragraph 30(1) of the UWG is incompatible with both Article 28 EC and Directive 84/450. The national provision prevents consumers from having the benefit of accurate information and is capable of affecting intra-Community trade. The reference to the origin of goods relates to one of their qualities and not to the marketing of those goods. Such a reference cannot therefore be regarded as a selling arrangement within the meaning of *Keck and Mithouard*, cited above.
27. According to Troostwijk, that provision restricts the possibility of disseminating advertising which is lawful in other Member States. It is clear that advertising an offer of sale such as that at issue in the main proceedings cannot be confined to the territory of a single Member State. Varying the information according to the Member States concerned is impossible on the internet, since that mode of communication is not restricted to a single region.
28. Regarding the compatibility of Paragraph 30(1) of the UWG with Directive 84/450, Troostwijk submits that that directive establishes partial harmonisation and allows Member States to retain and adopt provisions aimed at ensuring more extensive consumer protection. The goal of consumer protection is not served by the provision in so far as it 'prohibits truthful assertions in advertisements'.
29. Lastly, Troostwijk submits that the provision is not compatible with Article 10 of the ECHR concerning freedom of expression, since restrictions on that right may be justified only if the expression of the truth might, even in a democratic society, seriously jeopardise a high-ranking individual or collective right.

Response of the Court

30. The Court notes, as a preliminary point, that the file on the case forwarded to it by the national court shows that Paragraph 30(1) of the UWG is based on the presumption that consumers prefer to purchase goods sold by an insolvency administrator when a company is wound up because they hope to make purchases at advantageous prices. Where advertising related to the sale of goods from an insolvent estate, it would be difficult to know whether the sale has organised by the insolvency administrator or by a party who had acquired goods from the insolvent estate. The national provision is intended to prevent economic operators from taking undue advantage of that tendency on the part of consumers.
31. Although it is true that the national rules governing consumer protection in the event of sales of goods from an insolvent estate have not been harmonised at the Community level, the fact remains that some aspects relating to advertising for such sales may fall within the scope of Directive 84/450.
32. It should be borne in mind that that directive is intended to set minimum criteria and objectives on the basis of which it is possible to determine whether advertising is misleading. The Directive's provisions include Article 2(2), which define 'misleading advertising' and Article 3, which states which factors are to be taken into account to determine whether advertising is misleading.
33. Without its being necessary to examine in detail the degree of harmonisation achieved by Directive 84/450, it is common ground that Article 7 of that directive allows the Member States to retain or adopt provisions aimed at ensuring more extensive consumer protection than that provided for thereunder.
34. It should be remembered, however, that that power must be exercised in a way that is consistent with the fundamental principle of the free movement of goods, as expressed in the prohibition contained in Article 28 EC on quantitative restrictions on imports and any measures having equivalent effect between Member States (see, to that effect, Case C-23/99 *Commission v France* [2000] ECR I-7653, paragraph 33).
35. It is appropriate, first of all, to determine whether a national rule such as Paragraph 30(1) of the UWG, which prohibits any reference to the fact that the goods in question come from an insolvent estate where, in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of the insolvent estate, falls within the scope of application of Article 28 EC.
36. It is settled case-law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and thus prohibited by Article 28 EC (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 25; and *TK-Heimdienst*, cited above, paragraph 22).
37. The Court stated in paragraph 16 of *Keck and Mithouard*, cited above, that national provisions restricting or prohibiting certain selling arrangements which apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the line of case-law initiated by *Dassonville*, cited above.
38. The Court subsequently found provisions concerning inter alia the place and times of sale of certain products and advertising of those products as well as certain marketing methods to be provisions governing selling arrangements within the meaning of *Keck and Mithouard*, cited above (see inter alia Case C-292/92 *Hünemann and Others* [1993] ECR I-6787, paragraphs 21 and 22; Joined Cases C-401/92 and C-402/92 *Tankstation't Heukske and Boermans* [1994] I-2199, paragraphs 12 to 14; and *TK-Heimdienst*, cited above, paragraph 24).
39. The Court notes that Paragraph 30(1) of the UWG is intended to regulate references which may be made in advertisements with regard to the commercial origin of goods from an insolvent estate when they no longer constitute part of that estate. In those circumstances, the Court finds such a provision does not relate to the conditions which those goods must satisfy, but rather governs the marketing of those goods. Accordingly, it must be regarded as concerning selling arrangements within the meaning of *Keck and Mithouard*, cited above.

40. As is clear from *Keck* and *Mithouard*, however, such a selling arrangement cannot escape the prohibition laid down in Article 28 EC unless it satisfies the two conditions set out in paragraph 37 of this judgment.
41. As regards the first of those conditions, Paragraph 30(1) of the UWG applies without distinction to all the operators concerned who carry on their business on Austrian territory, regardless of whether they are Austrian nationals or foreigners.
42. As regards the second condition, Paragraph 30(1) of the UWG, contrary to the national provisions which gave rise to *Joined Cases C-34/95 to C36/95 De Agostini and TV-Shop* [1997] ECR I-3843 and to *Case C405/98 Gourmet International Products* [2001] ECR I-1795, does not lay down a total prohibition on all forms of advertising in a Member State for a product which is lawfully sold there. It merely prohibits any reference, when a large number of people are targeted, to the fact that goods originate from an insolvent estate if those goods no longer constitute part of the insolvent estate, on grounds of consumer protection. Although such a prohibition is, in principle, likely to limit the total volume of sales in that Member State and, consequently, also to reduce the volume of sales of goods from other Member States, it nevertheless does not affect the marketing of products originating from other Member States more than it affects the marketing of products from the Member State in question. In any event, there is no evidence in the file forwarded to the Court by the national court to permit a finding that the prohibition has had such an effect.
43. In those circumstances, as the Advocate General stated in paragraph 66 of his Opinion, it must be held that the two conditions laid down by *Keck* and *Mithouard*, cited above, and referred to in paragraph 37 of this judgment, are fully satisfied in the case in the main proceedings. Accordingly, a national provision such as Paragraph 30(1) of the UWG is not caught by the prohibition in Article 28 EC.
44. Second, it is necessary to consider *Troostwijk's* arguments that Paragraph 30(1) of the UWG, first, restricts the dissemination of advertising which is lawful in other Member States and, second, is incompatible with the principle of freedom of expression as laid down in Article 10 ECHR.
45. Regarding the first argument, it is appropriate to construe it as relating to the question whether Article 49 EC governing the freedom to provide services precludes a restriction on advertising such as that laid down in Paragraph 30 of the UWG.
46. Where a national measure relates to both the free movement of goods and freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms if it appears that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, *Case C-275/92 Schindler* [1994] ECR I-1039, paragraph 22; and *Case C-390/99 Canal Satélite Digital* [2002] ECR I-607, paragraph 31).
47. In the circumstances of the case in the main proceedings, the dissemination of advertising is not an end in itself. It is a secondary element in relation to the sale of the goods in question. Consequently the free movement of goods aspect prevails over the freedom to provide services aspect. It is thus not necessary to consider Paragraph 30(1) of the UWG in the light of Article 49 EC.
48. Regarding *Troostwijk's* second argument with regard to the compatibility of the legislation in question with freedom of expression, it should be recalled that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, *inter alia*, *Case C-260/89 ERT* [1991] ECR I-2925, paragraph 41; *Case C-274/99 P Connolly v Commission* [2001] ECR I-1611, paragraph 37; *Case C-94/00 Roquette Frères* [2002] ECR I-9011, paragraph 25; and *Case C-112/00 Schmidberger* [2003] ECR I-5659, paragraph 71).
49. Further, according to the Court's case-law, where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures (see, to that effect, *Case C-299/95 Krem-*

zow [1997] ECR I-2629, paragraph 15).

50. Whilst the principle of freedom of expression is expressly recognised by Article 10 ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26; Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42; and *Schmidberger*, cited above, paragraph 79).
51. It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising (see, to that effect, Case C-245/01 *RTL Television* [2003] ECR I-0000, paragraph 73; judgments of the ECHR of 20 November 1989, *Markt intern Verlag GmbH and Klaus Beermann*, Reports of Judgments and Decisions series A No 165, paragraph 33; and of 28 June 2001, *VGT Verein gegen Tierfabriken v Switzerland*, Reports of Judgments and Decisions 2001-VI, paragraphs 69 to 70).
52. In this case it appears, having regard to the circumstances of fact and of law characterising the situation which gave rise to the case in the main proceedings and the discretion enjoyed by the Member States, that a restriction on advertising as provided for in Paragraph 30 of the UWG is reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.

53. In the light of all the foregoing considerations, the question referred to the Court must be answered as follows: Article 28 EC does not preclude national legislation, which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate where in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Costs

54. The costs incurred by the Austrian and Swedish Governments and by the Commission, which have submitted observation to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, THE COURT (Fifth Chamber)

in answer to the questions referred to it by the Oberster Gerichtshof by order of 29 January 2002, hereby rules:

Article 28 EC does not preclude national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate, where, in public announcements or notices intended for a larger circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Timmermans Rosas von Bahr

Delivered in open court in Luxembourg on 25 March 2004.

R. Grass, Registrar
V. Skouris, President

GENERAL INTERNATIONAL LAW AND COMMUNITY LAW, RESOLUTIONS OF THE SECURITY COUNCIL, PROTECTION OF FUNDAMENTAL RIGHTS

CASE T-253/02 CHAFIQ AYADI V COUNCIL OF THE EUROPEAN UNION

(Common foreign and security policy – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Competence of the Community – Freezing of funds – Principle of subsidiarity – Fundamental rights – Jus cogens – Review by the Court – Action for annulment)

KEYWORDS

1. *Procedure – Intervention – Application not limited to supporting the form of order sought by one of the parties (Statute of the Court of Justice, Art. 40, fourth para.; Rules of Procedure of the Court of First Instance, Arts 113 and 116(3))*
2. *Actions for annulment – Action directed against an act confirming a previous act not challenged within the period prescribed (Art. 230 EC)*
3. *Actions for annulment – Jurisdiction of the Community judicature (Arts 5, second para., EC, 60 EC, 230 EC, 301 EC and 308 EC)*
4. *Public international law – Charter of the United Nations – Decisions of the Security Council*
5. *European Communities – Judicial review of the legality of the acts of the institutions (Council Regulation No 881/2002)*
6. *European Communities – Judicial review of the legality of the acts of the institutions (Council Regulation No 881/2002, as modified by Regulation No 561/2003, Art. 2a)*
7. *European Communities – Judicial review of the legality of the acts of the institutions (Council Regulation No 881/2002)*
8. *Actions for annulment – Community act implementing resolutions of the United Nations Security Council – Regulation No 881/2002 (Art. 230 EC; Council Regulation No 881/2002)*

9. *European Communities – Community act implementing resolutions of the United Nations Security Council – Regulation No 881/2002 (Art. 6 EU; Council Regulation No 881/2002)*
10. *Acts of the institutions – Statement of reasons – Obligation – Scope (Art. 253 EC; Council Regulation No 881/2002)*

SUMMARY OF THE JUDGMENT

1. Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as provided in Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention. An intervener is not, therefore, entitled to raise a plea of inadmissibility not raised by the party it supports. However, under Article 113 of the Rules of Procedure of the Court of First Instance, the latter may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case, including any raised by the interveners. A plea alleging a bar to proceeding that concerns the admissibility of the action raises such a matter of public policy. (see paras 64, 67-68)
2. An action for annulment directed against an act which merely confirms a previous act, not challenged within the period prescribed, is inadmissible. An act is a mere confirmation of an earlier act if it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier act was addressed. (see para. 70)
3. The Community judicature reviews the lawfulness of Community acts in the light of the principle of subsidiarity enshrined in the second paragraph of Article 5 EC. However, this general principle cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community. With regard to the interruption or reduction of economic relations with third countries, those very articles provide for action by the Community when that is deemed necessary in the form of a common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy (CFSP). In the sphere of application of Articles 60 EC and

301 EC, the EC Treaty thus confers on the Union the power to determine whether action by the Community is necessary. Such determination falls within the ambit of the exercise of discretion by the Union. It excludes any right for individuals to challenge, in the light of the principle of subsidiarity enshrined in the second paragraph of Article 5 EC, the lawfulness of the action subsequently taken by the Community in accordance with the CFSP common position or joint action of the Union. Moreover, since the sphere of application of Articles 60 EC and 301 EC may be extended, by having recourse to the additional legal basis of Article 308 EC, to the adoption of economic and financial sanctions imposed on individuals in the battle against international terrorism even when no connection with third countries has been established, it must follow that the lawfulness of Community measures adopted on that basis in accordance with a CFSP common position or joint action of the Union cannot be challenged by individuals in the light of the principle of subsidiarity either.

In any event, even assuming that the principle of subsidiarity finds application in the sphere of application of Articles 60 EC and 301 EC, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level. (see paras 107-112)

4. From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international Treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention on Human Rights and Fundamental Freedoms and, for those that are also members of the Community, their obligations under the EC Treaty. That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations.

Although not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it. First, the Community may not infringe the obligations imposed on its Member States by

the Charter of the United Nations or impede their performance. Second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations. (see para. 116)

5. In light of the principle of the primacy of the law of the United Nations over Community law, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council or of the Sanctions Committee according to the standard of protection of fundamental rights as recognised by the Community legal order cannot be justified either on the basis of international law or on the basis of Community law.

The resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations therefore fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. (see para. 116)

6. The freezing of funds provided for by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, as amended by Regulation No 561/2003, infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.

Moreover Regulation No 881/2002 and the Security Council resolutions implemented by that regulation do not prevent the persons concerned from leading a satisfactory personal, family and social life, given that the use for strictly private ends of the frozen economic resources is not forbidden *per se* by those

measures. Likewise, those measures do not of themselves prevent such persons from carrying on business or trade activities, whether as an employee or as a selfemployed person, but in substance concern the receipt of income from such activity. In particular, by virtue of Article 2a of the regulation in question, Article 2 may be inapplicable, subject to the conditions set by that provision, to any kind of funds or economic resources, including therefore the economic resources needed for the carrying on of employed or self-employed professional activities and the funds received or receivable in connection with such activity. Although Article 2a constitutes a provision derogating from Article 2, it is not to be interpreted strictly in the light of the humanitarian objective that it plainly pursues. It is for the national authorities, which are best placed to take into consideration the special circumstances of each case, to determine in the first place whether such a derogation may be granted and then to ensure that it is reviewed and implemented in keeping with the freezing of the funds of the person concerned. (see paras 116, 126-127, 130, 132)

7. The right of the persons concerned to be heard has not been infringed, given that the resolutions of the Security Council imposing sanctions on Usama bin Laden, the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities do not provide such a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in the list of persons whose funds are to be frozen and since it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned. In particular, in a situation in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it.

Nor were the Community institutions obliged to hear the persons concerned before Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban was adopted or in the context of the adoption and implementation of that act. (see para. 116)

8. In dealing with an action for annulment of Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. The Court also reviews the lawfulness of that regulation having regard to the Security Council's resolutions which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions. The Court then reviews the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.

On the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order. Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or yet, subject to the limited extent of the review carried out in the light of *jus cogens*, to check indirectly the appropriateness and proportionality of those measures. To that extent, there is no judicial remedy available to the persons concerned, the Security Council not having thought it appropriate to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.

However, that lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*. The right of access to the courts is in fact not absolute. The limitation of the right of the persons concerned to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, must be held to be inherent in that right. Such a limita-

tion is, moreover, justified both by the nature of the decisions that the Security Council is led to take under Chapter VII and by the legitimate objective pursued. Last, in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a formalised procedure involving the governments concerned, constitute another reasonable method of affording adequate protection of the fundamental rights of the persons concerned as recognised by *jus cogens*. (see para. 116)

9. The right of interested persons to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list of persons and entities whose funds must be frozen, must be classed as a right guaranteed not only by resolutions of the Security Council, as interpreted by the Sanctions Committee, but also by the Community legal order.

It follows that, both in examining such a request for review and in the context of the consultations between States and other actions that may take place, the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law, given that the respect of those fundamental rights does not appear capable of preventing the proper performance of their obligations under the Charter of the United Nations. The Member States must thus ensure, so far as is possible, that interested persons are put in a position to put their point of view before the competent national authorities when they present a request for their case to be reviewed. Furthermore, the margin of assessment that those authorities enjoy in this respect must be exercised in such a way as to take due account of the difficulties that the persons concerned may encounter in ensuring the effective protection of their rights, having regard to the specific context and nature of the measures affecting them. Thus, the Member States would not be justified in refusing to initiate the review procedure pro-

vided for by the Guidelines solely because the persons concerned could not provide precise and relevant information in support of their request, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question or the evidence supporting those reasons, on account of the confidential nature of those reasons or that evidence. Similarly, having regard to the fact that individuals are not entitled to be heard in person by the Sanctions Committee, with the result that they are dependent, essentially, on the diplomatic protection afforded by States to their nationals, the Member States are required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied.

What is more, it is open to the persons concerned to bring an action for judicial review based on the domestic law of the State of the government to which their request to be removed from the list was addressed, indeed even relying directly on Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban and on the relevant resolutions of the Security Council which that regulation puts into effect, against any breach by the competent national authority of the right of the persons involved to request the review of their case in order to be removed from the list of persons to whom sanctions are applicable. In such an action, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, which may lead it to refrain from applying, if need be, a national rule preventing that result, such as a rule excluding from judicial review a refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals. (see paras 145-150, 152)

10. The statement of reasons required by Article 253 EC must show clearly and unequivocally the Council's reasoning so as to enable the persons concerned to ascertain the reasons for the measures and to enable the Community judicature to exercise its power of review. Furthermore, the question whether a statement of reasons is adequate must be assessed by reference not only to the wording of the measure but also to its context and to the whole body

of legal rules governing the matter in question. In the case of a measure intended to have general application, as here, the preamble may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other.

In this regard, the cited legal bases of Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and recitals 1 to 7, in particular, in the preamble thereto, fully satisfy those requirements. The fact that the assertion that there was a risk of competition's being distorted, a result which according to its preamble the contested regulation seeks to prevent, is unconvincing cannot call that finding in question. Indeed, even if one recital of a measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons. (see paras 164-167)

JUDGMENT OF THE COURT OF FIRST INSTANCE (SECOND CHAMBER)

12 July 2006⁵

(Common foreign and security policy – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Competence of the Community – Freezing of funds – Fundamental rights – Jus cogens – Review by the Court – Action for annulment)

In Case T253/02,

Chafiq Ayadi, residing in Dublin (Ireland), represented initially by A. Lyon, H. Miller and M. Willis-Stewart, Solicitors, and S. Cox, Barrister, and subsequently by A. Lyon, H. Miller and S. Cox, applicant,

v

Council of the European Union, represented by M. Vitsentzatos and M. Bishop, acting as Agents, defendant, supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by J. Collins, and subsequently by R. Caudwell, acting as Agents, and by S. Moore, Barrister,

and by

⁵ Language of the case: English.

Commission of the European Communities, represented by C. Brown and M. Wilderspin, acting as Agents, interveners,

APPLICATION for annulment in part of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges, Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 25 October 2005,

gives the following Judgment

Legal context

1. Under Article 24(1) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.
2. Under Article 25 of the Charter of the United Nations, '[t]he Members of the [UN] agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.
3. According to Article 41 of the Charter of the United Nations:

'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

4. In accordance with Article 48(2) of the Charter

of the United Nations, the decisions of the Security Council for the maintenance of international peace and security shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

5. According to Article 103 of the Charter of the United Nations, [i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

6. In accordance with Article 11(1) EU:

'The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;

- to strengthen the security of the Union in all ways;

- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter ...'

7. Under Article 301 EC:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures.'

8. Article 60 EC provides:

'(1) If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

(2) Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital move-

ments and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.'

9. In accordance with the first paragraph of Article 307 EC:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

10. Lastly, Article 308 EC provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

Background to the case

11. On 15 October 1999 the Security Council of the United Nations ('the Security Council') adopted Resolution 1267 (1999), in which it inter alia condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security, deplored the fact that the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international terrorist operations. In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Usama bin Laden over to the appropriate authorities. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, freeze funds and other financial resources, in-

cluding funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need.

12. In paragraph 6 of Resolution 1267 (1999) the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members ('the Sanctions Committee'), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4.
13. Taking the view that action by the Community was necessary in order to implement that resolution, on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1). Article 2 of that Common Position prescribes the freezing of funds and other financial resources held abroad by the Taliban under the conditions set out in Security Council Resolution 1267 (1999).
14. On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2000 L 43, p. 1).
15. On 19 December 2000 the Security Council adopted Resolution 1333 (2000), demanding, inter alia, that the Taliban should comply with Resolution 1267 (1999), and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organisations and turn Usama bin Laden over to appropriate authorities to be brought to justice. The Security Council decided in particular to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999). Accordingly paragraph 8(c) of Resolution 1333

(2000) provides that the States are, inter alia, '[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee], including those in the Al-Qaeda organisation, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaeda organisation.'

16. In the same provision, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation.
17. In paragraph 17 of Resolution 1333 (2000), the Security Council called upon all States and all international and regional organisations, including the United Nations and its specialised agencies, to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement.
18. In paragraph 23 of Resolution 1333 (2000), the Security Council decided that the measures imposed inter alia by paragraph 8 were to be established for 12 months and that, at the end of that period, it would decide whether to extend them for a further period on the same conditions.
19. Taking the view that action by the Community was necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1). Article 4 of that Common Position provides:

'Funds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available

- to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee, under the conditions set out in [Resolution 1333 (2000)].'
20. On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).
 21. The third recital in the preamble to that regulation states that the measures provided for by Resolution 1333 (2000) 'fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.'
 22. Article 1 of Regulation No 467/2001 defines what is meant by 'funds' and 'freezing of funds'.
 23. Under Article 2 of Regulation No 467/2001:
 - '1. All funds and other financial resources belonging to any natural or legal person, entity or body designated by the... Sanctions Committee and listed in Annex I shall be frozen.
 2. No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of, persons, entities or bodies designated by the Taliban Sanctions Committee and listed in Annex I.
 3. Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained through the competent authorities of the Member States listed in Annex II.'
 24. Article 9(2) of Regulation No 467/2001 provides that '[e]xemptions granted by the Taliban Sanctions Committee shall apply throughout the Community'.
 25. Annex I to Regulation No 467/2001 contains the list of persons, entities and bodies affected by the freezing of funds imposed by Article 2. Under Article 10(1) of Regulation No 467/2001, the Commission is empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.
 26. Annex II to Regulation No 467/2001 contains the list of competent national authorities for the purpose of applying inter alia Article 2(3). In the case of Ireland, those authorities are the Central Bank of Ireland, Financial Markets Department, on the one hand, and on the other, the Department of Foreign Affairs, Bilateral Economic Relations Section.
 27. On 8 March 2001 the Sanctions Committee published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000). That list has since been amended and supplemented several times. The Commission has therefore adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.
 28. On 19 October 2001 the Sanctions Committee published a new addition to its list of 8 March 2001, including in particular the name of the following person, identified as being a person associated with Usama bin Laden, as follows:

'BIN MUHAMMAD, Ayadi Chafiq (A. K. A. AYADI SHAFIQ, Ben Muhammad; A. K. A. AYADI CHAFIK, Ben Muhammad; A. K. A. AIADI, Ben Muhammad; A. K. A. AIADY, Ben Muhammad), Helene Meyer Ring 10-1415-80809, Munich, Germany; 129 Park Road, NW8, London, England; 28 Chausse Di Lille, Moscron, Belgium; Darvingasse 1/2/5860, Vienna, Austria; Tunisia; DOB: 21 January 1963; POB: Safais (Sfax), Tunisia.'
 29. On the same day the Commission adopted Regulation (EC) No 2062/2001, amending, for the third time, Council Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25). In accordance with Article 1 thereof, the applicant's name was added to Annex I to Regulation No 467/2001 as follows:

'BIN MUHAMMAD, Ayadi Chafiq (aka Aayadi Shafiq, Ben Muhammad; aka Ayadi Chafik, Ben Muhammad; aka Aiadi, Ben Muhammad; aka Aiady, Ben Muhammad), Helene Meyer Ring 10-1415-80809, Munich, Germany; 129 Park Road, London NW8, England; 28 Chausse Di Lille, Moscron, Belgium; Darvingasse 1/2/58-60, Vienna, Austria; Tunisia; born 21.1.1963, Safais (Sfax), Tunisia.'
 30. On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda

network and the Taliban and other associated individuals, groups, undertakings and entities. Articles 1 and 2 of that resolution provide, in essence, that the measures, in particular the freezing of funds, imposed by Article 4(b) of Resolution 1267 (1999) and by Article 8(c) of Resolution 1333 (2000) are to be maintained. In accordance with paragraph 3 of Resolution 1390 (2002), those measures are to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council will either allow those measures to continue or decide to improve them.

31. Considering that action by the Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of that Common Position prescribes, *inter alia*, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).
32. On 27 May 2002, on the basis of Articles 60 EC, 301 EC and 308 EC, the Council adopted Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9) ('the contested regulation').
33. According to the fourth recital in the preamble to that regulation, the measures laid down by, *inter alia*, Security Council Resolution 1390 (2002) fall within the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.'
34. Article 1 of the contested regulation defines 'funds' and 'freezing of funds' in terms which are essentially identical to those used in Article 1 of Regulation No 467/2001. In addition, it defines what is meant by 'economic resources':
35. Article 2 of Regulation No 881/2002 provides:
- '1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.
 2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.
 3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'
36. Article 4 of the contested regulation provides:
- '1. The participation, knowingly and intentionally, in activities, the object or effect of which is, directly or indirectly, to circumvent Article 2 or to promote the transactions referred to in Article 3, shall be prohibited.
 2. Any information that the provisions of this Regulation are being, or have been, circumvented shall be notified to the competent authorities of the Member States and, directly or through these competent authorities, to the Commission.'
37. In accordance with Article 7(2) of Regulation No 881/2002, [w]ithout prejudice to the rights and obligations of the Member States under the Charter of the United Nations, the Commission shall maintain all necessary contacts with the Sanctions Committee for the purpose of the effective implementation of this Regulation.'
38. Annex I to the contested regulation contains the list of persons, groups and entities affected by the freezing of funds imposed by Article 2. That list includes, *inter alia*, the applicant's name as follows:
- 'Bin Muhammad, Ayadi Chafiq (aka Ayadi Shafiq, Ben Muhammad; aka Ayadi Chafik, Ben Muhammad; aka Aiadi, Ben Muhammad; aka Aiady, Ben Muhammad), Helene Meyer Ring 10-1415-80809, Munich, Germany; 129 Park Road, London NW8, England; 28 Chaussee De Lille, Mouscron, Belgium; Darvingasse 1/2/58-60, Vienna, Austria; Tunisia; born 21.1.1963, Safais (Sfax), Tunisia.'

39. On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.
40. On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures are again to be improved after 12 months or earlier if necessary.
41. Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), on 27 February 2003 the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62). Article 1 of that Common Position provides that, when implementing the measures set out in Article 3 of Common Position 2002/402/CFSP, the European Community is to provide for the exceptions permitted by United Nations Security Council Resolution 1452 (2002).
42. On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of the Security Council's Resolution 1452 (2002), to adjust the measures imposed by the Community.
43. Article 1 of Regulation No 561/2003 provides that The following Article shall be inserted in Regulation (EC) No 881/2002:
- "Article 2a
1. Article 2 shall not apply to funds or economic resources where:
- (a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:
- (i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
- (ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;
- (iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or
- (iv) necessary for extraordinary expenses; and
- (b) such determination has been notified to the Sanctions Committee; and
- (c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or
- (ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.
2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II.
- The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted.
- The competent authority shall also inform other Member States whether the request for such an exception has been granted.
3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.
- ..."
44. On 19 May 2003 the Commission adopted Regulation (EC) No 866/2003 of 19 May 2003 amending for the 18th time Council Regulation (EC) No 881/2002 (OJ 2003 L 124, p. 19). Under Article 1 of, and paragraph 5 of the Annex to, that regulation, Annex I to the contested regulation is amended to the effect that the entry referring to the applicant (see paragraph 38 above) is replaced by the following:

'Ayadi Shafiq Ben Mohamed BEN MOHAMED (alias (a) Bin Muhammad, Ayadi Chafiq (b) Ayadi Chafik, Ben Muhammad (c) Aiadi, Ben Muhammad (d) Aiady, Ben Muhammad (e) Ayadi Shafiq Ben Mohamed (f) Ben Mohamed, Ayadi Chafiq (g) Abou El Baraa), (a) Helene Meyer Ring 10-1415-80809, Munich, Germany (b) 129 Park Road, NW8, London, England (c) 28 Chaussée De Lille, Moscron, Belgium (d) Darvingasse 1/2/58-60, Vienna, Austria; date of birth: 21 March 1963; place of birth: Sfax, Tunisia; nationality: Tunisian, Bosnian, Austrian; passport No: E 423362 delivered in Islamabad on 15 May 1988; national identification No: 1292931; other information: his mother's name is Medina Abid; he is [actually] in Ireland.'

45. On 30 January 2004 the Commission adopted Regulation (EC) No 180/2004 of 30 January 2004 amending for the 29th time Regulation (EC) No 881/2002 (OJ 2004 L 28, p. 15). Under Article 1 of, and paragraph 4 of the Annex to, that regulation, Annex I to the contested regulation is amended to the effect that the entry referring to the applicant (see paragraph 38 above) is replaced by the following:

'Ayadi Shafiq Ben Mohamed Ben Mohamed (alias (a) Bin Muhammad, Ayadi Chafiq, (b) Ayadi Chafik, Ben Muhammad, (c) Aiadi, Ben Muhammad, (d) Aiady, Ben Muhammad, (e) Ayadi Shafiq Ben Mohamed, (f) Ben Mohamed, Ayadi Chafiq, (g) Abou El Baraa), (a) Helene Meyer Ring 10-1415-80809, Munich, Germany, (b) 129 Park Road, NW8, London, England, (c) 28 Chaussée De Lille, Moscron, Belgium. Date of birth: 21 March 1963. Place of birth: Sfax, Tunisia. Nationality: (a) Tunisian, (b) Bosnian. Passport No: E 423362 delivered in Islamabad on 15 May 1988. National identification No: 1292931. Other information: his mother's name is Medina Abid; he is [actually] in Ireland.'

46. On 30 January 2004 the Security Council adopted Resolution 1526 (2004) which is intended, on the one hand, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000), and paragraphs 1 and 2 of Resolution 1390 (2002) and, on the other, to strengthen the mandate of the Sanctions Committee. Paragraph 3 of Resolution 1526 (2004) states that those measures are to be further improved in 18 months, or sooner if necessary.
47. Paragraph 18 of Resolution 1526 (2004) states that the Security Council 'strongly encourages

all States to inform, to the extent possible, individuals and entities included in the [Sanctions Committee's] list of the measures imposed on them, and of the [Sanctions Committee's] guidelines and Resolution 1452 (2002)'.

48. On 29 July 2005 the Security Council adopted Resolution 1617 (2005). That resolution provides *inter alia* for the maintenance of the measures in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 21 of Resolution 1617 (2005), those measures are to be reviewed with a view to their possible further strengthening in 17 months, or sooner if necessary.
49. On 17 January 2006 the Commission adopted Regulation (EC) No 76/2006 amending for the sixty-first time Regulation No 881/2002 (OJ L 12, p. 7). In accordance with Article 1 thereof and paragraph 8 in the Annex thereto, Annex I to the contested regulation is amended to the effect that the entry relating to the applicant (see paragraph 45 above) is replaced by the following entry:

'Shafiq Ben Mohamed Ben Mohamed Al-Ayadi (alias (a) Bin Muhammad, Ayadi Chafiq, (b) Ayadi Chafik, Ben Muhammad, (c) Aiadi, Ben Muhammad, (d) Aiady, Ben Muhammad, (e) Ayadi Shafiq Ben Mohamed, (f) Ben Mohamed, Ayadi Chafiq, (g) Abou El Baraa). Address: (a) Helene Meyer Ring 10-1415-80809, Munich, Germany, (b) 129 Park Road, NW8, London, England, (c) 28 Chaussée De Lille, Moscron, Belgium, (d) Street of Provare 20, Sarajevo, Bosnia and Herzegovina (last registered address in Bosnia and Herzegovina). Date of birth: (a) 21.03.1963, (b) 21.01.1963. Place of birth: Sfax, Tunisia. Nationality: (a) Tunisian, (b) Bosnia and Herzegovina. Passport No: (a) E 423362 delivered in Islamabad on 15.05.1988, (b) 0841438 (Bosnia and Herzegovina passport issued on 30 December 1998 which expired on 30.12.2003. National identification No: 1292931. Other information: (a) address in Belgium is a PO box, (b) his father's name is Mohamed, mother's name is Medina Abid; (c) reportedly living in Dublin, Ireland.'

Procedure

50. By application lodged at the Registry of the Court of First Instance on 26 August 2002, Mr Ayadi brought an action against the Council and the Commission for annulment in part of the contested regulation.

51. By separate document lodged at the Registry of the Court of First Instance on 25 October 2002 the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged his observations on that objection on 18 December 2002. By order of 3 February 2003, the Court of First Instance (Second Chamber) dismissed the action as inadmissible in so far as directed against the Commission and ordered the applicant to pay the costs relating to that part of the action.
52. By separate document lodged at the Registry of the Court of First Instance on 13 November 2002, Mr Ayadi applied for legal aid. By order of 3 February 2003, the President of the Second Chamber of the Court of First Instance granted Mr Ayadi legal aid.
53. By document lodged at the Registry of the Court of First Instance on 8 January 2003 the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in these proceedings in support of the forms of order sought by the defendant. By order of 7 February 2003 the President of the Second Chamber of the Court of First Instance granted leave to intervene. The intervener lodged its statement within the prescribed period.
54. By document lodged at the Registry of the Court of First Instance on 24 July 2003 the Commission sought leave to intervene in these proceedings in support of the forms of order sought by the defendant. By order of 22 October 2003, the President of the Second Chamber of the Court of First Instance granted leave to intervene pursuant to Article 116(6) of the Rules of Procedure.
55. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.
56. Save for the United Kingdom, which presented apologies for its absence, the parties presented oral argument and answered questions put by the Court at the hearing on 25 October 2005.
- the applicant in Annex I to Regulation No 881/2002;
- order the Council to pay the costs.
58. At the hearing the applicant stated that his action was directed against the contested regulation only in so far as the latter is of direct and individual concern to him, of which the Court of First Instance took formal note in the minutes of the hearing.
59. The Council, supported by the United Kingdom and the Commission, contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Facts

60. The applicant states that he is a Tunisian national and that since 1997 he has resided in Ireland, with his wife, also a Tunisian national, and their two minor children, both Irish nationals. His bank accounts in Ireland and the United Kingdom were frozen by order of those Member States. The applicant, who accepts that he has been designated by the Sanctions Committee as a person associated with Usama bin Laden, denies that that designation is correct but accepts that that matter lies outside the scope of these proceedings.

Law

1. *On admissibility*

Arguments of the parties

61. The United Kingdom observes that the applicant's assets were frozen pursuant to Regulation No 467/2001. The contested regulation merely maintained the freezing order on his assets in place and so did not bring about a distinct change in the applicant's legal position within the meaning of the case-law (Case 60/81 IBM v Commission [1981] ECR 2639, paragraph 9). In those circumstances, the United Kingdom maintains that the applicant ought to have challenged Regulation No 467/2001 and that the present action, brought against the contested regulation, is out of time and hence inadmissible.
62. At the hearing the applicant argued that the effects of Regulation No 467/2001 were strictly limited in time, like Security Council Resolu-

Forms of order sought

57. The applicant claims that the Court should:
- annul Article 2 and so much of Article 4 as relates to Article 2 of Regulation No 881/2002;
 - or, alternatively, annul the reference to

tion 1333 (2000) which it implemented (see paragraph 18 above). In contrast, the temporal effects of the contested regulation are unlimited, like those of Security Council Resolution 1390 (2002) which it implements and which simply provides for an opportunity of review after twelve months (see paragraph 30 above). The adoption of the contested regulation thus brought about a fundamental change in the applicant's legal situation.

63. The Council did not wish to express any view on that question at the hearing. On the other hand, the Commission concurred with the United Kingdom's opinion that the temporary nature of the Security Council Resolutions at issue is not of such relevance as to distinguish Regulation No 467/2001 from the contested regulation, given that all those resolutions provide a mechanism for the review of their applicability after twelve months. The fact that the contested regulation was adopted on a legal basis different from that of Regulation No 467/2001 is not relevant either, for, according to the Commission, it does not bring about a change in the applicant's legal position.

Findings of the Court

64. Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as provided in Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention.
65. The Council has not in its claims raised a plea of inadmissibility.
66. The Council and the Commission are not, therefore, entitled to raise such a plea of inadmissibility and the Court is not bound to consider the pleas relied on in this regard (Case C-313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraph 22).
67. However, it is settled case-law that, under Article 113 of the Rules of Procedure, the Court may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case, including any raised by the interveners (Case T-88/01 Sniace v Commission [2005] ECR II-1165, paragraph 52, and the case-law cited there).
68. In this case, the plea alleging a bar to proceeding raised by the interveners is a matter of public policy, since it relates to the admissibility of the action (Case C298/00 P Italy v Commission [2004] ECR I-4087, paragraph 35). It may therefore be examined by the Court of First Instance of its own motion.
69. Although the United Kingdom has invoked IBM v Commission (cited in paragraph 61 above) in support of its plea of inadmissibility, the latter is in essence based on the settled case-law of the Court of Justice and the Court of First Instance relating to confirmatory acts.
70. According to that case-law, an action for annulment directed against an act which merely confirms a previous act, not challenged within the period prescribed, is inadmissible (Joined Cases 166/86 and 220/86 Irish Cement v Commission [1988] ECR 6473, paragraph 16, and Case C-480/93 P Zunis Holding and Others v Commission [1996] ECR I-1, paragraph 14). An act is a mere confirmation of an earlier act if it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier act was addressed (see judgment in Case 54/77 Herpels v Commission [1978] ECR 585, paragraph 14; order in Case C-521/03 Internationaler Hilfsfonds v Commission [2004], not published in the European Court Reports, paragraph 47; judgment in Case T-331/94 IPK v Commission [1997] ECR II-1665, paragraph 24, and order in Case T-84/97 BEUC v Commission [1998] ECR II-795, paragraph 52).
71. In the present case, it must be concluded that the contested regulation is a new act in relation to Regulation No 467/2001 and that it was preceded by a reconsideration of the situation of the persons included, like the applicant, in the lists annexed to those regulations.
72. First of all, the two regulations differ appreciably both in their titles and in their preambles and material provisions, which is in itself enough to dismiss the theory that one is merely confirmatory of the other. Indeed, the definition of 'funds' in Article 1 of Regulation No 881/2002 does not correspond exactly to the definition of 'funds' in Article 1 of Regulation No 467/2001, the former providing, as the latter does not, for the freezing of 'economic resources'.
73. Next, Regulation No 467/2001 was adopted in order to give effect in the Community to Security Council Resolution 1333 (2000) in accordance with Common Position 2001/154, whereas the contested regulation was adopt-

- ed in order to give effect to Resolution 1390 (2002) in accordance with Common Position 2002/402.
74. It cannot be denied that Resolution 1390 (2002) and Common Position 2002/402 contain new factors as compared to Resolution 1333 (2000) and Common Position 2001/154, and that the former were preceded by re-examination of the situation brought about by the latter. The same must necessarily be true of the contested regulation in comparison with Regulation No 467/2001.
75. Thus, as stated in the third and seventh recitals in the preamble to Common Position 2002/402, Resolution 1390 (2002) 'adjusts the scope of the sanctions concerning the freezing of funds' imposed by Resolution 1333 (2000) and, [t]herefore, the European Union restrictive measures should be adjusted in accordance with UNSCR 1390 (2002)'. Similarly, in the words of the second and fourth recitals in the preamble to the contested regulation, [t]he Security Council decided, inter alia, ... that the scope of the freezing of funds ... should be adjusted' and that, therefore, 'Community legislation is necessary'.
76. In particular, under paragraph 23 of Resolution 1333 (2000), the measures imposed by that regulation were established for twelve months at the end of which the Security Council was to decide whether the Taliban had complied with them and to decide accordingly whether to extend these measures for a further period on the same conditions. Resolution 1390 (2002) therefore contains a new and important element compared with Resolution 1333 (2000), in that it significantly extends that regulation's temporal scope.
77. Thus, contrary to the arguments of the United Kingdom and the Commission, a distinct change in the applicant's legal position has indeed been brought about by Resolution 1390 (2002), Common Position 2002/402 and the contested regulation. In point of fact, by means of those acts the applicant's funds remain frozen even after the period of twelve months laid down by paragraph 23 of Resolution 1333 (2002) has expired, whereas, if those acts had not been adopted, the obligation imposed on all the Member States of the UN to freeze the applicant's funds, laid down in that resolution, would automatically have been extinguished when the period in question had expired and the Community measures implementing that resolution would have lapsed.
78. Moreover, although by paragraph 1 of Resolution 1390 (2002), the Security Council decided to 'continue' the measures imposed by Resolution 1333 (2000), it did so following their re-examination, as envisaged by paragraph 23 of that resolution and as is confirmed by paragraph 3 of Resolution 1390 (2002), under which the measures it lays down are to be 'reviewed' in 12 months.
79. Lastly, Regulation No 467/2001 was adopted on the legal basis of Article 60 EC and Article 301 EC alone, at a time when the measures at issue sought to interrupt or reduce economic relations with a third country, whereas the contested regulation was adopted on the legal basis of Article 60 EC, Article 301 EC and Article 308 EC, at a time when there was no longer any link between those measures and the territory or rulers of a third country. Contrary to the Commission's submission at the hearing, that change in the legal basis of the acts at issue, which was made in the light of developments in the international situation in the context of which the sanctions ordered by the Security Council and put into effect by the Community must be seen, does indeed constitute a new element and demands a review of the applicant's situation. That change has led to a change in his legal position, permitting him inter alia to rely on pleas in law and arguments quite different from those put forward in support of his action for annulment (see, to this effect, Case T-306/01 Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II-0000, under appeal, 'Yusuf', paragraphs 108 to 124 and paragraphs 125 to 170, and Case T-315/01 Kadi v Council and Commission [2005] ECR II-0000, under appeal, 'Kadi', paragraphs 87 to 135).
80. It follows that the plea of inadmissibility raised by the United Kingdom and the Commission must be rejected.
81. With regard to the other conditions for the admissibility of the action, the Court also considers it appropriate to point out that, in so far as the applicant is expressly named in Annex I to the contested regulation, that act is of direct and individual concern to him, within the meaning of the fourth paragraph of Article 230 EC, even though that act is unquestionably of general application (Yusuf, paragraph 186). This action is therefore admissible.

2. On the substance

82. In support of the forms of order sought by him, the applicant essentially relies on three pleas in law, the first alleging that the Council was not competent to adopt Articles 2 and 4 of the contested regulation ('the contested provisions') and a misuse of powers, the second alleging breach of the fundamental principles of subsidiarity, proportionality and respect for human rights and the third alleging infringement of an essential procedural requirement.

The first plea, alleging lack of competence and a misuse of powers

Arguments of the parties

83. According to the applicant, Articles 60 EC and 301 EC did not confer on the Council the power to adopt the contested provisions, since the Taliban government in Afghanistan had fallen before they were adopted. Those provisions authorise only the adoption of measures designed to interrupt or reduce, where appropriate selectively, 'economic relations with one or more third countries'. Unlike Regulation No 467/2001, which provided for economic sanctions against Afghanistan, the contested regulation refers only to associates of Usama bin Laden, the Al Qaeda network and the Taliban. Those are not third countries and do not constitute the government of any part of Afghanistan.
84. As regards Article 308 EC, the applicant maintains that it does not confer on the Council the power to direct Member States to impose economic sanctions on individuals, in contravention of their fundamental rights. Such a power is incompatible with the limited terms of Articles 60 EC and 301 EC.
85. The adoption of the contested provisions therefore also constitutes a misuse of the powers conferred on the Council by Article 60 EC and Article 301 EC.
86. The Council takes issue with the applicant's arguments, referring to Yusuf and Kadi.

Findings of the Court

87. The Court of First Instance has previously ruled in Yusuf (paragraphs 107 to 170) and Kadi (paragraphs 87 to 135) on the Community's powers under Articles 60 EC, 301 EC and 308 EC to adopt provisions such as those in the contested regulation, which provide for economic and financial sanctions on individuals in con-

nection with the struggle against international terrorism, but without establishing any link at all with a third country, unlike the provisions of Regulation No 467/2001.

88. On that occasion, as the applicant expressly acknowledged at the hearing in response to a question asked by the Court of First Instance, exhaustive answers were given to arguments in essence identical to those put forward by the parties in relation to this question in the present case (in connection with the similar arguments put forward in the case giving rise to Yusuf, see paragraphs 80 to 106 of that judgment, and in connection with the similar arguments put forward in the case giving rise to Kadi, see paragraphs 64 to 86 of that judgment).
89. In concluding its reasoning, the Court of First Instance held that the institutions and the United Kingdom are therefore right to maintain that the Council was competent to adopt the contested regulation which sets in motion the economic and financial sanctions provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC' (Yusuf, paragraph 170, and Kadi, paragraph 135).
90. For essentially the same reasons as those set out in Yusuf and Kadi, the applicant's complaints alleging that the Community lacked competence are to be rejected (with regard to the Community judicature's power to give reasons for its judgment by reference to an earlier judgment ruling on largely identical questions, see Case C-229/04 Crailsheimer Volksbank [2005] ECR I-9273, paragraphs 47 to 49).
91. With regard to the allegation of misuse of powers, which alone might serve to distinguish this case from those giving rise to the judgments in Yusuf and Kadi, it too must be rejected, given that it is put forward merely as the corollary of the applicant's other complaints concerning competence.
92. The first plea must therefore be rejected in its entirety.

The second plea, alleging infringement of the fundamental principles of subsidiarity, proportionality and respect for human rights

Arguments of the parties

93. The applicant submits, first, that the contested provisions infringe the principle of subsidiarity in that they require Member States to adopt, on the basis of their obligations under Com-

- munity law, measures which, under international law, they are free to choose to apply or not to apply.
94. In that regard, the applicant argues that Articles 25 and 41 of the Charter of the United Nations, interpreted in the light of the principles of that organisation, and in particular in the light of the principle of the sovereign equality of its Member States set out in Article 2(1) of the Charter, do not require Member States of the United Nations to apply without alteration or reservation those measures which the Security Council 'calls upon' them to apply. On the contrary, Member States are free to decide how to respond to such a call.
95. By contrast, the Council's interpretation, according to which paragraphs 8(c) and 17 of Security Council Resolution 1333 (2000) are binding on Members of the United Nations and therefore upon the Community institutions, is in his opinion inconsistent with the fundamental rules of international law and in particular with Articles 7, 8, 17, 22 and 23 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948, in that it would permit the Sanctions Committee to require Members of the United Nations to exclude individuals designated by that Committee from any means of obtaining financial support, without the person concerned's having any right to know the reasons for the measure or the material upon which it is based and without the individual's having any access to an independent or judicial body to determine its correctness.
96. Furthermore, even if the Security Council resolutions in question are binding on Member States, the Council does not explain why it was necessary for the Council itself to act in their place in the present case.
97. In the second part of the plea the applicant maintains that the contested provisions infringe the principle of proportionality, in so far as they have the effect of denying an individual all income or public assistance and, ultimately, any means of subsistence for him and his family. Such measures are not essential, even for the purposes of denying resources to Usama bin Laden.
98. The applicant contends, thirdly, that the contested provisions infringe his fundamental rights, particularly that of access to his property guaranteed by Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms ('the ECHR') and the right to a judicial remedy guaranteed by Article 6 of the ECHR. The outcome of those measures, which he contends are contrary to the constitutional traditions of the Member States, is that the applicant will be reduced to stealing in order to survive, which also constitutes degrading treatment prohibited by Article 3 of the ECHR and a denial of respect for his dignity in contravention of Article 8 of the ECHR.
99. With more particular regard to the alleged infringement of his right of access to his property, the applicant acknowledged at the hearing that this must be assessed solely in the light of the rules currently in force, in accordance with the rulings in *Yusuf* (paragraph 287) and *Kadi* (paragraph 236), and that account must therefore be taken of the express possibilities of exemptions or derogations from the freezing of funds provided for by Regulation No 561/2003, which was adopted after this action was brought.
100. On this point, the applicant has admitted that the Irish authorities granted him the public assistance necessary for his basic expenses, so that he was not deprived of all resources or of the means of subsistence. None the less, the contested regulation, even as amended by Regulation No 561/2003, did not let him enjoy other social advantages, prevented him from leading a normal life and made him utterly dependent on the Irish State for his subsistence. More particularly, he maintained that Article 2 of the contested regulation did not allow him to do any work at all, either employed or self-employed. Thus, he had been refused a taxi-driver's licence. In any event, it was impossible for him to hire a vehicle or to be paid by customers, since that would amount to making funds or economic resources available to him within the meaning of that provision.
101. With more particular regard to the alleged infringement of his right to a judicial remedy, the applicant accepted at the hearing that the judicial review performed in this case by the Court of First Instance must, in so far as it bears indirectly on the Security Council resolutions at issue, be confined to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, as was held in *Yusuf* (paragraph 276 et seq.) and *Kadi* (paragraph 225 et seq.).
102. The applicant has nevertheless maintained that the conclusions reached by the Court of First

Instance in Yusuf (in particular, in paragraphs 344 and 345) and Kadi (in particular, in paragraphs 289 and 290) cannot be transposed to the circumstances of this case. First, the freezing of his funds is not to be considered to be a temporary precautionary measure, in contrast to the finding in those two judgments, but rather to be actual confiscation. Second, there is no effective mechanism for reviewing the individual measures freezing funds adopted by the Security Council, with the result that the danger is that his property will remain frozen for the rest of his life. On this head the applicant has argued that he had endeavoured in vain to persuade the Security Council to alter its stance in relation to him. So, he wrote twice to the Irish authorities, on 5 February 2004 and 19 May 2004, seeking their assistance in having him removed from the Sanctions Committee list. By letter of 10 October 2005 those authorities informed him that his file was still being considered, but did not give him to understand that they would take any steps to his advantage.

103. The Council, supported by the interveners, opposes the applicant's arguments, referring to Yusuf and Kadi.

Findings of the Court

104. It is appropriate to begin by examining the first part of the plea and to continue by examining the second and third parts together. Determining whether any of the applicant's fundamental rights have been infringed by the contested regulation necessarily involves an assessment of that measure's compliance with the principle of proportionality in the light of the objective pursued (Opinion of Advocate General Léger in Joined Cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I0000, paragraph 107).

Concerning the first part of the second plea, alleging breach of the principle of subsidiarity

105. The applicant argues in substance that, even if Articles 60 EC, 301 EC and 308 EC do confer competence in principle on the Community to adopt measures such as those in question in this case (the issue in the first plea in law), the fact remains that the Member States are best placed to determine what special measures are called for when a Security Council resolution is to be implemented. By adopting the contested regulation the Council, in his view, compromised their freedom of choice and offended

against the principle of subsidiarity.

106. In that regard, it is appropriate to recall that the principle of subsidiarity is set out in the second paragraph of Article 5 EC, which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

107. According to settled case-law, the Community judicature reviews the lawfulness of Community acts in the light of that general principle (see, to that effect, Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I11453, paragraphs 177 to 185; Case C-110/03 *Belgium v Commission* [2005] ECR I2801, paragraph 58, and Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II4653, paragraphs 197 and 198).

108. The Court of First Instance considers, however, that this general principle cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community (see, in this connection, Article 60(2) EC).

109. In fact, with regard to the interruption or reduction of economic relations with third countries, those very articles provide for action by the Community when that is 'deemed necessary' in the form of a common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy (CFSP).

110. In the sphere of application of Articles 60 EC and 301 EC, the EC Treaty thus confers on the Union the power to determine whether action by the Community is necessary. Such determination falls within the ambit of the exercise of discretion by the Union. It excludes any right for individuals to challenge, in the light of the principle of subsidiarity enshrined in the second paragraph of Article 5 EC, the lawfulness of the action subsequently taken by the Community in accordance with the CFSP common position or joint action of the Union.

111. Moreover, since the Court has accepted, in Yusuf (paragraph 158 et seq.) and Kadi (paragraph 122 et seq.), that the sphere of application of Articles 60 EC and 301 EC could be extended, by having recourse to the additional legal basis

of Article 308 EC, to the adoption of economic and financial sanctions imposed on individuals in the battle against international terrorism even when no connection with third countries has been established, it must follow that the lawfulness of Community measures adopted on that basis in accordance with a CFSP common position or joint action of the Union cannot be challenged by individuals in the light of the principle of subsidiarity either.

112. In any event, even assuming that the principle of subsidiarity finds application in circumstances such as those of this case, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level.

113. Last, with regard to the claim that the Council compromised the Member States' freedom of choice, the Council was right when it stressed that Common Position 2002/402 reflects the unanimous assessment of the Member States that action by the Community was necessary in order to implement the freezing of funds decided on by the Security Council. As the United Kingdom points out, the Member States themselves having elected to fulfil their obligations under the Charter of the United Nations by means of a Community measure, the Council cannot be accused of having compromised their freedom of choice by complying with their intention.

114. The first part of the second plea must therefore be rejected.

Concerning the second and third parts of the second plea, alleging breach of the principles of proportionality and of observance of human rights

115. Subject only to the specific point of law that will be considered in paragraph 156 below, the Court of First Instance has already ruled, in Yusuf (paragraphs 226 to 346) and Kadi (paragraphs 176 to 291), on all the points of law raised by the parties in connection with the second and third parts of the second plea in this action.

116. On that occasion, the Court held, in particular, as follows:

- from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every

other obligation of domestic law or of international Treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty (Yusuf, paragraph 231, and Kadi, paragraph 181);

- that primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations (Yusuf, paragraph 234, and Kadi, paragraph 184);
- although not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it (Yusuf, paragraph 243, and Kadi, paragraph 193);
- first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations (Yusuf, paragraph 254, and Kadi, paragraph 204);
- as a result, the applicants' arguments challenging the contested regulation and based, on the one hand, on the autonomy of the Community legal order vis-à-vis the legal order under the United Nations and, on the other, on the necessity of transposing Security Council resolutions into the domestic law of the Member States, in accordance with the constitutional provisions and fundamental principles of that law, must be rejected (Yusuf, paragraph 258, and Kadi, paragraph 208);
- the contested regulation, adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council

adopted under Chapter VII of the Charter of the United Nations (Yusuf, paragraph 264, and Kadi, paragraph 213);

- in that situation, the Community institutions acted under circumscribed powers, with the result that they had no autonomous discretion (Yusuf, paragraph 265, and Kadi, paragraph 214);
- in light of the considerations set out above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council or of the Sanctions Committee according to the standard of protection of fundamental rights as recognised by the Community legal order cannot be justified either on the basis of international law or on the basis of Community law (Yusuf, paragraph 272, and Kadi, paragraph 221);
- the resolutions of the Security Council at issue therefore fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call into question, even indirectly, their lawfulness in the light of Community law; on the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations (Yusuf, paragraph 276, and Kadi, paragraph 225);
- none the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible (Yusuf, paragraph 277, and Kadi, paragraph 226);
- the freezing of funds provided for by the contested regulation infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens* (Yusuf, paragraphs 288 and 289, and Kadi, paragraphs 237 and 238);
- since the Security Council resolutions concerned do not provide a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in

the list in question and since it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case, the arguments alleging breach of such a right must be rejected (Yusuf, paragraphs 306, 307 and 321, and Kadi, paragraphs 261 and 268);

- in these circumstances in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (Yusuf, paragraph 320, and Kadi, paragraph 274);
- nor were the Community institutions obliged to hear the persons concerned before the contested regulation was adopted (Yusuf, paragraph 329) or in the context of the adoption and implementation of that act (Kadi, paragraph 259);
- in dealing with an action for annulment of the contested regulation, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions; the Court also reviews the lawfulness of the contested regulation having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions; the Court reviews the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person (Yusuf, paragraphs 334, 335 and 337, and Kadi, paragraphs 279, 280 and 282);
- on the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order;

nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 337 above, to check indirectly the appropriateness and proportionality of those measures (Yusuf, paragraphs 338 and 339, and Kadi, paragraphs 283 and 284);

- to that extent, there is no judicial remedy available to the persons concerned, the Security Council not having thought it appropriate to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee (Yusuf, paragraph 340, and Kadi, paragraph 285);
- the lacuna thus found to exist in the previous indent in the judicial protection available to the applicants is not in itself contrary to *jus cogens*, for (a) the right of access to the courts is not absolute; (b) the limitation of the right of the persons concerned to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, is inherent in that right; (c) such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII and by the legitimate objective pursued, and (d) in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving the governments concerned, constitute another reasonable method of affording adequate protection of the fundamental rights of the persons concerned as recognised by *jus cogens* (Yusuf, paragraphs 341 to 345, and Kadi, paragraphs 286 to 290);
- the arguments relied on to challenge the contested regulation alleging breach of the right to an effective judicial remedy must consequently be rejected (Yusuf, paragraph 346, and Kadi, paragraph 291).

117. As the applicant acknowledged at the hearing, in its examination of the Yusuf and Kadi cases the Court gave exhaustive answers to the ar-

guments, in essence identical, put forward in those cases by the parties in their written pleadings, in connection with the second and third parts of the second plea (in respect of the similar arguments put forward by the parties in the Yusuf case, see Yusuf, paragraphs 190 to 225, and, in respect of the similar arguments put forward by the parties in the Kadi case, see Kadi, paragraphs 138 to 175). That is particularly the case in relation to the applicant's arguments claiming that Security Council resolutions are not binding on the Member States (paragraph 94, above), that the resolutions in question are incompatible with fundamental rules of international law on the protection of human rights (paragraph 95, above), that fundamental rights guaranteed by the ECHR have been infringed (paragraph 98, above), particularly from the standpoint of proportionality (paragraph 97, above) and that the right to an effective judicial remedy has been infringed (paragraph 101, above).

118. Nevertheless, it is necessary to add the following points in response to the arguments more specifically propounded by the applicant concerning, on the one hand, the alleged ineffectiveness of the exemptions and derogations from the freezing of funds provided for by Regulation No 561/2003, especially as regards carrying on a trade or business (paragraphs 99 and 100, above), and, on the other, the alleged invalidity in the circumstances of the conclusions reached by the Court in Yusuf and Kadi concerning the compatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons concerned (paragraphs 101 and 102, above).

119. With regard, first, to the alleged ineffectiveness of the exemptions and derogations from the freezing of funds, it is to be borne in mind that Article 2a of the contested regulation, added to the latter by Regulation No 561/2003 which was adopted as a result of Security Council Resolution 1452 (2002), provides, among other derogations and exemptions, that, upon a request made by an interested person, and provided that the Sanctions Committee does not expressly object, the competent national authorities may declare the freezing of funds or economic resources to be inapplicable to funds or economic resources which they have determined are necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges' (paragraph 43, above). The use

of the word 'including', repeating the text of Resolution 1452 (2002), shows that neither that resolution nor Regulation No 561/2003 provides a specific and exhaustive list of 'basic expenses' that may be exempted from the freezing of funds. The determination of the kinds of expenses capable of being so classified is therefore left, to a large extent, to be assessed by the competent national authorities responsible for the implementation of the contested regulation under the supervision of the Sanctions Committee. In addition, funds necessary for any 'extraordinary expenses' whatsoever may in future be unfrozen, on the express authorisation of the Sanctions Committee.

120. It is established that, in accordance with those provisions, Ireland sought and obtained the approval of the Sanctions Committee in August 2003 for the payment of public assistance to the applicant, so enabling him to meet his basic needs and those of his family. In December 2003 the Sanctions Committee authorised Ireland to increase the amount of the allowances paid to the applicant, having regard to the increase in the Irish national budget. It is clear that, far from having the purpose or the effect of submitting the applicant to inhuman or degrading treatment, the freezing of his funds takes account, so far as is possible, of his basic needs and fundamental rights (see, to this effect, Yusuf, paragraphs 291 and 312, and Kadi, paragraphs 240 and 265).
121. For the rest, it is indeed to be recognised that the freezing of the applicant's funds, subject only to the exemptions and derogations provided for by Article 2a of the contested regulation, constitutes a particularly drastic measure with respect to him, which is capable even of preventing him from leading a normal social life and of making him wholly dependent on the public assistance granted by the Irish authorities.
122. Nevertheless, it is to be recalled that that measure constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, for the purpose in particular of preventing terrorist attacks of the kind perpetrated in the United States of America on 11 September 2001 (Yusuf, paragraphs 295 and 297, and Kadi, paragraphs 244 and 246).
123. Any measure of this kind imposing sanctions

has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions (Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 22). Nevertheless, the importance of the aims pursued by the regulation imposing those sanctions is such as to justify those negative consequences, even though they may be of a substantial nature, for some operators (*Bosphorus*, paragraph 23).

124. In *Bosphorus*, paragraph 123 above, the Court of Justice ruled that the impounding of an aircraft belonging to a person based in the Federal Republic of Yugoslavia but leased to an 'innocent' external economic operator acting in good faith was not incompatible with the fundamental rights recognised by Community law, when compared with the public-interest objective of fundamental importance to the international community, which was to put an end to the state of war in the region and to the massive violations of human rights and of humanitarian international law in the Republic of Bosnia-Herzegovina. In its judgment of 30 June 2005 in *Bosphorus v. Ireland*, No 45036/98, not yet published in the Reports of Judgments and Decisions, the European Court of Human Rights also held that the impounding of the aircraft did not give rise to a violation of the ECHR (paragraph 167), having regard to the nature of the interference at issue and to the public interest pursued by the impoundment and by the sanctions regime (paragraph 166).
125. It must be held a fortiori, in the present case, that the freezing of funds, financial assets and other economic resources of the persons identified by the Security Council as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban is not incompatible with the fundamental rights of the human person falling within the ambit of *jus cogens*, in light of the public-interest objective of fundamental importance to the international community which is to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts (see, to this effect, Yusuf, paragraph 298, and Kadi, paragraph 247).
126. It has, moreover, to be remarked that the contested regulation and the Security Council resolutions implemented by that regulation do not prevent the applicant from leading a sat-

isfactory personal, family and social life, given the circumstances. Thus, according to the interpretation given at the hearing by the Council, which is to be approved, the use for strictly private ends of the frozen economic resources, such as a house to live in or a car, is not forbidden per se by those measures. That is all the more true where everyday consumer goods are concerned.

127. Approval must also be given to the reasoning put forward at the hearing by the Council, that the contested regulation and the Security Council resolutions implemented by that regulation do not of themselves prevent the applicant, contrary to his submission, from carrying on business or trade activities, whether as an employee or as a self-employed person, contrary to the his submission, but in substance concern the receipt of income from such activity.
128. First, in point of fact no provision in those acts makes express mention of the exercise of such activity, either to forbid or to regulate it.
129. Second, the measures at issue are not intended to prevent the persons concerned from actually acquiring funds or economic resources, but do no more than order the freezing of those funds and economic resources in order to prevent their being made available to, or exploited by, those persons, except for strictly personal purposes, as stated in paragraph 126, above. In consequence, it is not so much the carrying on of a trade or business, as an employee or as a self-employed person, as the free receipt of the income from such an activity that is regulated by those measures.
130. Third, by virtue of Article 2a of the contested regulation, Article 2 may be inapplicable, subject to the conditions set by that provision, to any kind of funds or economic resources, including therefore the economic resources needed for the carrying on of employed or self-employed professional activities and the funds received or receivable in connection with such activity. Although Article 2a constitutes a provision derogating from Article 2, it is not to be interpreted strictly in the light of the humanitarian objective that it plainly pursues.
131. Thus, in the circumstances of this case, both the grant to the applicant of a taxi-driver's licence and his hiring of a car, as 'economic resources', and the trade receipts produced by working as a taxi driver, as 'funds', may theoretically be the object of a derogation from the freezing of

the applicant's funds and economic resources, if necessary on the conditions and within the limits fixed by one of the competent authorities of the Member States listed in Annex II to the contested regulation or by the Sanctions Committee.

132. However, as the Council observed at the hearing, it is for those national authorities, which are best placed to take into consideration the special circumstances of each case, to determine in the first place whether such a derogation may be granted and then to ensure that it is reviewed and implemented in keeping with the freezing of the funds of the person concerned. Thus, in this case, it would be possible for those authorities to put in place controls designed to check that the earned income received by the applicant from working as a taxi driver does not exceed the limit of what is judged to be necessary to meet his basic expenses. In contrast, a refusal to grant him a taxi-driver's licence, decided on by those authorities without regard to his needs, whether basic or extraordinary, and without consulting the Sanctions Committee, would, a priori, indicate misinterpretation or misapplication of the contested regulation.
133. That being so, there are no grounds for challenging the findings made by the Court in Yusuf and Kadi in the light of the arguments more specifically developed by the applicant at the hearing and relating to the alleged ineffectiveness of the exemptions and derogations from the freezing of funds provided for by Regulation No 561/2003.
134. With regard, secondly, to the alleged invalidity, in the circumstances of this case, of the conclusions reached by the Court in Yusuf and Kadi, concerning the compatibility with jus cogens of the lacuna found to exist in the judicial protection of the persons concerned, the applicant pleads, on the one hand, that the freezing of his funds amounts to confiscation and, on the other, that the machinery for review of the individual measures for freezing of funds decided by the Security Council and put into effect by the contested regulation is ineffective.
135. So far as concerns, first, the allegedly confiscatory nature of the freezing of the applicant's funds, it is to be borne in mind that the Court has held in Yusuf (paragraph 299) and Kadi (paragraph 248) that freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their

financial assets but only the use thereof. In addition, in its assessment of the compatibility of such a measure with jus cogens, the Court attached special significance to the fact that, far from providing for measures for an unlimited or unspecified period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed (Yusuf, paragraph 344, and Kadi, paragraph 289).

136. Moreover, the applicant has not put forward any evidence or argument that might shake the foundation of those findings in the particular circumstances of this case. On the contrary, those findings have in the meantime been corroborated by the fact that, like the four resolutions that preceded it (see paragraphs 18, 30, 40 and 46, above), Resolution 1617 (2005), adopted on 29 July 2005, that is to say, within the maximum period of 18 months prescribed by the previous Resolution 1526 (2004), once more provided for a mechanism for review 'in 17 months, or sooner'.
137. As regards, second, the effectiveness of the mechanism for review of the individual fund-freezing measures adopted by the Security Council and implemented by the contested regulation, it is to be borne in mind, in addition to the findings summarised in paragraph 116, above, that in Yusuf (paragraph 309 et seq.) and Kadi (paragraphs 262 et seq.), the Court noted that the persons concerned might address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds.
138. On the basis of the measures referred to in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002), and set out afresh in paragraph 1 of Resolution 1526 (2004) and Resolution 1617 (2005), the Sanctions Committee is in fact responsible for the regular updating of the list of persons and entities whose funds must be frozen pursuant to those Security Council resolutions.
139. With particular regard to an application for re-examination of an individual case, for the purpose of having the person concerned removed from the list of persons affected by the sanctions, the Guidelines of the [Sanctions]

Committee for the conduct of its work' ('the Guidelines'), adopted on 7 November 2002, amended on 10 April 2003 and revised (without substantial amendment) on 21 December 2005, provide in section 8, entitled 'De-listing', as follows:

'(a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;

(b) The government to which a petition is submitted (the petitioned government) should review all relevant information and then approach bilaterally the government(s) originally proposing designation (the designating government(s)) to seek additional information and to hold consultations on the de-listing request;

(c) The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations;

(d) If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;

(e) The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.'

140. The Court has previously held that, by adopting those Guidelines, the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered

in the Sanctions Committee's list, and in particular their right to be heard (Yusuf, paragraph 312, and Kadi, paragraph 265). The importance attached by the Security Council to observance of those rights is, moreover, clearly apparent from its Resolution 1526 (2004). Under paragraph 18 of that resolution, the Security Council '[s]trongly encourages all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them, and of the Committee's guidelines and resolution 1452 (2002)'.

141. Admittedly, the procedure described above confers no right directly on the persons concerned themselves to be heard by the Committee, the only authority competent to give a decision, on a State's petition, on the re-examination of their case, with the result that they are dependent, essentially, on the diplomatic protection afforded by the States to their nationals; such a restriction of the right to be heard by the competent authority is not, however, to be deemed improper in the light of the mandatory prescriptions of the public international order. On the contrary, with regard to the challenge to the validity of decisions ordering the freezing of funds belonging to individuals or entities suspected of contributing to the financing of international terrorism, adopted by the Security Council through its Sanctions Committee under Chapter VII of the Charter of the United Nations on the basis of information communicated by the States and regional organisations, it is appropriate that the right of the persons involved to be heard should be adapted to an administrative procedure on several levels, in which the national authorities referred to in Annex II of the contested regulation play an essential part (Yusuf, paragraphs 314 and 315, and Kadi, paragraphs 267 and 268; see also, by analogy, the order of the President of the Second Chamber of the Court of First Instance of 2 August 2000 in Case T-189/00 R'Invest' Import und Export and Invest Commerce v Commission [2000] ECR II-2993).
142. Although the Sanctions Committee takes its decisions by consensus, the effectiveness of the procedure for requesting to be removed from the list is guaranteed, on the one hand, by the various formal consultation mechanisms intended to facilitate that agreement, provided for in section 8(b) to (e) of the Guidelines and, on the other, by the obligation imposed on all Member States of the United Nations, including the members of that committee, to act in good faith in that procedure in accordance with the general principle of international law that every Treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*), enshrined in Article 26 of the Treaty of Vienna on the Law of Treaties, concluded in Vienna on 23 May 1969. In this connection it must be observed that the Guidelines are binding on all the Member States of the United Nations by virtue of their international legal obligations, in accordance with the Security Council resolutions at issue. In particular, it follows from paragraph 9 of Resolution 1267 (1999), paragraph 19 of Resolution 1333 (2000) and paragraph 7 of Resolution 1390 (2002) that all States are required to cooperate fully with the Sanctions Committee in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of those resolutions.
143. With more particular regard to the petitioned government, which is the government to which the request for removal from the list is addressed and which is, therefore, in most cases that of the petitioner's country of residence or nationality, the effectiveness of that procedure for removal from the list is further guaranteed by the obligation imposed on it by section 8(b) of the Guidelines to review all relevant information supplied by the person concerned and then to make a bilateral approach to the designating government.
144. Here it is appropriate to add that particular obligations are imposed on the Member States of the Community when a request for removal from the list is addressed to them.
145. The Sanctions Committee having, with its Guidelines, interpreted the Security Council resolutions in question as conferring on interested persons the right to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list in dispute (see paragraphs 138 and 139 above), the contested regulation, which gives effect to those resolutions within the Community, must be interpreted and applied in the same way (Yusuf, paragraph 276, and Kadi, paragraph 225). That right must accordingly be classed as a right guaranteed not only by those Guidelines but also by the Community legal order.
146. It follows that, both in examining such a request and in the context of the consultations between States and other actions that may

take place under paragraph 8 of the Guidelines, the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law, given that the respect of those fundamental rights does not appear capable of preventing the proper performance of their obligations under the Charter of the United Nations (see, a contrario, Yusuf, paragraph 240, and Kadi, paragraph 190).

147. The Member States must thus ensure, so far as is possible, that interested persons are put in a position to put their point of view before the competent national authorities when they present a request for their case to be reviewed. Furthermore, the margin of assessment that those authorities enjoy in this respect must be exercised in such a way as to take due account of the difficulties that the persons concerned may encounter in ensuring the effective protection of their rights, having regard to the specific context and nature of the measures affecting them.

148. Thus, the Member States would not be justified in refusing to initiate the review procedure provided for by the Guidelines solely because the persons concerned could not provide precise and relevant information in support of their request, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question or the evidence supporting those reasons, on account of the confidential nature of those reasons or that evidence.

149. Similarly, having regard to the fact, noted in paragraph 141 above, that individuals are not entitled to be heard in person by the Sanctions Committee, with the result that they are dependent, essentially, on the diplomatic protection afforded by States to their nationals, the Member States are required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied.

150. It is appropriate to add that, as the Court noted, following the submissions of the United Kingdom, in Yusuf (paragraph 317) and Kadi (paragraph 270), it is open to the persons concerned to bring an action for judicial review based on

the domestic law of the State of the petitioned government, indeed even relying directly on the contested regulation and the relevant resolutions of the Security Council which that regulation puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination and, more generally, against any infringement by that national authority of the right of the persons involved to request the review of their case. At the hearing in this case the Council thus invoked, to that effect, a decision given by a court of a Member State ordering that State to request, as a matter of urgency, the Sanctions Committee to remove the names of two persons from the list in question, on pain of paying a daily penalty (Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), Fourth Chamber, judgment of 11 February 2005 in the case of Nabil Sayadi and Patricia Vinck v Belgian State).

151. On this issue it is also to be borne in mind that, according to the Court of Justice's settled case-law (Case C-443/03 Leffler [2005] ECR I-9611, paragraphs 49 and 50, and the cases there cited), in the absence of Community provisions it is for the domestic legal system of each Member State to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law. The Court has made it clear that those rules cannot be less favourable than those governing rights which originate in domestic law (principle of equivalence) and that they cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). The principle of effectiveness must lead the national court to apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the *raison d'être* and objective of the Community act in question.

152. It follows that, in an action in which it is alleged that the competent national authorities have infringed the right of the persons involved to request review of their cases in order to be removed from the list at issue, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, which may lead it to refrain from applying, if need be, a national rule preventing that result (Leffler, paragraph 151, above, paragraph 51, and the case-law there cited), such as a rule excluding from judicial review a refusal of national authorities to take

action with a view to guaranteeing the diplomatic protection of their nationals.

153. In the present case, the applicant claimed at the hearing that the Irish authorities had informed him by letter of 10 October 2005 that his request to be removed from the list at issue, made on 5 February 2004, was still under consideration by those authorities. In so far as the applicant intends thus to challenge the Irish authorities' failure to cooperate in good faith with him, it is for him to avail himself of the abovementioned opportunities for judicial remedy offered by domestic law.
154. In any event, such a lack of cooperation, even if it were established, in no way means that the procedure for removal from the list is in itself ineffective (see, by analogy, the order of the President of the Court of First Instance of 15 May 2003 in Case T47/03 R Sison v Council [2003] ECR II-2047, paragraph 39, and the case-law there cited).
155. That being so, there are no grounds for challenging the assessment made by the Court of First Instance in Yusuf and Kadi concerning the arguments more specifically developed by the applicant at the hearing with regard to the alleged incompatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons involved.
156. Last, in so far as Yusuf and Kadi do not answer the applicant's point that the Member States of the United Nations are not bound to apply without reservation or alteration the measures that the Security Council 'calls upon' them to adopt, the United Kingdom rightly counters that Article 39 of the Charter of the United Nations draws a distinction between 'recommendations', which are not binding, and 'decisions', which are. In this case, the sanctions provided for by paragraph 8(c) of Resolution 1333 (2000) were indeed adopted by way of 'decision'. Likewise, in paragraph 1 of Resolution 1390 (2002) the Security Council 'decide[d]' to continue the measures 'imposed' by that provision. So that argument too must be rejected.
157. Having regard to the foregoing, the second and third parts of the second plea must be rejected. This plea must therefore be rejected in its entirety.

The third plea, alleging infringement of an essential procedural requirement

Arguments of the parties

158. The applicant maintains that the Council infringed an essential procedural requirement in failing to state adequate reasons for taking the view that the adoption of Community legislation, rather than of national measures, was required in this case. The ground referred to in this regard in the fourth recital in the preamble to the contested regulation, namely, that of 'avoiding distortion of competition' is not founded in fact.
159. The Council and the United Kingdom consider that this plea coincides with the plea alleging infringement of the principle of subsidiarity and refer to their observations in response to that plea. In so far as the applicant contends that the contested regulation fails to set out the reasons why Community action was held to be appropriate and necessary, the United Kingdom denies that this is the case, in the light of the recitals in the preamble to the regulation. In so far as the applicant relies more specifically on a failure to state adequate reasons in relation to the alleged objective of avoiding a distortion of competition, the Council submits that the reasons for the contested regulation must be examined as a whole and not by isolating a single sentence in a page of recitals.

Findings of the Court

160. By this plea the applicant alleges a twofold failure to state proper reasons.
161. First, he claims that the Council failed to give an adequate statement of the reasons why it judged that in the circumstances it was necessary to adopt Community, rather than national, legislation.
162. That claim is unfounded, given that the legislative citations in the contested regulation make reference, on the one hand, to Articles 60 EC, 301 EC and 308 EC and, on the other, to Common Position 2002/402. Although the Court of First Instance found in Yusuf (paragraph 138) and Kadi (paragraph 102) that the preamble to the contested regulation wasted very few words on that point, the reasoning is none the less sufficient. As to the reasons for which it was considered in that common position that action by the Community was necessary, they are the Union's and not the Community's. They did not, therefore, need to be set out in the Community act itself.
163. Second, the applicant maintains that the

ground given in the fourth recital in the preamble to the contested regulation, namely, the objective of 'avoiding distortion of competition' has no foundation in fact.

164. It is true that in Yusuf (paragraphs 141 and 150) and Kadi (paragraphs 105 and 114) the Court of First Instance found that the assertion that there was a risk of competition's being distorted, a result which according to its preamble the contested regulation seeks to prevent, was unconvincing and that therefore the measures at issue in the case could not find authorisation in the objective referred to in Article 3(1)(c) and (g) EC.

165. However, as the Council rightly observes, the statement of reasons for a regulation must be examined as a whole. According to the case-law, even if one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons (Case 119/86 Spain v Commission [1987] ECR 4121, paragraph 51, and Joined Cases T129/95, T2/96 and T97/96 Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Council and Commission [1999] ECR II-17, paragraph 160), which in this case they do.

166. In that regard, it may be observed that the statement of reasons required by Article 253 EC must show clearly and unequivocally the Council's reasoning so as to enable the persons concerned to ascertain the reasons for the measures and to enable the Community judicature to exercise its power of review. Furthermore, the question whether a statement of reasons is adequate must be assessed by reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. In the case of a measure intended to have general application, as here, the preamble may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other (Case C344/04 International Air Transport Association and Others [2006] ECR I-0000, paragraphs 66 and 67, and the case-law there cited).

167. In the circumstances of this case, the legislative citations of the contested regulation and the first to seventh recitals in its preamble, in particular, more than satisfy those requirements, as is clear from Yusuf (paragraph 158 et seq.)

and Kadi (paragraph 122 et seq.).

168. Furthermore, in so far as the contested regulation expressly names the applicant in Annex I, as a person to whom the freezing of funds must apply, sufficient reasons are supplied by the reference made in Article 2 of that act to the corresponding designation made by the Sanctions Committee.

169. It follows from the above that the third plea must be rejected.

170. None of the pleas in law put forward by the applicant in support of his action being well founded, the latter must be dismissed.

Costs

171. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the Council.

172. Nevertheless, under Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds, THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders the applicant to bear, in addition to his own costs, those of the Council;**
3. **Orders the United Kingdom of Great Britain and Northern Ireland and the Commission to bear their own costs.**

Pirrung Forwood Papisavvas

Delivered in open court in Luxembourg on 12 July 2006.

E. Coulon, Registrar

J. Pirrung, President

COMMUNITY COMPETENCE, FRAMEWORK DECISIONS,
CRIMINAL LAW

CASE C-176/03 COMMISSION OF THE EUROPEAN COMMUNITIES v COUNCIL OF THE EUROPEAN UNION

(Action for annulment – Articles 29 EU, 31(e) EU, 34 EU and 47 EU – Framework Decision 2003/80/JHA – Protection of the environment – Criminal penalties – Community competence – Legal basis – Article 175 EC)

Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 26 May 2005

Judgment of the Court (Grand Chamber), 13 September 2005

SUMMARY OF THE JUDGMENT

Environment — Protection — Community competence — Criminal penalties — Framework Decision 2003/80 on the protection of the environment through criminal law — Appropriate legal basis — Article 175 EC — Decision based on Title VI of the Treaty on European Union — Infringement of Article 47 EU (Arts 135 EC, 175 EC and 280(4) EC; Art. 47 EU; Council Framework Decision 2003/80, Arts 1 to 7)

Framework Decision 2003/80 on the protection of the environment through criminal law, being based on Title VI of the Treaty on European Union, encroaches upon the powers which Article 175 EC confers on the Community, and, accordingly, the entire framework decision being indivisible, infringes Article 47 EU. Articles 1 to 7 of that framework decision, which entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment, could have been properly adopted on the basis of Article 175 EC in so far as, on account of both their aim and their content, their principal objective is the protection of the environment, which constitutes one of the essential objectives of the Community.

In this regard, while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. That competence of the Community legislature in relation to the implementation of environmental policy cannot be called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. (see paras 41-42, 47-48, 51-53)

JUDGMENT OF THE COURT (GRAND CHAMBER)

13 September 2005⁶

(Action for annulment – Articles 29 EU, 31(e) EU, 34 EU and 47 EU – Framework Decision 2003/80/JHA – Protection of the environment – Criminal penalties – Community competence – Legal basis – Article 175 EC)

APPLICATION for annulment pursuant to Article 35 EU brought on 15 April 2003,

Commission of the European Communities, represented by M. Petite, J.F. Pasquier and W. Bogensberger, acting as Agents, with an address for service in Luxembourg, applicant, supported by:

European Parliament, represented by G. Garzón Clariana, H. Duintjer Tebbens and A. Baas, and M. Gómez-Leal, acting as Agents, with an address for service in Luxembourg, intervener,

v

Council of the European Union, represented by J.C. Piris, J. Schutte and K. Michoel, acting as Agents, with an address for service in Luxembourg, defendant, supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent, Federal Republic of Germany, represented by W.D. Plessing and A. Dittrich, acting as Agents, Hellenic Republic, represented

⁶ Language of the case: French.

by E.M. Mamouna and M. Tassopoulou, acting as Agents, with an address for service in Luxembourg, Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg, French Republic, represented by G. de Bergues, F. Alabrune and E. Puisais, acting as Agents, Ireland, represented by D. O'Hagan, acting as Agent, and P. Gallagher, E. Fitzsimons SC and E. Regan BL, with an address for service in Luxembourg, Kingdom of the Netherlands, represented by H.G. Sevenster and C. Wissels, acting as Agents, Portuguese Republic, represented by L. Fernandes and A. Fraga Pires, acting as Agents, Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent, with an address for service in Luxembourg, Kingdom of Sweden, represented by A. Kruse, K. Wistrand and A. Falk, acting as Agents, United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson, acting as Agent, and R. Plender QC, interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, R. Schintgen (Rapporteur), N. Colneric, S. von Bahr, J. N. Cunha Rodrigues, G. Arestis, M. Ilešič and J. Malenovský, Judges, Advocate General: D. Ruiz-Jarabo Colomer, Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 5 April 2005,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005, gives the following Judgment

1. By its application the Commission of the European Communities is seeking annulment of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55; 'the framework decision').

Legal framework and background

2. On 27 January 2003, on the initiative of the Kingdom of Denmark, the Council of the European Union adopted the framework decision.
3. Based on Title VI of the Treaty on European Union, in particular Articles 29 EU, 31(e) EU and 34(2)(b) EU, as worded prior to the entry into force of the Treaty of Nice, the framework decision constitutes, as is clear from the first three recitals in its preamble, the instrument by which the European Union intends to respond with concerted action to the disturbing

increase in offences posing a threat to the environment.

4. The framework decision lays down a number of environmental offences, in respect of which the Member States are required to prescribe criminal penalties.
5. Thus, Article 2 of the framework decision, entitled 'Intentional offences', provides:

'Each Member State shall take the necessary measures to establish as criminal offences under its domestic law

(a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person;

(b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

(c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law;

(g) the unlawful trade in ozone-depleting substances,

when committed intentionally.'

6. Article 3 of the framework decision, entitled 'Negligent offences', provides:

'Each Member State shall take the necessary measures to establish as criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated in Article 2.'

7. Article 4 of the framework decision states that each Member State is to take the necessary measures to ensure that participating in or instigating the conduct referred to in Article 2 is punishable.
8. Article 5(1) of the framework decision provides that the penalties thus laid down must be 'effective, proportionate and dissuasive' including, 'at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition'. Article 5(2) adds that the criminal penalties 'may be accompanied by other penalties or measures'.
9. Article 6 of the framework decision governs the liability, as the result of an act or omission, of legal persons and Article 7 sets out the sanctions to which they are to be subject, which 'include criminal or non-criminal fines and may include other sanctions'.
10. Finally, Article 8 of the framework decision concerns jurisdiction and Article 9 deals with prosecutions brought by a Member State which does not extradite its own nationals.
11. The Commission objected in the various Council bodies to the legal basis relied on by the Council to require the Member States to impose criminal penalties on persons committing environmental offences. In its submission, the correct legal basis in that respect was Article 175(1) EC and it had indeed put forward, on 15 March 2001, a proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (OJ 2001 C 180 E, p. 238, 'the proposed directive'), based on Article 175 EC, the annex to which listed the Community law measures to which the offences set out in Article 3 of the proposal relate.
12. On 9 April 2002, the European Parliament expressed its view on both the proposed directive, at first reading, and on the draft framework decision.
13. It concurred with the Commission's view of the scope of the Community's competence, whilst calling on the Council (i) to use the framework decision as a measure complementing the directive that would take effect in relation to the protection of the environment through crimi-

nal law solely in respect of judicial cooperation and (ii) to refrain from adopting the framework decision before adoption of the proposed directive (see texts adopted by the Parliament on 9 April 2002 bearing references A50099/2002 (first reading) and A50080/2002).

14. The Council did not adopt the proposed directive, but the fifth and seventh recitals to the framework decision are worded as follows:

'(5) The Council considered it appropriate to incorporate into the present Framework decision a number of substantive provisions contained in the proposed Directive, in particular those defining the conduct which Member States have to establish as criminal offences under their domestic law.

...

(7) The Council has considered this proposal but has come to the conclusion that the majority required for its adoption by the Council cannot be obtained. The said majority considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community and that the objectives could be reached by adopting a Framework-Decision on the basis of Title VI of the Treaty on European Union. The Council also considered that the present Framework Decision, based on Article 34 of the Treaty on European Union, is a correct instrument to impose on the member States the obligation to provide for criminal sanctions. The amended proposal submitted by the Commission was not of a nature to allow the Council to change its position in this respect.'

15. The Commission appended the following statement to the minutes of the Council meeting at which the framework decision was adopted:

'The Commission takes the view that the Framework Decision is not the appropriate legal instrument by which to require Member States to introduce sanctions of a criminal nature at national level in the case of offences detrimental to the environment.

As the Commission pointed out on several occasions within Council bodies, it considers that in the context of the competences conferred on it for the purpose of attaining the objectives stated in Article 2 of the Treaty establishing the European Community, the Community is competent to require the Member States to impose sanctions at national level – including criminal sanctions if appropriate – where that proves necessary in order to attain a Commu-

nity objective.

This is the case for environmental matters which are the subject of Title XIX of the Treaty establishing the European Community.

Furthermore, the Commission points out that its proposal for a Directive on the protection of the environment through criminal law has not been appropriately examined under the codecision procedure.

If the Council adopts the Framework Decision despite this Community competence, the Commission reserves all the rights conferred on it by the Treaty.'

The action

16. By order of the President of the Court of 29 September 2003, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Parliament, on the other, were granted leave to intervene in support of the form of order sought by the Council and the Commission respectively.
17. By order of 17 March 2004, the President of the Court dismissed the application brought by the European Economic and Social Committee for leave to intervene in support of the form of order sought by the Commission.

Arguments of the parties

18. The Commission challenges the Council's choice of Article 34 EU, in conjunction with Articles 29 EU and 31(e) EU, as the legal basis for Articles 1 to 7 of the framework decision. It submits that the purpose and content of the latter are within the scope of the Community's powers on the environment, as they are stated in Article 3(1) EC and Articles 174 to 176 EC.
19. Although it does not claim that the Community legislature has a general competence in criminal matters, the Commission submits that the legislature is competent, under Article 175 EC, to require the Member States to prescribe criminal penalties for infringements of Community environmental protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective. The harmonisation of national criminal laws, in

particular of the constituent elements of environmental offences to which criminal penalties attach, is designed to be an aid to the Community policy in question.

20. The Commission recognises that there is no precedent in this area. It relies, however, in support of its argument, on the case-law of the Court concerning the duty of loyal cooperation and the principles of effectiveness and equivalence (see, *inter alia*, Case 50/76 Amsterdam Bulb [1977] ECR 137, paragraph 33, Case C186/98 Nunes and de Matos [1999] ECR I4883, paragraphs 12 and 14, and the order of 13 July 1990 in Case C2/88 IMM Zwartveld and Others [1990] ECR I3365, paragraph 17).
21. Likewise, a number of regulations adopted in the sphere of fisheries and transport policy either require the Member States to bring criminal proceedings or impose restrictions on the types of penalties which those States may impose. The Commission refers, in particular, to two Community measures which require the Member States to introduce penalties which are necessarily criminal in nature, although that qualification has not been expressly employed (see Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77) and Articles 1 to 3 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17)).
22. In addition, the Commission submits that the framework decision must in any event be annulled in part on the ground that Articles 5(2), 6 and 7 thereof leave the Member States free to prescribe penalties other than criminal penalties, even to choose between criminal and other penalties, which undeniably falls within the Community's competence.
23. However, the Commission does not maintain that the framework decision as a whole should have been the subject-matter of a directive. In particular, it does not dispute that Title VI of the Treaty on European Union is the appropriate legal basis for the provisions of the decision which deal with jurisdiction, extradition and prosecutions of persons who have committed offences. However, given that those provisions are incapable of existing independently, it must apply for annulment of the framework decision in its entirety.
24. The Commission also puts forward a ground

of challenge alleging abuse of process. In that regard, it relies on the fifth and seventh recitals in the preamble to the framework decision, which show that the choice of an instrument under Title VI of the Treaty was based on considerations of expediency, since the proposed directive had failed to obtain the majority required for its adoption because a majority of Member States had refused to recognise that the Community had the necessary powers to require the Member States to prescribe criminal penalties for environmental offences.

25. The Parliament concurs with the Commission's arguments. It submits, more specifically, that the Council confused the Community's power to adopt the proposed directive and the power, not claimed by the Community, to adopt the framework decision in its entirety. The matters upon which the Council relies in support of its argument are, in reality, considerations of expediency concerning the choice of whether or not to impose solely criminal penalties, considerations which should have been dealt with in the legislative procedure on the basis of Articles 175 EC and 251 EC.
26. The Council and the Member States which have intervened in these proceedings, with the exception of the Kingdom of the Netherlands, submit that, as the law currently stands, the Community does not have power to require the Member States to impose criminal penalties in respect of the conduct covered by the framework decision.
27. Not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it.
28. Articles 135 EC and 280 EC, which expressly reserve to the Member States the application of national criminal law and the administration of justice, confirm that interpretation.
29. That interpretation is also borne out by the fact that the Treaty on European Union devotes a specific title to judicial cooperation in criminal matters (see Articles 29 EU, 30 EU and 31(e) EU), which expressly confers on the European Union competence in criminal matters, in particular as regards the determination of the constituent elements of the relevant offences and

penalties. The Commission's position is therefore contradictory, since it amounts, on the one hand, to claiming that the authors of the Treaty on European Union and the EC Treaty intended to confer by implication on the Community competence in criminal matters and, on the other, to disregarding the fact that the same authors expressly attributed such a competence to the European Union.

30. None of the judgments or secondary legislation to which the Commission refers lends support to its argument.
31. First, the Court has never obliged the Member States to adopt criminal penalties. According to its case-law, it is certainly the responsibility of the Member States to ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance, and the penalty must, moreover, be effective, dissuasive and proportionate to the infringement; furthermore, the national authorities must proceed with respect to infringements of Community law with the same diligence as that which they bring to bear in implementing corresponding national laws (see, in particular, Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraphs 24 and 25). However, the Court has not held, either expressly or by implication, that the Community is competent to harmonise the criminal laws applicable in the Member States. It has rather held that the choice of penalties is a matter for the Member States.
32. Second, legislative practice is in keeping with that interpretation. The various pieces of secondary legislation restate the traditional form of words, by virtue of which 'effective, proportionate and dissuasive sanctions' are to be prescribed (see, for example, Article 3 of Directive 2002/90), but do not call into question the freedom of the Member States to choose between proceeding under administrative or criminal law. On the rare occasions when the Community legislature has specified that the Member States are to bring criminal or administrative proceedings, it has merely stated expressly the choice which was open to them in any event.
33. Furthermore, whenever the Commission has proposed to the Council that a Community measure having implications for criminal matters be adopted, the Council has detached the criminal part of that measure so that it may be

- dealt with in a framework decision (see Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1), which had to be supplemented by Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2000 L 140, p. 1); see also Directive 2002/90, supplemented by Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1)).
34. In this instance, regard being had to both its purpose and content, the framework decision concerns the harmonisation of criminal law. The mere fact that it seeks to combat environmental offences is not such as to found the Community's competence. In fact, the framework decision supplements Community law on environmental protection.
 35. In addition, the Council contends that the plea alleging abuse of process is based on an incorrect reading of the preamble to the framework decision.
 36. The Kingdom of the Netherlands, whilst supporting the form of order sought by the Council, adopts a slightly more qualified argument than the Council. It contends that, in exercising the powers conferred on it by the EC Treaty, the Community may require the Member States to provide for the possibility of punishing certain conduct under national criminal law, provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned (see Case C240/90 *Germany v Commission* [1992] ECR I5383). That could be the case if the enforcement of a harmonising rule based, for example, on Article 175 EC gave rise to a need for criminal penalties.
 37. Conversely, if it is apparent from the content and nature of the proposed measure that it is intended essentially to bring about a general harmonisation of criminal laws and that the system of penalties is not inseparably linked to the area of Community law concerned, Articles 29 EU, 31(e) EU and 34(2)(b) EU are the correct legal basis for the measure. That is the case in this instance. It is clear from the purpose and content of the framework decision that it is intended, generally, to secure harmonisation of criminal laws in the Member States. The fact that rules adopted under the EC Treaty may be concerned is not decisive.
- ### Findings of the Court
38. Article 47 EU provides that nothing in the Treaty on European Union is to affect the EC Treaty. That requirement is also found in the first paragraph of Article 29 EU, which introduces Title VI of the Treaty on European Union.
 39. It is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community (see Case C170/96 *Commission v Council* [1998] ECR I-2763, paragraph 16).
 40. It is therefore necessary to ascertain whether Articles 1 to 7 of the framework decision affect the powers of the Community under Article 175 EC inasmuch as those articles could, as the Commission maintains, have been adopted on the basis of the last-mentioned provision.
 41. On that point, it is common ground that protection of the environment constitutes one of the essential objectives of the Community (see Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13, Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8, Case C213/96 *Outo-kumpu* [1998] ECR I1777, paragraph 32). In that regard, Article 2 EC states that the Community has as its task to promote 'a high level of protection and improvement of the quality of the environment' and, to that end, Article 3(1)(l) EC provides for the establishment of 'a policy in the sphere of the environment'.
 42. Furthermore, in the words of Article 6 EC '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities', a provision which emphasises the fundamental nature of that objective and its extension across the range of those policies and activities.
 43. Articles 174 EC to 176 EC comprise, as a general rule, the framework within which Community environmental policy must be carried out. In particular, Article 174(1) EC lists the objectives of the Community's action on the environment and Article 175 EC sets out the procedures to be followed in order to achieve those objectives. The Community's powers are, in general,

exercised in accordance with the procedure laid down in Article 251 EC, following consultation of the Economic and Social Committee and the Committee of the Regions. However, in relation to certain spheres referred to in Article 175(2) EC, the Council takes decisions alone, acting unanimously on a proposal from the Commission after consulting the Parliament and the two abovementioned bodies.

44. As the Court has previously held, the measures referred to in the three indents of the first subparagraph of Article 175(2) EC all imply the involvement of the Community institutions in areas such as fiscal policy, energy policy or town and country planning policy, in which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required (Case C36/98 *Spain v Council* [2001] ECR I779, paragraph 54).
45. Moreover, it must be borne in mind that, according to the Court's settled case-law, the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see, *inter alia*, Case C-300/89 *Commission v Council* [1991] ECR I-2867, 'Titanium dioxide', paragraph 10, and Case C336/00 *Huber* [2002] ECR I7699, paragraph 30).
46. As regards the aim of the framework decision, it is clear both from its title and from its first three recitals that its objective is the protection of the environment. The Council was concerned 'at the rise in environmental offences and their effects which are increasingly extending beyond the borders of the States in which the offences are committed', and, having found that those offences constitute 'a threat to the environment' and 'a problem jointly faced by the Member States', concluded that 'a tough response' and 'concerted action to protect the environment under criminal law' were called for.
47. As to the content of the framework decision, Article 2 establishes a list of particularly serious environmental offences, in respect of which the Member States must impose criminal penalties. Articles 2 to 7 of the decision do indeed entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. As a general rule, neither

criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27, and Case C226/97 *Lemmens* [1998] ECR I3711, paragraph 19).

48. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.
49. It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive.
50. The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment.
51. It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.
52. That finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness

of Community law.

53. In those circumstances, the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community.
54. There is therefore no need to examine the Commission's argument that the framework decision should in any event be annulled in part in so far as Articles 5(2), 6 and 7 leave the Member States free also to provide for penalties other than criminal penalties, even to choose between criminal penalties and other penalties, matters allegedly falling undeniably within the Community's competence.
55. In the light of all the foregoing, the framework decision must be annulled.

Costs

1. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first paragraph of Article 69(4), the interveners in these proceedings must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

2. Annuls Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law;
3. Orders the Council of the European Union to pay the costs;
4. Orders the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.

INFORMATION SOCIETY SERVICE

Judgment of the Court (Third Chamber), 2 June 2005

CASE C-89/04 MEDIAKABEL BV v COMMISSARIAAT VOOR DE MEDIA

(Reference for a preliminary ruling from the Raad van State)

(Directive 89/552/CEE – Article 1(a) – Television broadcasting services – Scope of application – Directive 98/34/EC – Article 1(2) – Information society service – Scope of application)

Opinion of Advocate General Tizzano delivered on 10 March 2005

KEYWORDS

1. *Freedom to provide services — Television broadcasting activities — Directive 89/552 — Concept of ‘television broadcasting’ — Definition independent of Article 1(a) of Directive 89/552, irrespective of the concept of ‘information society service’ in Directive 98/34 — Services coming within that concept — Criteria (European Parliament and Council Directive 98/34, Art. 1(2); Council Directive 89/552, Art. 1(a))*
2. *Freedom to provide services — Television broadcasting activities — Directive 89/552 — Concept of ‘television broadcasting’ — Service consisting of broadcasting television programmes intended for reception by the public and not provided at the individual request of a recipient — Included — Manner of compliance with the obligation to reserve for European works a majority proportion of transmission time — Irrelevant (Council Directive 89/552, Arts 1(a), and 4(1))*

SUMMARY OF THE JUDGMENT

1. The concept of ‘television broadcasting’ re-

ferred to in Article 1(a) of Directive 89/552 concerning the pursuit of television broadcasting activities, as amended by Directive 97/36, is defined independently by that provision. It is not defined by opposition to the concept of ‘information society service’ within the meaning of Article 1(2) of Directive 98/34, laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services, as amended by Directive 98/48, and therefore does not necessarily cover services which are not covered by the latter concept.

A service comes within the concept of ‘television broadcasting’ if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment. (see paras 25, 33, operative part 1-2)

2. A service which consists of broadcasting television programmes intended for reception by the public and which is not provided at the individual request of a recipient of services is a television broadcasting service within the meaning of Article 1(a) of Directive 89/552 concerning the pursuit of television broadcasting activities, as amended by Directive 97/36. Priority is to be given to the standpoint of the service provider in the analysis of the concept of ‘television broadcasting service’, as the determining criterion for that concept is the broadcast of television programmes ‘intended for reception by the public’. However, the situation of services which compete with the service in question is not relevant for that assessment.

Moreover, the conditions in which the provider of such a service complies with the obligation referred to in Article 4(1) of Directive 89/552, to reserve for European works a majority proportion of his transmission time, are irrelevant for the classification of that service as a television broadcasting service. (see paras 42, 45, 52, operative part 3-4)

JUDGMENT OF THE COURT (Third Chamber)

2 June 2005⁷

⁷ Language of the case: Dutch.

(Directive 89/552/CEE – Article 1(a) – Television broadcasting services – Scope of application – Directive 98/34/EC – Article 1(2) – Information society service – Scope of application)

In Case C-89/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decision of 18 February 2004, received at the Court on 20 February 2004, in the proceedings *Mediakabel BV v Commissariaat voor de Media*,

THE COURT (Third Chamber),

composed of A. Rosas, President, A. Borg Barthet, J.P. Puissochet (Rapporteur), S. von Bahr and J. Malenovský, Judges, Advocate General: A. Tizzano, Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 January 2005, after considering the observations submitted on behalf of:

- Mediakabel BV, by M. Geus and E. Steyger, advocaten,
- the Commissariaat voor de Media, by G. Weesing, advocaat,
- the Netherlands Government, by H.G. Sevener and C. Wissels, acting as Agents,
- the Belgian Government, by A. Goldman, acting as Agent, assisted by A. Berenboom and A. Joachimowicz, avocats,
- the French Government, by G. de Bergues and S. Ramet, acting as Agents,
- the United Kingdom Government, by C. Jackson, acting as Agent,
- the Commission of the European Communities, by W. Wils, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2005,

gives the following Judgment

1. The reference for a preliminary ruling concerns the interpretation of Article 1(a) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552') and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of

technical standards and regulations and of rules on information society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34').

2. The reference was made in the context of proceedings brought by Mediakabel BV ('Mediakabel') against a decision by the Commissariaat voor de Media (Media Authority), which found that the 'Filmtime' service offered by Mediakabel to its customers was a television broadcasting service subject to the prior authorisation procedure applicable to those services in the Netherlands.

Legal framework

Community legislation

3. Directive 89/552 lays down inter alia in Article 4(1) an obligation for television broadcasters to reserve a majority proportion of their transmission time for European works.

4. Article 1 of that directive provides:

'For the purpose of this Directive:

(a) "television broadcasting" means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services;

...'

5. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) lays down the legal framework applicable to information society services. According to Article 2(a) of that directive, 'information society services' means 'services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC'.

6. According to Article 1 of Directive 98/34:

'For the purposes of this Directive, the follow-

ing meanings shall apply:

...

(2) "service": any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present,

– "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

– radio broadcasting services,

– television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC.

...'

7. Annex V to Directive 98/34, entitled 'Indicative list of services not covered by the second subparagraph of point 2 of Article 1', includes a point 3, concerning 'Services not supplied "at the individual request of a recipient of services"', which covers 'Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers ("point to multipoint" transmission)'. Point 3(a) refers to 'television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC'.

8. According to recital 18 to the Directive on electronic commerce:

'... television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-de-

mand or the provision of commercial communications by electronic mail are information society services'.

National legislation

9. Under Article 1(f) of the Mediawet (Law on the Media), 'programme' means: 'an electronic product with visual and auditory content intended for broadcast and for reception by the general public or part of the general public, except for data services which are available only at individual request, and other interactive services'. Article 1(l) defines a 'programme for special broadcast' as 'an encoded programme broadcast and intended for reception by that part of the general public which has signed an agreement concerning the reception thereof with the broadcaster which manages the programme'.
10. Under Article 71a(1) of the Mediawet, a commercial broadcaster may only transmit or have transmitted a television programme it has developed if it has obtained authorisation to do so from the Commissariaat voor de Media, without prejudice to the provisions of the Telecommunicatiewet (Law on Telecommunications).

The main proceedings and the questions referred for a preliminary ruling

11. Since the end of 1999, Mediakabel has offered its subscribers, first, the 'Mr Zap' offer through certain broadcasting networks operated by third parties. That service, which is authorised by the Commissariaat voor de Media pursuant to the Mediawet, allows, in return for a monthly subscription, reception of a number of television broadcasts which supplement the programmes transmitted by the network supplier, using a decoder and a smart card. Second, Mediakabel offers its Mr Zap subscribers pay-per-view service for additional programmes as part of an offer called 'Filmtime'. If a Mr Zap subscriber wishes to order a film from the Filmtime catalogue, he makes that order separately using his remote control or telephone and, after identifying himself using a personal identification code and paying by automatic debit, he receives an individual key which allows him to view one or more of the 60 films on offer each month, at the times indicated on the television screen or in the programme guide.

12. By decision of 15 March 2001, the Commissari-

aat voor de Media informed Mediakabel that it considered Filmtime to be a programme for special broadcast within the meaning of Article 1 of the Mediawet, for which the appropriate authorisation therefore had to be obtained in accordance with Article 71a(1) thereof. Mediakabel submitted an application for authorisation to the Commissariaat voor de Media, but stated when lodging the application that the procedure followed did not seem to be applicable to the service in question which was, in its view, an interactive service falling within the category of information society services and thus outside the scope of competence of the Commissariaat voor de Media. By decision of 19 June 2001, the Commissariaat voor de Media authorised the broadcast of the televised programme for special broadcast 'Filmtime' for a period of five years, without prejudice to the provisions of the Telecommunicatiewet.

13. Mediakabel brought an action against that decision, which was dismissed by the Commissariaat voor de Media on 20 November 2001. Mediakabel's action before the Rechtbank te Rotterdam (Rotterdam District Court) was also dismissed, by decision of 27 September 2002.
14. Mediakabel then brought an appeal before the Raad van State, where it maintained that Filmtime was not a programme within the meaning of Article 1 of the Mediawet. It argued inter alia that that service was accessible only on individual request and that it should therefore be classified not as a television broadcasting service but as an information society service supplied on individual demand within the meaning of the third sentence of Article 1(a) of Directive 89/552 and thereby falling outside the scope of application of that directive. Since it concerns films which are not always available immediately on demand, that service constitutes, in Mediakabel's view, a 'near-video on-demand' which, precisely because it is accessible at individual request by subscribers, cannot be made subject to the requirements of Directive 89/552, in particular the obligation to reserve a certain percentage of the programming time to European works.
15. The Raad van State states that the concept of 'programme' within the meaning of Article 1(f) of the Mediawet should be interpreted in keeping with that of 'television broadcasting services' referred to in Article 1(a) of Directive 89/552. It states that Directive 98/34, in particular point 3(a) of Annex V thereto, which includes near-video on-de-

mand under television broadcasting services, seems to give a more specific definition of that concept than that given in Article 1(a) of Directive 89/552, thus making it more difficult to determine the respective scopes of application of that directive and of the Directive on electronic commerce. The national court also notes that Filmtime bears the hallmarks of both an information society service, including the fact that it is accessible on individual demand by the subscriber, and of a television broadcasting service, since Mediakabel selects the films available and determines their broadcast frequency and schedules.

16. In those circumstances, the Raad van State decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is the term "television broadcasting" within the meaning of Article 1(a) of Directive 89/552/EEC to be interpreted as not covering an "information society service" within the meaning of Article 1(2) of Directive 98/34/EC, as amended by Directive 98/48/EC, but as covering services such as those set out in the indicative list of services not covered by Article 1(2) of Directive 98/34/EC, including "near-video on-demand services", contained in Annex V to Directive 98/34/EC, in particular subparagraph (3), which therefore do not constitute "information society services"?

(b) If the answer to Question 1a is in the negative, how should a distinction be drawn between the term "television broadcasting" within the meaning of Article 1(a) of Directive 89/552/EEC and the term "communication services providing items of information ... on individual demand" also set out therein?

(2) (a) On the basis of which criteria must it be determined whether a service such as that at issue, which involves encoded signals, transmitted over a network, of a range of films selected by the provider, which subscribers can, in return for a separate payment per film and using a key sent by the provider on individual demand, decode and view at various times determined by the provider, and which contains elements of an (individual) information society service and also elements of a television broadcasting service, constitutes a television broadcasting service or an information society service?

(b) In this regard is priority to be given to the standpoint of the subscriber or rather to that of the service provider? Is the kind of services with which the service concerned is in compe-

tion relevant in this regard?

(3) In that connection is it relevant that,

– on the one hand, classification of a service such as that at issue as an “information society service” to which Directive 89/552/EEC does not apply might undermine the effectiveness of that directive, in particular as regards the objectives underlying the requirement thereunder to reserve a specific percentage of transmission time for European works, and

– on the other, if Directive 89/552/EEC does apply, the requirement thereunder to reserve a specific percentage of transmission time for European works is not entirely apposite because the subscribers pay per film and can only view the film which has been paid for?

The questions referred for a preliminary ruling

Question 1(a)

17. By Question 1(a), the national court asks whether the concept of ‘television broadcasting’ within the meaning of Article 1(a) of Directive 89/552 covers services which do not fall within the concept of ‘information society service’ within the meaning of Article 1(2) of Directive 98/34 and which are covered by point 3 of Annex V to the latter directive.
18. As rightly pointed out by the Belgian Government, the scope of the concept of ‘television broadcasting service’ is determined independently by Article 1(a) of Directive 89/552, which contains all the relevant elements in that regard. Thus the concept includes any service consisting of the initial transmission by wire or over the air, including that by satellite, in encoded or unencoded form, of television programmes intended for reception by the public.
19. Directive 98/34 and the Directive on electronic commerce have a purpose different from that of Directive 89/552. They lay down the Community legal framework applicable only to information society services referred to in Article 1(2) of Directive 98/34, that is, any services provided at a distance by electronic means and at the individual request of a recipient of services. Directive 98/34 provides expressly in that provision that it does not apply to ‘television broadcasting services covered by point (a) of Article 1 of Directive 89/552’. Thus on this point Directive 98/34 merely refers to Directive 89/552 and, like the Directive on electronic commerce, does not contain any definition of the concept of television service.
20. To be sure, Annex V to Directive 98/34, relating to services not covered by the definition of information society service, appears to contain elements defining the concept of ‘television broadcasting services’ which are more specific than those given in Directive 89/552. First, that annex includes, in point 3, television broadcasting services among the services ‘provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission)’. Second, at (a) of the same point, it is stated that television broadcasting services include ‘near-video on-demand’.
21. However, that annex, in keeping with its title and Article 1(2) of Directive 98/34, serves only as a guideline and is intended only to define by exclusion the concept of ‘information society service’. It is not intended to, nor does it, specify the boundaries of the concept of ‘television broadcasting service’, the definition of which rests solely on the criteria laid down in Article 1(a) of Directive 89/552.
22. Moreover, the scope of the concept of ‘television broadcasting’ can certainly not be inferred by exclusion from that of the concept of ‘information society service’. Directive 98/34, both in Article 1(2) and in Annex V, refers to services which are not covered by the concept of ‘information society service’ and which do not as such constitute television broadcasting services. This is the case, inter alia, of radio broadcasting services. Likewise, television broadcasting services cannot be limited to services ‘provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers’, referred to in point 3 of Annex V to Directive 98/34. If that interpretation was followed, services such as television available by subscription, transmitted to a limited number of recipients, would be excluded from the concept of ‘television broadcasting service’, whereas they do come within that concept, by virtue of the criteria laid down in Article 1(a) of Directive 89/552.
23. Lastly, it was not the intention of the Community legislature, when Directives 98/34 and 98/48 were adopted, to amend Directive 89/552, which itself had been amended less than a year earlier by Directive 97/36. Thus

recital 20 to Directive 98/48, which amended Directive 98/34, states that Directive 98/48 'is without prejudice to the scope of ... Directive 89/552'.

24. Accordingly, Directive 98/34 does not affect the scope of application of Directive 89/552.
25. In the light of the foregoing, the answer to Question 1(a) should be that the concept of 'television broadcasting' referred to in Article 1(a) of Directive 89/552 is defined independently by that provision. It is not defined by opposition to the concept of 'information society service' within the meaning of Article 1(2) of Directive 98/34 and therefore does not necessarily cover services which are not covered by the latter concept.

Question 1(b)

26. By Question 1(b), the national court asks essentially what are the criteria for determining whether a service constitutes 'television broadcasting' within the meaning of Article 1(a) of Directive 89/552 or 'communication services providing items of information ... on individual demand' referred to in the same article.
27. The criteria for that distinction are laid down expressly in Article 1(a) of Directive 89/552.
28. A service constitutes 'television broadcasting' if it consists of initial transmission of television programmes intended for reception by the public.
29. First, the Court notes that the manner in which images are transmitted is not a determining factor in that assessment, as evidenced by the use in Article 1(a) of Directive 89/552 of the terms 'by wire or over the air, including that by satellite, in unencoded or encoded form'. The Court has thus held that transmission by cable comes within the scope of that directive, even though cable distribution was not very widespread at the time when Directive 89/552 was adopted (see Case C11/95 *Commission v Belgium* [1996] ECR I-4115, paragraphs 15 to 25).
30. Next, the service in question must consist of the transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously.
31. Lastly, the exclusion of 'communication services ... on individual demand' from the concept of 'television broadcasting' means that, conversely, the latter concept covers services which are not supplied on individual demand. The requirement that the television programmes must be 'intended for reception by the public' in order to come within that concept supports this analysis.
32. Thus, a pay-per-view television service, even one which is accessible to a limited number of subscribers, but which comprises only programmes selected by the broadcaster and is broadcast at times set by the broadcaster, cannot be regarded as being provided on individual demand. Consequently, it comes within the concept of 'television broadcasting'. The fact that the images in such a service are accessible using a personal code is not relevant in this respect, because the subscribing public all receive the broadcast at the same time.
33. Accordingly, the answer to Question 1(b) should be that a service comes within the concept of 'television broadcasting' referred to in Article 1(a) of Directive 89/552 if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment.

Questions 2(a) and (b)

34. By Questions 2(a) and (b), which it is appropriate to examine together, the national court asks essentially whether a service such as *Filmtime*, at issue in the main proceedings, is a television broadcasting service falling within the scope of application of Directive 89/552 or an information society service coming under the Directive on electronic commerce, and which criteria must be taken into consideration in such an analysis.
35. As rightly pointed out by the Commissariaat voor de Media, the Netherlands Government, the Belgian Government, the French Government, the United Kingdom Government and the Commission, it is clear from the information in the order for reference that a service such as *Filmtime* meets the criteria for constituting a 'television broadcasting service' as discussed in the answer to Question 1(b).
36. Such a service consists of the broadcast of films intended for a television viewing public, and therefore does concern television programmes broadcast for an indeterminate number of po-

tential television viewers.

37. Mediakabel's argument that that type of service, which is accessible only on individual demand, using a specific key granted individually to each subscriber, thereby constitutes an information society service provided 'on individual demand' cannot be accepted.
38. Although such a service fulfils the first two criteria for constituting an 'information society service' within the meaning of Article 1(2) of Directive 98/34, that is, it is provided at a distance and transmitted in part by electronic equipment, it does not meet the third criterion of the concept, according to which the service in question must be provided 'at the individual request of a recipient of services'. The list of films offered as part of a service such as Filmtime is determined by the service provider. That selection of films is offered to all subscribers on the same terms, either through written media or through information transmitted on the television screen, and those films are accessible at the broadcast times determined by the provider. The individual key allowing access to the films is only a means of unencoding images the signals of which are sent simultaneously to all subscribers.
39. Such a service is thus not commanded individually by an isolated recipient who has free choice of programmes in an interactive setting. It must be considered to be a near-video on-demand service, provided on a 'point to multipoint' basis and not 'at the individual request of a recipient of services'.
40. Mediakabel stated to the Court that it did not agree before the Raad van State that Filmtime should be classified as a near-video on-demand service. That statement is of no relevance for the classification, however, which results from an examination of the objective characteristics of the type of services in question.
41. Moreover, contrary to Mediakabel's submissions, the concept of 'near-video on-demand' is one known to the Community legislature. Although it is true that it has not been specifically defined by Community law, the concept is referred to in the indicative list in Annex V to Directive 98/34, where it is included among television broadcasting services. Likewise, points 83 and 84 of the Explanatory Report accompanying the European Convention on Transfrontier Television of 5 May 1989, which was drawn up at the same time as Directive 89/552 and to which the latter refers in recital 4 thereto, indicate that near-video on-demand is not a 'communication service operating on individual demand', a concept which corresponds to that referred to in Article 1(a) of Directive 89/552 and thus comes within the scope of application of that convention (see, to that effect, concerning other points in the Explanatory Report of the European Convention on Transfrontier Television, Joined Cases C-320/94, C-328/94, C-329/94 and C337/94 to C339/94 RTI and Others [1996] ECR I-6471, paragraph 33, and Case C-245/01 RTL Television [2003] ECR I-12489, paragraph 63).
42. The determining criterion for the concept of 'television broadcasting service' is therefore the broadcast of television programmes 'intended for reception by the public'. Accordingly, priority should be given to the standpoint of the service provider in the assessment.
43. The manner in which the images are transmitted, by contrast, is not a determining factor in that assessment, as stated in response to Question 1(b).
44. As to the situation of services which compete with the service in question, it is not necessary to take it into consideration since each of those services is governed by a specific regulatory framework and no principle requires that the same legal regime be set for services which have different characteristics.
45. Accordingly, the answer to Questions 2(a) and (b) should be that a service such as Filmtime, which consists of broadcasting television programmes intended for reception by the public and which is not provided at the individual request of a recipient of services, is a television broadcasting service within the meaning of Article 1(a) of Directive 89/552. Priority is to be given to the standpoint of the service provider in the analysis of the concept of 'television broadcasting service'. However, the situation of services which compete with the service in question is not relevant for that assessment.

Question 3

46. By its third question, the national court asks essentially whether the difficulty for the provider of a service such as Filmtime to comply with the obligation laid down in Article 4(1) of Directive 89/552 to reserve a certain percentage of programming time for European works may preclude its classification as a television broadcasting service.

47. This question must be answered in the negative, for two sets of reasons.
48. First, since the service in question fulfils the criteria for being classified as a television broadcasting service, it is not necessary to take into account the consequences of that classification for the service provider.
49. The scope of application of legislation cannot be made contingent on possible adverse consequences it may have for traders to whom the Community legislature intended it to apply. In addition, a narrow interpretation of the concept of 'television broadcasting service', which would have the effect of excluding a service such as that at issue in the main proceedings from the scope of application of the directive, would jeopardise the objectives pursued by it and therefore cannot be accepted.
50. Second, the provider of a service such as Filmtime is not entirely prevented from complying with Article 4(1) of Directive 89/552.
51. That provision sets a quota for European works in the 'transmission' time of the television broadcaster in question but cannot be intended to require television viewers to actually watch those works. Although it is undeniable that the provider of a service such as that at issue in the main proceedings does not determine the works which are actually chosen and watched by the subscribers, the fact remains that that provider, like any operator broadcasting television programmes intended for reception by the public, chooses the works which he broadcasts. The films which are in a list that that provider offers to the subscribers to the service all give rise to the broadcast of signals, transmitted in identical conditions to the subscribers, who have the choice to unencode or not the images thus transmitted. The provider therefore knows his overall transmission time, and can thus comply with the obligation imposed on him to 'reserve for European works ... a majority proportion of [his] transmission time'.
52. In the light of the foregoing, the answer to the third question should be that the conditions in which the provider of a service such as Filmtime complies with the obligation referred to in Article 4(1) of Directive 89/552 to reserve for European works a majority proportion of his transmission time are irrelevant for the classification of that service as a television broadcast-

ing service.

Costs

53. Since these proceedings are, for the parties to the main proceedings, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

- 1. The concept of 'television broadcasting' referred to in Article 1(a) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, is defined independently by that provision. It is not defined by opposition to the concept of 'information society service' within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, and therefore does not necessarily cover services which are not covered by the latter concept.**
- 2. A service comes within the concept of 'television broadcasting' referred to in Article 1(a) of Directive 89/552, as amended by Directive 97/36, if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment.**
- 3. A service such as Filmtime, which consists of broadcasting television programmes intended for reception by the public and which is not provided at the individual request of a recipient of services, is a television broadcasting service within the meaning of Article 1(a) of Directive 89/552, as amended by Directive 97/36. Priority is to be given to the standpoint**

of the service provider in the analysis of the concept of 'television broadcasting service'. However, the situation of services which compete with the service in question is not relevant for that assessment.

4. The conditions in which the provider of a service such as Filmtime complies with the obligation referred to in Article 4(1) of Directive 89/552, as amended by Directive 97/36, to reserve for European works a majority proportion of his transmission time are irrelevant for the classification of that service as a television broadcasting service.

[Signatures]

ECHR AND ECJ, FUNDAMENTAL RIGHTS AND COMMUNITY LAW, RIGHTS OF THE DEFENCE, DEVELOPMENT OF CRIMINAL LAW THROUGH CASE-LAW, NULLUM CRIMEN, NULLA POENA SINE LEGE, DEFINITION OF PERPETRATOR

CASE T-99/04 AC-TREUHAND AG v COMMISSION OF THE EUROPEAN COMMUNITIES

(Competition – Agreements, decisions and concerted practices – Organic peroxides – Fines – Article 81 EC – Rights of the defence – Right to a fair hearing – Meaning of perpetrator of an infringement – Principle of nullum crimen, nulla poena sine lege – Principle of legal certainty – Legitimate expectations)

KEYWORDS

1. *Competition – Administrative procedure – Observation of the rights of the defence – Undertaking concerned able to rely in full on those rights only after the notification of the statement of objections – Commission under an obligation to inform the undertaking of the subject-matter and purpose of the preliminary investigation when the first measure is taken in respect of that undertaking (Council Regulation No 17, Arts 11 and 14)*
2. *Competition – Agreements, decisions and concerted practices – Imputed to an undertaking – Commission decision attributing joint liability to a consultancy firm which is not active on the market concerned but which contributed actively and intentionally to the cartel (Arts 3(1) (g) EC and 81(1) EC; Council Regulation No 17, Art. 15(2))*

SUMMARY OF THE JUDGMENT

1. In the context of the administrative procedure under Regulation No 17, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence, because it is not until then that it is informed of all the essential evidence on which the Commission is relying at

that stage of the procedure and that it has a right of access to the file in order to ensure that its rights of defence are effectively exercised. If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it.

The fact nevertheless remains that the measures of inquiry adopted by the Commission during the preliminary investigation – in particular, the measures of investigation and requests for information under Articles 11 and 14 of Regulation No 17 – suggest, by their very nature, that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected. Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.

It follows that when the first measure is taken in respect of an undertaking, including in requests for information under Article 11 of Regulation No 17, the Commission is required to inform the undertaking concerned, *inter alia*, of the subject-matter and purpose of the investigation underway. In that regard, the reasoning does not need to be so extensive as that required for decisions ordering investigation, owing to the more restrictive nature of the latter and the particular intensity of their impact on the legal situation of the undertaking concerned. That reasoning must, however, enable the undertaking to understand the purpose and the subject-matter of that investigation, which means that the putative infringements must be specified and, in that context, the fact that the undertaking may be faced with allegations related to that possible infringement, so that it can take the measures which it deems useful for its exoneration and, thus, prepare its defence at the *inter partes* stage of the administrative procedure.

(see paras 48, 50-51, 56)

2. A Commission decision establishing that a consultancy firm shares liability for an infringe-

ment of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates does not exceed the limits of the prohibition laid down in that provision and, consequently, by imposing a fine on that firm, the Commission does not exceed the powers conferred on it under Article 15(2) of Regulation No 17.

A literal, contextual and teleological interpretation of the term 'agreements between undertakings' as used in Article 81(1) EC does not require a restrictive interpretation of the notion of perpetrator of the infringement, according to which the relationship of a firm of that kind with the cartel would merely have been one of non-punishable complicity. On the contrary, an undertaking may infringe the prohibition laid down in that provision where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active itself on that relevant market. Any other interpretation might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, as read in the light of Article 3(1)(g) EC, which is to ensure that competition in the internal market is not distorted, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked simply on the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise.

If the attribution of the infringement as a whole to such an undertaking is to be in line with the requirements of the principle of individual liability, two conditions – one objective, one subjective – must be met. The first condition is that the undertaking concerned must have contributed to the implementation of the cartel even if only in a subsidiary, accessory or passive role, since the potentially limited importance of that contribution may be taken into consideration for the purposes of determining the level of the penalty. The second condition is that the undertaking must have manifested its own intention, showing that it is in agreement, albeit only tacitly, with the objectives of the cartel. The latter condition constitutes the justification for holding that the undertaking concerned shares liability, since it intends to contribute

through its own conduct to the common objectives pursued by the participants as a whole and is aware of the anti-competitive conduct of the other participants, or is in a position reasonably to foresee that conduct, and is ready to accept the attendant risk.

Even though, at the time of the alleged misconduct, the Community judicature had not made an explicit ruling on that question, such an interpretation of Article 81(1) EC is not contrary, either, to the principle of *nullum crimen, nulla poena sine lege*, which need not necessarily have the same scope as when it is applied to a situation covered by criminal law in the strict sense, because the procedure before the Commission under Regulation 17 is merely administrative in nature. Thus, any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community case-law, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

Lastly, even though the Commission's decision-making practice prior to the contested decision could appear to conflict with the above interpretation of Article 81(1) EC, the principle of the protection of legitimate expectations cannot stand in the way of the reorientation of the Commission's decision-making practice, based on a correct interpretation of the full implications of the prohibition laid down in Article 81(1) EC and even more foreseeable, given the existence of a precedent. (see paras 112, 113, 117, 122-123, 127, 133-135, 149-150, 157, 163-164)

JUDGMENT OF THE COURT OF FIRST INSTANCE (THIRD CHAMBER, EXTENDED COMPOSITION)

8 July 2008⁸

⁸ Language of the case: German.

(Competition – Agreements, decisions and concerted practices – Organic peroxides – Fines – Article 81 EC – Rights of the defence – Right to a fair hearing – Meaning of perpetrator of an infringement – Principle of *nullum crimen, nulla poena sine lege* – Principle of legal certainty – Legitimate expectations)

AC-Treuhand AG, established in Zurich (Switzerland), represented by M. Karl, C. Steinle and J. Drolshammer, lawyers, applicant,

v

Commission of the European Communities, represented by A. Bouquet, acting as Agent, and by A. Böhlke, lawyer, defendant,

ACTION for annulment of Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of M. Jaeger, President, J. Azizi and O. Czúcz, Judges, Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2007, gives the following Judgment

Background to the dispute

1. Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44; 'the contested decision') concerns a cartel formed and implemented on the European market for organic peroxides – chemicals used in the plastics and rubber industry – by the AKZO group ('AKZO'), Atofina SA, successor to Atochem ('Atochem/Atofina'), and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc, now Degussa UK Holdings Ltd ('PC/Degussa'), *inter alia*.
2. It is apparent from the contested decision that the cartel was founded in 1971 by a written agreement ('the 1971 agreement'), amended in 1975 ('the 1975 agreement'), between three producers of organic peroxides, namely AKZO, Luperox GmbH, which later became Atochem/Atofina, and PC/Degussa ('the cartel'). The aim of that cartel was, *inter alia*, to preserve the market shares of those producers and to coordinate their price increases. Meetings were held regularly to ensure the proper functioning of the cartel. Under the cartel, Fides Trust AG ('Fides'), and subsequently, from 1993, the applicant, AC-Treuhand AG, were entrusted, on the basis of agency agreements with AKZO, Atochem/Atofina and PC/Degussa, with, *inter alia*, storing certain secret documents relating to the cartel, such as the 1971 agreement, on their premises; collecting and treating certain information concerning the commercial activity of the three organic peroxide producers; communicating to them the data thus treated; and completing logistical and clerical-administrative tasks associated with the organisation of meetings between those producers, particularly in Zurich (Switzerland), such as the reservation of rooms and the reimbursement of their representatives' travel costs. However, certain factual elements relating to the applicant's activities in relation to the cartel are contested between the parties.
3. The Commission had initiated an investigation into the cartel following a meeting on 7 April 2000 with AKZO's representatives, who informed it of an infringement of the Community competition rules in order to gain immunity under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). Subsequently, Atochem/Atofina and PC/Degussa also decided to cooperate with the Commission and provided it with additional information (recitals 56 to 63 in the preamble to the contested decision).
4. On 3 February 2003 the Commission sent a request for information to the applicant. In that request, the Commission essentially stated that it was in the process of investigating a putative infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) by the European organic peroxide producers. It also requested the applicant to provide an organigram of its undertaking, to describe its activity and its development, including its takeover of the activity of Fides, its activity as the 'secretariat' for the organic peroxide producers and its turnover for 1991 to 2001. The applicant responded to that request for information by letter of 5 March 2003 (recital 73 of the contested decision).
5. On 20 March 2003 a meeting was held between the representatives of the applicant and the

Commission's staff in charge of the case-file, at the end of which the latter stated that the applicant was also concerned by the proceedings initiated by the Commission, without however specifying the offences alleged against it.

6. On 27 March 2003 the Commission initiated the formal examination procedure and adopted a statement of objections which was subsequently served on the applicant, among others. The applicant submitted its observations on the objections on 16 June 2003 and attended the hearing on 26 June 2003. The Commission finally adopted the contested decision on 10 December 2003, which it served on the applicant on 9 January 2004, and by which it imposed a fine on it of EUR 1 000 (recital 454 and Article 2(e) of the contested decision).
7. The adoption and the notification of the contested decision were accompanied by a press release in which the Commission stated, *inter alia*, that, as a consultancy firm, the applicant had played, from the end of 1993, an essential role in the cartel by organising meetings and covering up evidence of the infringement. Therefore, the Commission concluded that the applicant had also infringed the competition rules and stated:

'The sanction taken [against the applicant] is of a limited amount due to the novelty of the policy followed in that area. The message is clear however: those who organise or facilitate cartels, thus not only their members, must henceforth fear being caught and having very heavy sanctions imposed on them'.

Procedure and forms of order sought by the parties

8. By application lodged at the Registry at the Court of First Instance on 16 March 2004, the applicant brought the present action.
9. By letter lodged at the Court Registry on 30 November 2005, the applicant requested, as regards the publication of the judgment of the Court of First Instance bringing the proceedings to an end, confidential treatment of the entire agreement which it had concluded with Fides, which forms part of the annex to the application, and of the name of Fides and of the applicant's former employee, Mr S.
10. By letter lodged at the Court Registry on 1 February 2006, the applicant stated that it wished to maintain its request for confidentiality and, in the alternative, requested that confidential

treatment be granted to certain passages, rendered unreadable, of the text of the agreement cited in paragraph 9 above, of which it produced a non-confidential version at the Court's request.

11. Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance and on the proposal of the Third Chamber, the Court decided, after hearing the parties in accordance with Article 51 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.
12. On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure.
13. At the hearing, which took place on 12 September 2007, the parties presented oral argument and answered the oral questions put by the Court.
14. The oral procedure was closed at the end of the hearing on 12 September 2007. Pursuant to Article 32 of the Rules of Procedure, since a member of the Chamber was prevented from taking part in the judicial deliberations, the most junior judge within the meaning of Article 6 of the Rules of Procedure accordingly abstained from taking part in the deliberations and the Court's deliberations were conducted by the three judges whose signatures the present judgment bears.
15. At the hearing, the applicant withdrew its request for confidential treatment in so far as it concerned mention of the name of Fides; formal note of this was taken in the minutes of the hearing.
16. The applicant claims that the Court should:
 - annul the contested decision in so far as it concerns the applicant;
 - order the Commission to pay the costs.
17. The Commission contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs.

Law

A. Preliminary observations

18. The Court of First Instance considers it necessary to address, first, the applicant's request for

confidential treatment since it did not withdraw that request at the hearing (see paragraphs 9, 10 and 15 above).

19. As regards the name of the applicant's former employee, the Court took account of that request in accordance with its practice regarding publication in relation to the identity of natural persons in other cases (see, to that effect, Case T120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II4441, paragraphs 31 and 33). However, the Court considers that the existence as such of the agreement between Fides and the applicant has, in any event, lost its potentially confidential character in the light of the identification of that agreement in the extract from the – publicly accessible – companies register of the canton of Zurich regarding the applicant's establishment, as produced in the annex to the application and in recitals 20 and 91 of the version of the contested decision published provisionally on the internet site of the Directorate-General for Competition of the Commission (see, to that effect, the order of the President of the Third Chamber, Extended Composition, of the Court of First Instance in Case T289/03 *BUPA and Others v Commission* [2005] ECR II741, paragraphs 34 and 35), no objection to that publication having been made by the applicant in accordance with the procedure laid down in Article 9 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21).
20. Consequently, the request for confidential treatment must be rejected in so far as it concerns the existence of the agreement between Fides and the applicant.
21. Next, the Court points out that, in support of its action, the applicant relies on five pleas in law: (i) infringement of the rights of the defence and of the right to a fair hearing; (ii) infringement of the principle of *nullum crimen, nulla poena sine lege*; (iii) infringement of the principle of the protection of legitimate expectations; (iv) in the alternative, infringement of the principle of legal certainty and the principle of *nulla poena sine lege certa*; and (v) infringement of the principle of legal certainty and the principle of *nulla poena sine lege certa* as regards the second paragraph of Article 3 of the

contested decision.

B. The first plea, alleging infringement of the rights of the defence and of the right to a fair hearing

1. Arguments of the parties

- a. Arguments of the applicant
22. The applicant maintains that the Commission was late in informing it – three years after the start of the investigation – of the proceeding which had been initiated and the complaints made against it. It first learned of this when the formal investigation procedure was initiated and the statement of objections of 27 March 2003 adopted. Before that, the applicant had received only the request for information dated 3 February 2003, to which it had duly responded by letter of 5 March 2003. It was not until 20 March 2003, at the meeting with the Commission, that the applicant learned that it was also concerned by the investigation, without, however, receiving any precise information on the extent of the accusations made against it.
23. In the applicant's view, under Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed at Rome on 4 November 1950, anyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. That right is a corollary of the fundamental right to a fair hearing laid down in Article 6(1) of the ECHR and is an integral part of the rights of the defence, as recognised by the caselaw as general principles of Community law applicable to the penalty-based administrative procedures laid down in Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) (Cases 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraphs 172 to 176; C7/98 *Krombach* [2000] ECR I1935, paragraphs 25 and 26; C274/99 *P Connolly v Commission* [2001] ECR I1611, paragraphs 37 and 38; and Joined Cases C204/00 *P*, C205/00 *P*, C211/00 *P*, C213/00 *P*, C217/00 *P* and C219/00 *P Aalborg Portland and Others v Commission* [2004] ECR I123, paragraphs 63 and 64; see also Case T15/99 *Brugg Rohrsysteme v Commission* [2002] ECR II1613, paragraphs 109 and 122, and Case T23/99 *LR AF 1998 v Commission* [2002] ECR II1705, paragraph 220), and is confirmed by Ar-

- title 6(2) EU and by Article 48(2) of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 at Nice (OJ 2000 C 364, p. 1).
24. Under Article 15(2) of Regulation No 17, the fines which may be imposed on undertakings do, in fact – notwithstanding what is stated in Article 15(4) of that regulation – have a ‘criminal law character’ given their deterrent and punitive objective (Opinion of Judge Vesterdorf, acting as Advocate General in Case T1/89 Rhône-Poulenc v Commission [1991] ECR II867; see also the Opinion of Advocate General Roemer in Case 14/68 Wilhelm [1969] ECR 1, points 17 and 24; Opinion of Advocate General Mayras in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663; Opinion of Advocate General Léger in Case C185/95 P Baustahlgewerbe v Commission [1998] ECR I8417, I8422, point 31; and the Opinions of Advocate General RuizJarabo Colomer in Case C204/00 P Aalborg Portland and Others v Commission [2004] ECR I133, point 26; Case C205/00 P Irish Cement v Commission [2004] ECR I171, point 32; Case C213/00 P Italcementi v Commission [2004] ECR I230, point 26; Case C217/00 P Buzzi Unicem SpA v Commission [2004] ECR I267, point 29; and in Case C219/00 P Cementir v Commission [2004] ECR I342, point 25). That conclusion is also to be inferred from the caselaw of the European Court of Human Rights (‘Eur. Court H. R.’) (Engel and others v. the Netherlands, judgment of 8 June 1976, Series A no. 22 (1977), § 82; Oztürk v Germany, judgment of 21 February 1984, Series A no. 73, § 53; and Lutz v Germany, judgment of 25 August 1987, Series A no. 123, § 54).
 25. In that regard, the applicant disputes the Commission’s statement that no offence is imputed to undertakings during the investigation stage of the administrative proceedings. On the contrary, according to the applicant, the Commission takes measures during that stage which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (Joined Cases C238/99 P, C-244/99 P, C-245/99 P, C247/99 P, C250/99 P to C252/99 P and C254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I8375, paragraph 182). The fact that, under the procedure laid down in Regulation No 17, the persons concerned are not the subject of any formal accusation until they receive the statement of objections (Joined Cases T5/00 and T6/00 Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission [2003] ECR II5761, paragraph 79) is not decisive and does not rule out the possibility that, during the investigation stage, the applicant may already have become ‘a person charged’ for the purposes of Article 6(3) of the ECHR, as interpreted by the Eur. Court H. R. In the light of that caselaw, a formal indictment is not necessary but the initiation of an investigation procedure of criminal law character is sufficient (Eur. Court H. R. Delcourt v Belgium, judgment of 17 January 1970, Series A no. 11, p. 13, § 25; Ringeisen v Austria, judgment of 17 July 1971, Series A no. 13, p. 45, § 110; Deweer v Belgium, judgment of 27 February 1980, Series A no. 35, p. 22, § 42; Viezzer v Italy, judgment of 19 February 1991, Series A no. 196-B, p. 21, § 17; Adolf v Austria, judgment of 26 March 1982, Series A no. 49, p. 15, § 30; and Imbroschia v Switzerland, judgment of 24 November 1993, Series A no. 275, p. 13, § 36).
 26. The applicant submits that it is apparent from the objective of Article 6(3)(a) of the ECHR that, in the context of criminal proceedings, a person charged with an offence must be informed immediately of the initiation and purpose of the investigation concerning him, so that he is not left in a state of uncertainty for longer than necessary. By contrast, a notification only at the formal indictment stage, which often does not take place until after a series of long investigations, is not sufficient and risks seriously compromising the fairness of the remainder of the proceedings and depriving the right guaranteed by Article 6(3)(c) of the ECHR of its useful effect. Where, as in the present case, the Commission carries out the investigation secretly for approximately three years before adopting the statement of objections, it gains an unfair start in terms of collecting evidence which is incompatible with Article 6 of the ECHR. That stems from the fact that, in view of the time which has elapsed, it is difficult – or even virtually impossible – for the undertakings concerned to reconstruct the facts and to provide evidence to the contrary.
 27. In addition, the obligation to notify immediately the undertakings concerned stems from the importance, or decisive nature, of the investigation procedure for the Commission’s future decision (Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859, paragraph 15, and Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraph

63). After a long investigation, carried out with the support of the applicants for immunity or clemency, which precedes the adoption of the statement of objections, the Commission has a tendency to believe that the facts have already been established and is subsequently not very inclined to review the conclusions which it has drawn from that investigation. The risk of the forthcoming decision being biased is all the greater given that the Commission alone acts as investigator, prosecutor and judge. In the circumstances of the present case, the Commission was no longer an impartial judge and the applicant no longer had an adequate and sufficient opportunity (see *Eur. Court H. R., Delta v France*, judgment of 19 December 1990, Series A no. 191-A, p. 16, § 36) to contest the false allegations made by AKZO, the main witness for 'the prosecution'. Thus, at the stage of notification of the statement of objections, the undertaking concerned finds itself in a situation in which its chances of convincing the Commission of the erroneous nature of the presentation of the facts in that statement are significantly reduced, which seriously impairs the effectiveness of its defence.

28. The applicant points out that, in the present case, the Commission based its complaints almost exclusively on the witness statement of the applicant for immunity, AKZO, with which it has had close contact since the year 2000. Accordingly, the applicant maintains that, in the eyes of the Commission, AKZO was more credible than any undertaking, such as the applicant, which did not undertake to cooperate under point B(d) of the Leniency Notice and which the staff in charge of the case-file did not know personally. Consequently, the Commission attributed more weight to AKZO's false statements concerning the applicant's role than to the information provided by the applicant, without giving the applicant the opportunity to defend itself in an effective manner against AKZO's statements and to rectify them.
29. In the present case the Commission should have informed the applicant of the nature and the reasons for the suspicions against it when, on 27 June 2000, AKZO sent it a description of the applicant's alleged role in the cartel – given that, as of that moment, the Commission's future decision risked being biased as a result of AKZO's false allegations – and, at the latest, on 18 June 2001, when AKZO submitted its final witness statement to the Commission. The contested decision was based, as far as concerns the applicant, almost exclusively on

that witness statement. Consequently, by not informing the applicant as soon as the inquiry was launched against it, the Commission infringed the applicant's right to a fair hearing and its rights of defence under Article 6(1) and (3)(a) of the ECHR.

30. In the applicant's view, that illegality must lead to the annulment of the contested decision (Opinion of Advocate General Mischo in *Case C250/99 P Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, ECR I8503, point 80). In order to ensure the useful effect of the right guaranteed under Article 6(3)(a) of the ECHR, which is an elementary procedural guarantee in a society governed by the rule of law, the undertaking concerned cannot be required to show that the Commission's decision would have been different if it had been informed in good time. The act of informing the accused in good time and in an exhaustive manner constitutes the *condicio sine qua non* of a fair hearing and is mandatory. Accordingly, any decision imposing a fine which has been adopted in infringement of that procedural guarantee must be annulled.
31. In the alternative, the applicant claims that, if the Commission had respected the right guaranteed under Article 6(3)(a) of the ECHR and had informed it without delay of the nature and purpose of the investigation against it, it could have reconstructed the relevant facts more easily and more exhaustively than it had been able to in 2003. In particular, it could have drawn the Commission's attention to the erroneous nature of AKZO's witness statement concerning its role in the cartel. That challenge to the evidence would have led the Commission to seek further information from AKZO and, where necessary, to carry out an investigation under Article 14 of Regulation No 17.
32. However, in the absence of timely information, the applicant was deprived of the possibility of exercising decisive influence over the conduct of the investigation or over the Commission's internal decision-making process. Otherwise, the Commission would have concluded that the applicant had not actually committed an infringement and that its relationship to the organic peroxide producers involved in the cartel was one of non-punishable complicity. Thus, at that decisive stage of the procedure, the Commission deprived the applicant of the opportunity to defend itself quickly and effectively against AKZO's allegations.

33. Accordingly, the contested decision should be annulled for infringement of the rights of the defence and of Article 6(3)(a) of the ECHR.
34. In that regard, the applicant none the less acknowledged at the hearing, in response to a specific question put by the Court, that, in its view, even if it had been informed at the stage of the request for information of 3 February 2003 and had thus had the opportunity to defend itself more effectively, that would not have changed the Commission's findings concerning the applicant in the contested decision. Formal note to that effect was taken in the minutes of the hearing.
- b. Arguments of the Commission
35. The Commission disputes that it is required, prior to notifying the statement of objections, to inform the applicant of the nature of and the reasons for the investigation concerning it.
36. First, as is expressly confirmed in Article 15(4) of Regulation No 17, neither the administrative procedure nor the possibility of imposing fines under that regulation is of a criminal law nature. Second, that procedure is divided into two stages, namely a preliminary investigation stage and an *inter partes* stage which covers the period from notification of the statement of objections to adoption of the final decision. Although the *inter partes* stage enables the Commission to give a final decision on the infringement concerned (*Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, paragraphs 182 to 184), no offence is imputed to the undertakings concerned during the investigation stage. That stage enables a search to be made for the factual evidence which enables the Commission to determine whether or not it is appropriate to take action against an undertaking. To that end, the Commission can require information and the undertakings are under an obligation to cooperate actively in providing all information relating to the subject-matter of the inquiry (*Case 374/87 Orkem v Commission* [1989] ECR 3283, paragraph 27).
37. At the time when such measures of inquiry are adopted, the Commission is not yet in a position to impute offences to undertakings because it is still seeking the evidence which might lead a statement of objections to be adopted. Accordingly, the mere fact that an undertaking is the subject of measures of inquiry on the part of the Commission cannot be assimilated to an accusation of that undertaking (Opinion of Advocate General Mischo in *Case C250/99 P Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, paragraphs 41 to 46). Consequently, the applicant's argument that it should already have been informed at the investigation stage in order to be able to draw up its defence cannot be upheld.
38. The Commission acknowledges that the rights of the defence, as fundamental rights, form an integral part of the general principles of law, whose observance the Community judiciary must ensure (*Krombach*, cited in paragraph 23 above, paragraphs 25 and 26, and *Connolly v Commission*, cited in paragraph 23 above, paragraphs 37 and 38). In addition, it is true that the Commission has to ensure that those rights are not impaired during the investigation stage, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings such that they may incur liability (*Hoechst v Commission*, cited in paragraph 27 above, paragraph 15, and *Aalborg Portland and Others v Commission*, cited in paragraph 23 above, paragraph 63). However, that obligation relates only to certain rights of the defence, such as the right to legal representation and the privileged nature of correspondence between lawyer and client, whereas other rights relate only to the *inter partes* proceedings initiated following the adoption of a statement of objections (*Hoechst v Commission*, cited in paragraph 27 above, paragraph 16).
39. In any event, the alleged right to be informed immediately of the nature of and the reasons for the investigation does not exist, nor does it result from Article 6(3)(a) of the ECHR, because there is no element of 'accusation' during the investigation stage. Such formal 'accusation' occurs only at the stage of the notification of the statement of objections (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*, cited in paragraph 25 above, paragraph 79). That statement implies the initiation of the procedure under Article 3 of Regulation No 17 and demonstrates the Commission's intention to adopt a decision finding an infringement (see, to that effect, *Case 48/72 Brasserie de Haecht* [1973] ECR 77, paragraph 16). At the same time, that statement serves as a means of informing the undertaking of the subject-matter of the procedure which is initiated against it and of the conduct imputed to it by the Commission (*Joined Cases T305/94,*

T-306/94, T-307/94, T313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T335/94 Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II931, paragraph 132, and Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission, cited in paragraph 25 above, paragraph 80).

40. That is confirmed in the caselaw according to which there is no right under Community competition law to be informed of the state of the administrative procedure before the statement of objections is formally issued; an interpretation to the contrary would give rise to a right to be informed of an investigation in circumstances where suspicions exist in respect of an undertaking, which would seriously hamper the work of the Commission (Case T50/00 Dalmine v Commission [2004] ECR II2395, paragraph 110).
41. The Commission adds that, although the caselaw of the Eur. Court H. R. in relation to Article 6 of the ECHR may, where necessary, play a role in the context of investigation procedures which have a criminal law character – as regards, for example, the calculation of a ‘reasonable time’ within the meaning of Article 6(1) of the ECHR – there is nothing to suggest that that is also the case for Article 6(3)(a) of the ECHR. In order to be taken into account, failure to respect the guarantees under Article 6(3)(a) of the ECHR at the investigation stage must seriously compromise the fair nature of the proceedings (Eur. Court H. R. *Imbroscia v Switzerland*, judgment of 24 November 1993, Series A no. 275, § 36, and the caselaw cited therein), account being taken of the implementation of the procedure as a whole.
42. In the present case, the inter partes stage of the administrative procedure laid down in Regulation No 17 is particularly important in that regard since it aims precisely to inform the person concerned of the nature and grounds of the accusation made against him. However, the applicant has not brought any complaint regarding the proper conduct of that stage of the procedure. Thus, the applicant cannot assert for the first time in its reply that it was not given the opportunity, during the inter partes stage of that procedure, to voice its point of view, in an appropriate and sufficient manner, on the version of the facts adopted by the Commission. In any event, the applicant’s false allegation cannot call into question either the

inter partes nature of that stage of the administrative procedure, or its fairness.

43. Consequently, the present plea must be rejected as unfounded.

2. Findings of the Court

44. By its first plea, the applicant claims in essence that the Commission infringed its rights of defence and, in particular, its right to a fair hearing, as recognised by Article 6(3)(a) of the ECHR, by failing to inform it, very early on in the investigation procedure, of the nature of and the reasons for the accusation made against it and, in particular, by failing to send it AKZO’s witness statements earlier.
45. It should be pointed out, at the outset, that the Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not as such form part of Community law. That said, the fact remains that the Community judiciary is called upon to ensure the observance of the fundamental rights which form an integral part of the general principles of law and, for that purpose, it draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights, on which the Member States have collaborated and to which they are signatories. In that regard, the ECHR has special significance, as confirmed by Article 6(2) EU (see, to that effect, Case T112/98 *MannesmannröhrenWerke v Commission* [2001] ECR II729, paragraphs 59 and 60 and the caselaw cited therein). That has also been reaffirmed in the fifth recital in the preamble to the Charter of Fundamental Rights of the European Union, and Articles 52(3) and 53 thereof.
46. In that regard, it is settled caselaw that the rights of the defence in any proceedings in which penalties, especially fines or penalty payments, may be imposed, such as those provided for in Regulation No 17, are fundamental rights forming an integral part of the general principles of law, whose observance the Community judiciary ensures (see, to that effect, *Aalborg Portland and Others v Commission*, cited in paragraph 23 above, paragraph 64, and Case C3/06 P *Groupe Danone v Commission* [2007] ECR I1331, paragraph 68).
47. It should also be pointed out that the administrative procedure under Regulation No 17,

- which takes place before the Commission, is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary investigation stage and an *inter partes* stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 17 and which covers the period up until the notification of the statement of objections, is intended to enable the Commission to gather all the relevant information confirming or not the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the *inter partes* stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see, to that effect, *Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, paragraphs 181 to 183, and Case C105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I8725, paragraph 38).
48. First, as regards the preliminary investigation stage, the Court has stated that the starting point of that stage is the date on which the Commission, in exercise of the powers conferred on it by Articles 11 and 14 of Regulation No 17, takes measures which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (*Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, paragraph 182, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 47 above, paragraph 38). Second, it is apparent from the caselaw of the Court of Justice that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence (see, to that effect, *Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, paragraphs 315 and 316; *Aalborg Portland and Others v Commission*, cited in paragraph 23 above, paragraphs 66 and 67; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 47 above, paragraph 47; and Case C407/04 P *Dalmine v Commission* [2007] ECR I829, paragraph 59). If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it (*Dalmine v Commission*, cited in paragraph 40 above, paragraph 60).
49. Accordingly, the applicant's argument that respect for the rights of the defence and the right to a fair hearing implies that it be granted access to AKZO's witness statements during the preliminary investigation stage must be rejected.
50. The fact nevertheless remains that, as is apparent from the caselaw cited in paragraph 48 above, the measures of inquiry adopted by the Commission during the preliminary investigation stage – in particular, the measures of investigation and requests for information under Articles 11 and 14 of Regulation No 17 – suggest, by their very nature, that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected.
51. Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (see, to that effect, *Hoechst v Commission*, paragraph 27 above, paragraph 15). As regards the observance of a reasonable period of time, the Court has thus held, in essence, that an excessively lengthy preliminary investigation may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence where those rights are relied on during the *inter partes* stage. The more time that elapses between a measure of investigation and the notification of the statement of objections, the greater the likelihood that

exculpatory evidence can no longer be obtained or only obtained with difficulty. For that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights produce their full effects, that is to say, the *inter partes* stage of the administrative procedure, but must extend to the entire procedure and be carried out by reference to its total duration (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 47 above, paragraphs 49 and 50).

52. The Court considers that those considerations apply by analogy to the question whether and, if so, to what extent the Commission is required to provide the undertaking concerned, as of the preliminary investigation stage, with certain information on the subject-matter and purpose of the investigation, which enable its defence in the *inter partes* stage to be effective. Even though, in formal terms, the undertaking concerned does not have the status of 'a person charged' during the preliminary investigation stage, the initiation of the investigation in its regard, by the adoption of a measure of inquiry concerning it, cannot generally be dissociated, in substantive terms, from the existence of suspicion, hence from an implied imputation of misconduct for the purposes of the caselaw cited in paragraph 48 above, which justifies the adoption of that measure (see also, to that effect, *Eur. Court H. R., Casse v Luxembourg*, no. 40327/02, § 29 to 33, 71 and 72, 27 April 2006).
53. As regards the scope of that duty to inform, it should be noted that, in a request for information – whether informal for the purposes of Article 11(2) of Regulation No 17 or in the form of a decision under Article 11(5) thereof – the Commission is required, under Article 11(3) and in order, *inter alia*, to respect the rights of defence of the undertakings concerned, to state the legal basis and the purpose of that request. Thus, the necessity, for the purposes of Article 11(1) of Regulation No 17, of the information requested by the Commission must be assessed by reference to the purpose of the inquiry, as compulsorily stated in the request for information itself. In that regard, the Court has pointed out that the Commission is entitled to require only the disclosure of information which may enable it to investigate putative infringements which justify the investigation and which are set out in the request for information

as such (see, to that effect, *Case T39/90 SEP v Commission* [1991] ECR II1497, paragraph 25, and *Case T34/93 Société générale v Commission* [1995] ECR II545, paragraphs 39, 40, 62 and 63).

54. Next, it should be noted that the Commission is required to point out in a decision ordering investigation, under Article 14(3) of Regulation No 17, the subject-matter and purpose of that investigation. That requirement constitutes a fundamental guarantee of the rights of defence of the undertakings concerned, with the result that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation. In that regard, it is apparent from the caselaw that, although it is true that the Commission is not required to communicate to the addressee of a decision ordering investigation all the information at its disposal concerning the putative infringements or to make a precise legal analysis of those infringements, it must nevertheless clearly indicate the presumed facts which it intends to investigate (see, to that effect, *Hoechst v Commission*, cited in paragraph 27 above, paragraph 41; *Case 85/87 Dow Benelux v Commission* [1989] ECR 3137, paragraphs 8 and 9; judgment of 12 July 2007 in *Case T266/03 CB v Commission*, not published in the ECR, paragraph 36; see, by analogy, *Société générale v Commission*, cited in paragraph 53 above, paragraphs 62 and 63). By the same token, in the context of an investigation based on Article 14(2) of Regulation No 17, the Commission's inspectors must produce written authorisation specifying the subject-matter and purpose of the investigation.
55. The Court considers that the requirements set out in paragraphs 53 and 54 above apply independently of the question whether the request for information, which is sent to an undertaking suspected of having committed an infringement, is a formal decision for the purposes of Article 11(5) of Regulation No 17, or an informal letter for the purposes of Article 11(2) thereof. In addition, in the context of the preliminary investigation stage, the opportunity for the undertaking concerned to prepare its defence effectively cannot vary depending on whether the Commission adopts a measure of inquiry under Article 11 or Article 14 of Regulation No 17, since all those measures suggest that an infringement has been committed and may have a significant impact on the situation

of the undertakings suspected (see, to that effect, *Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 25 above, paragraph 182, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 47 above, paragraph 38).

56. It follows that, when the first measure is taken in respect of an undertaking, including in requests for information under Article 11 of Regulation No 17, the Commission is required to inform the undertaking concerned, *inter alia*, of the subject-matter and purpose of the investigation underway. In that regard, the reasoning does not need to be so extensive as that required for decisions ordering investigation, owing to the more restrictive nature of the latter and the particular intensity of their impact on the legal situation of the undertaking concerned (see, in relation to the Commission's powers of investigation, *CB v Commission*, cited in paragraph 54 above, paragraph 71). That reasoning must, however, enable the undertaking to understand the purpose and the subject-matter of that investigation, which means that the putative infringements must be specified and, in that context, the fact that the undertaking may be faced with allegations related to that possible infringement, so that it can take the measures which it deems useful for its exoneration and, thus, prepare its defence at the *inter partes* stage of the administrative procedure.
57. Consequently, in the present case, the Commission was required, when it sent the request for information of 3 February 2003, to inform the applicant, *inter alia*, of the putative infringements concerned by the investigation and of the fact that, in that context, the Commission might have to impute to it unlawful conduct. It is apparent solely from that request that the Commission was in the process of investigating a putative infringement of Article 81 EC committed by European organic peroxide producers as a result of certain conduct, mentioned therein by way of example and in a general manner, but without any indication that the investigation also concerned a possible infringement attributed to the applicant. It appears that it was not until the meeting of 20 March 2003 – that is to say, several weeks before initiation of the formal investigation procedure – that the officials of the Commission in charge of the case-file pointed out that the applicant was also covered by the investigation. As matters stood, the need to give prior notice
- to the applicant was all the greater since, as the Commission itself stated, its decision to investigate a consultancy firm constituted a re-orientation of its former decisionmaking practice and, consequently, the applicant could not necessarily expect to be directly concerned by the statement of objections.
58. However, that circumstance cannot, in itself, lead to the annulment of the contested decision. It is also necessary to establish whether the irregularity committed by the Commission was capable of actually compromising the applicant's rights of defence in the procedure in question (see, to that effect, *Aalborg Portland and Others v Commission*, cited in paragraph 23 above, paragraphs 71 *et seq.*, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 47 above, paragraphs 55 and *seq.*).
59. In the present case, the applicant has not produced any concrete evidence to establish that the irregularity in question adversely affected the efficiency of its defence during the *inter partes* stage of the administrative procedure and that the progress of that procedure, as a whole, and the content of the Commission's decision could have been influenced by a more efficient defence. On the contrary, at the hearing, the applicant admitted that prior information regarding the allegations against it, in particular at the stage of the request for information of 3 February 2003, would not have had any influence on the conclusions reached by the Commission in its regard in the contested decision, and formal note of that acknowledgement was taken in the minutes of the hearing. The possibility of any such influence is even less likely since there was a gap of only seven weeks or thereabouts between the request for information, on the one hand, and the notification of the initiation of the formal investigation procedure and the notification of the statement of objections, on the other.
60. Consequently, the present plea must be rejected as unfounded.
- C. The second plea, alleging infringement of the principle of *nullum crimen, nulla poena sine lege***
- 1. Arguments of the parties**
- (a) Arguments of the applicant**
- General part

61. The applicant maintains that it has not infringed Article 81 EC since its relationship to the cartel members – AKZO, Atochem/Atofina and PC/Degussa – was merely one of non-punishable complicity. It claims that the Commission itself acknowledged, in recital 339 of the contested decision, that the applicant was not a contracting party to the cartel concluded by those organic peroxide producers. None the less, the Commission reached the very vague conclusion, in recital 349 of the contested decision, that the applicant ‘was party to the agreement and/or took decisions as an undertaking and/or as an association of undertakings’. Next, the Commission acknowledged, in recital 454 of that decision, that ‘addressing a decision to an undertaking and/or association of undertakings having a role of this kind in a cartel is to a certain extent a novelty’. In the applicant’s view, the Commission thus overstepped the limits of the power conferred on it by Article 15(2) of Regulation No 17, read in conjunction with Article 81(1) EC, and infringed the principle of *nullum crimen, nulla poena sine lege*. In addition, the Commission’s imprecise legal assessment is based on erroneous findings of fact concerning the applicant’s role in the cartel.

The challenge of the facts found in the contested decision

62. The applicant essentially disputes the importance attributed by the Commission, in the contested decision, to its activity in the cartel (recitals 95, 105, 332, 333 and 345 of the contested decision). In reality, the applicant, as a consultancy firm and an agent subject to the instructions of AKZO, Atochem/Atofina and PC/Degussa, merely provided those undertakings with clerical-administrative services, the vast majority of which had nothing to do with the cartel.

63. First, between the end of 1993 and the end of 1999, the applicant was linked, by virtue of the Swiss law of obligations and without any anticompetitive intention, to those three organic peroxide producers by service contracts termed ‘agency agreements’. On the basis of those agency agreements and on the instructions of those producers, it (i) established market statistics; (ii) organised four official meetings of those producers in Zurich while attending the official part of those meetings; (iii) reserved a meeting room for four unofficial meetings of those producers in Zurich, but without attending – or only partly – those meetings or being aware of their content; (iv) reimbursed the rep-

resentatives of those producers the travel costs incurred in attending those meetings; and (v) kept hold of certain documents – some of which were anti-competitive – on behalf of PC/Degussa and Atochem/Atofina.

64. In addition, contrary to the finding in recital 340 of the contested decision, those agency agreements did not restrict competition; only the agreements between the producers, in particular the 1971 agreement, to which the applicant was never a party (recital 339 of the contested decision), provided for restrictions of competition on the organic peroxide market. Thus, the statement in recital 335 of the contested decision that the applicant’s activity ‘formed the basis to realise the cartel’ is also incorrect, since that cartel was created in 1971 by AKZO, Atochem/Atofina and PC/Degussa without the applicant’s assistance. In essence, the applicant states that, in so far as those of its activities characterised as misconduct were linked to the cartel, such as the reservation of meeting rooms and the reimbursement of travel costs, for the three organic peroxide producers they were merely of a logistical and clerical-administrative nature.

65. Second, the applicant essentially claims that, in referring – in recitals 87, 109 et seq. and, in particular, in recital 209 of the contested decision – to ‘Fides/AC-Treuhand’ as a single unity, the Commission wrongly attributed to it the acts committed by Fides during the period from 1971 to 1993. In so doing, the Commission infringes the principles of culpability and individual liability and adversely affects the applicant’s reputation (Case C49/92 P Commission v Anic Partecipazioni [1999] ECR I4125, paragraph 145). The applicant, which was founded in 1993, is not liable for Fides’ conduct and there is no structural link, in terms of company law, between the two. At the end of 1993, the applicant acquired from Fides only the department in charge of providing management advice to associations, and then concluded new agency agreements with Fides’ former clients. In addition, Fides’ letter of November 1993, in which it advised its former clients to continue their commercial relations with the applicant, is not evidence which is relevant to show the alleged ‘personal continuity’ between Fides and the applicant. It is common practice in the context of company takeovers that, for marketing reasons, the seller sends such ‘letters of recommendation’ concerning the possible transfer of agency to the company which has taken over. The applicant concludes from this that it

- cannot be held liable for Fides' conduct, a fact which should have led the Commission to attribute significantly less importance to its role during the decisive period from 1994 to 1999.
66. In that regard, the applicant states that, unlike Fides, it did not participate in the anti-competitive exchange of information between the three organic peroxide producers. The description of the applicant's role in recitals 91 et seq. of the contested decision does not take account of the fact that, in 1993, those producers substantially modified the manner of operation of the cartel by abandoning thereafter the practice of communicating to one another, with the participation of Fides, sales and price figures in meetings. After 1993 that system was replaced by a system run by AKZO, in which the applicant did not participate and of which it was not even aware, under which information was exchanged by fax and in meetings referred to as 'working groups' (recital 136 of the contested decision). In that context, AKZO established detailed statistics to be presented at the meetings of the working group, ran those meetings, ensured that market shares were being respected and insisted that the other producers increase their prices.
67. Third, as regards the storage of the originals of the 1971 and 1975 agreements, the applicant asserts that it stored in its safe only the copies of Atochem/Atofina and PC/Degussa, which were free to take them away or consult them at any time. Furthermore, the applicant admits to having calculated until 1995 or 1996, on behalf of the organic peroxide producers, the deviations from the quotas agreed between them. The members of the cartel were also free to consult the documents relating to that calculation at any time. The conservation of documents of a third party by the applicant does not constitute, in itself, conduct which is prohibited under the competition rules.
68. Fourth, the applicant disputes the allegation that it collected information on the sale of organic peroxide and provided the 'relevant statistics' to the members of the cartel (recital 92 of the contested decision). The applicant claims that those statistics were lawful and had nothing to do with the cartel, as has been confirmed, according to the applicant, by AKZO, Atochem/Atofina and PC/Degussa. Following the implementation by Fides, at the request of those producers, of an official information system on the organic peroxide market, the applicant concluded tacitly, at the end of 1993, new agency agreements with them which concerned the drawing up of 'neutral' market statistics. Those statistics were based on past sales figures (in tons), as provided by those producers, and neither the prices charged by them nor the names of their clients were identified in those statistics. They were accompanied by a list of the categories of relevant goods which the Commission wrongly designated as 'code AC-Treuhand' (recital 105 of the contested decision). However, that list was merely a working tool for the applicant to enable it to establish the market statistics and for the company in charge of auditing the sales volumes communicated by the producers. The statistics established in that manner indicated, for the categories of organic peroxide concerned, merely the total volume of the market for the preceding year or the preceding quarter, the sales volume for each producer and its market share, but no information concerning competitors.
69. In that regard, the applicant points out that, between 1993 and 1999, the exchange between the organic peroxide producers of sales volumes and prices by country and by client and, consequently, the coordination of their conduct, no longer followed the rules agreed in 1971 and in 1975, but was made by fax or at separate meetings of the working group and, occasionally, following official meetings in Zurich, but without the applicant's participation (recitals 128 and 136 of the contested decision). The applicant concludes from this that, contrary to the impression created in recital 92 of the contested decision, the market statistics which the applicant established did not serve to coordinate the conduct of the producers. Nor did the preparation and the review of the data from the market information system constitute the basis of the infringement. From 1993 onwards, the statistics established by the applicant were not related to its attendance at the meetings of the cartel or proposing of quotas. That link was broken, at the latest, in 1996 when the applicant stopped calculating the deviations from the agreed quotas.
70. The applicant states that the auditing of the sales figures of the organic peroxide producers had nothing to do with the cartel. The applicant neither 'undertook nor approved' the auditing in that regard (recital 333 of the contested decision); nor was it the cartel's 'accountant' (recital 404 of the contested decision). That erroneous assessment is a result of: (i) bracketing together the functioning of the lawful market information system and that of the cartel's

system; and (ii) a confusion with the duties of the company acting as subagent for the applicant, which audited the sales volumes communicated to the applicant by the producers, every three to six months, concerning each category of products. On that basis, the applicant calculated the respective market shares in order to send the 'total market figures' back to the producers. Finally, the auditing of the sales volumes communicated to the applicant met the wishes of the three producers and is a common and lawful practice in the context of professionally competent market information systems which has nothing to do with the cartel.

71. Fifth, the applicant disputes the Commission's assertion that it attended 'at least at one instance' a working group meeting (recital 92 of the contested decision), or even a number of those meetings (recital 99 thereof). In reality, the applicant almost never attended the meetings of the three organic peroxide producers which were held for anti-competitive purposes. Out of the 63 meetings which took place from the end of December 1993, as set out in table 4 of the contested decision (p. 28 et seq.), of which only nine were held in Zurich, only five were partly attended by employees of the applicant, namely the meetings in Zurich on 25 October 1994, 16 February 1995, 16 January and 19 April 1996 and 23 November 1998. To that list it is appropriate to add the meeting in Amersfoort (Netherlands) on 19 October 1998, which was attended only by representatives of AKZO and a former employee of the applicant, Mr S. However, the applicant disputes, in a very detailed manner, the significance attributed by the Commission, in the contested decision, to the attendance of Mr S. In any event, it is for the Commission to prove that the applicant actually attended meetings which had an anti-competitive purpose (Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraph 78).
72. The applicant states that, with the exception of the meeting of 16 January 1996, all the meetings were so-called 'summit' meetings consisting of an 'official' part and an 'unofficial' part. The applicant's employees attended only the official part of those meetings in the context of which only issues relating to official market statistics, product classification and product safety were addressed. In that context, the applicant's role was limited to clerical-administrative activities, such as sending out letters of invitation setting out the agenda, reserving meeting rooms and, where necessary, hotel rooms, wel-

coming participants and taking minutes of the official meetings. On instruction, the applicant also made a telephone booking to reserve a hotel conference room for the 'unofficial' meetings in Zurich on 23 October 1997, 17 April 1998 and 27 October 1998, but without attending those meetings itself.

73. Accordingly, AKZO's assertion, as reproduced in recital 127 of the contested decision, that the applicant was 'continuously' involved in the yearly meetings – for example, when market shares needed to be adapted – is manifestly erroneous. The applicant's attendance was not necessary for that purpose, since each of the organic peroxide producers knew the 'official' market shares owing to the exchange between them of their sales volumes by fax or at working group meetings (recital 128 of the contested decision).
74. Sixth, the applicant submits that it was neither the chairman nor the moderator of the cartel (recitals 92, 99, 102 and 336 of the contested decision). Firstly, there was no 'chairperson' at the few meetings of the three organic peroxide producers which the applicant attended between 1994 and 1999 and during which its role was limited to welcoming the participants and taking minutes of the official part of the meeting. Secondly, the applicant neither acted as 'moderator' in the case of tension between the members of the cartel nor encouraged the latter to reach a compromise: the participants always came to the conclusion by themselves that abandoning the discussions would only make the situation worse. Furthermore, in view of the fact that the applicant did not attend the unofficial meetings (see paragraph 72 above), it could not have acted as moderator in the case of tension between the members of the cartel.
75. In that regard, the applicant disputes having declared in its response to the statement of objections that it had 'acted as an intermediary' (recitals 92, 94 and 99 of the contested decision). In reality, the applicant had stated that, as secretary, Mr S had merely played an 'organisational role in the meetings', which means, *inter alia*, that he opened with a few words of welcome the four official and lawful 'summit' meetings held between 1994 and 1999 (see paragraph 72 above) and that he announced the lunch break. However, Mr S never or almost never attended, during that same period, the unofficial meetings of the three organic peroxide producers. Point 10 of the 1971 agreement, under

the title 'Arbitration', shows that the producers themselves played the role of moderators, which was confirmed by Atochem/Atofina in relation to AKZO's role as moderator at numerous meetings. The applicant concludes from this that AKZO made false accusations against it in order to turn attention away from the role which AKZO itself played as moderator.

76. Seventh, the applicant reaffirms that it carried out the task of calculating the deviations from the agreed quotas and sending them to the organic peroxide producers, under the terms of its mandate and on instruction, only until 1995 or 1996. From 1997 at the latest the calculation of those deviations was made by the three producers themselves, under the supervision of AKZO, on the basis of their sales statistics which they exchanged at the meetings of the working group or by fax (see paragraph 69 above). AKZO then established, on that basis, the overall statistics consisting of the sales statistics of all the organic peroxide producers and presented them at the next meeting of the working group. In addition, the documents produced by AKZO with the intention of proving that, in 1996 or in 1997, the applicant continued to calculate the deviations from the agreed quotas originated from AKZO itself and not from the applicant.
77. Finally, the applicant submits that the Commission's assessment of the evidence is unlawful because it fails to have regard to the presumption of innocence (*Baustahlgewerbe v Commission*, cited in paragraph 24 above, paragraph 58) or the fundamental right to a fair hearing, as laid down in Article 6(1) of the ECHR and Article 47(2) of the Charter of Fundamental Rights of the European Union. The Commission endorsed AKZO's erroneous witness statement without investigating whether it was well founded in the light of the witness statements provided by Atochem/Atofina, PC/Degussa and the applicant contradicting that statement. It is apparent from Article 6(1) of the ECHR that statements made by a cooperating party can be regarded as credible only when they are supported by additional and independent evidence (*Eur. Commission H. R., X v United Kingdom*, no 7306/75, decision of 6 October 1976, Decisions and Reports, no 7, p. 119, 122). In addition, credibility is the sole relevant criterion for assessing the evidence produced (*Case T44/00 Mannesmannröhren-Werke v Commission* [2004] ECR II2223, referring to the Opinion of Judge Vesterdorf, acting as Advocate General in *Rhône-Poulenc v Com-*
- mission, cited in paragraph 24 above, ECR II869; see also, to that effect, *Joined Cases C310/98 and C406/98 MetTrans and Sagpol* [2000] ECR I1797, paragraph 29, and *Joined Cases T141/99, T142/99, T150/99 and T151/99 Vela and Tec-nagrind v Commission* [2002] ECR II4547, paragraph 223).
78. A cooperating party has every reason not to tell the truth and the Commission is required, of its own motion, to call its statement into question, especially if it is decisive for the final decision and is contradicted by another statement (see also recital 85 in the preamble to Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article [81 EC] (IV/31.371 – Roofing felt) (OJ 1986 L 232, p. 15), and recital 278 of the contested decision). In the present case, the Commission infringed those principles by accepting numerous false accusations made by AKZO against the applicant without producing other independent evidence to that effect (see also, to that effect, judgment of 14 October 1994 in *Case T44/02 Dresdner Bank v Commission*, not published in the ECR, paragraph 74). As it is, a particularly critical examination of AKZO's statements was necessary in the light, first, of the danger that AKZO was exaggerating the role and importance of the applicant in order to turn attention away from its own decisive role in the implementation of the cartel and, second, of the fact that AKZO was late in making some of its unfounded accusations against the applicant.
79. If AKZO had admitted in its letter of 17 February 2003 that it was itself responsible for the proposal of new quotas and not the applicant, the Commission would have had no choice but to take note of AKZO's decisive role in the cartel, which – pursuant to point B(e) of the Leniency Notice – would have prohibited it from exempting AKZO from a fine. According to the applicant, the risk of being refused immunity from the fine and the scale of the fine with which AKZO was faced confirm the fact that AKZO had an incentive to testify against the applicant. Consequently, in basing its decision on AKZO's erroneous statements in the absence of additional and independent evidence in support of its complaints and without questioning the credibility of those statements or taking account of all the facts exculpating the applicant, the Commission failed to have regard to the requirements of the fundamental right to a fair hearing and to the presumption of innocence.

The infringement of the principle of *nullum crimen, nulla poena sine lege*

- The effects of the principle of *nullum crimen, nulla poena sine lege* on the distinction in Community competition law between perpetration and complicity
80. The applicant points out that, under Article 15(2)(a) of Regulation No 17, the Commission may impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81(1) EC. However, undertakings which, without participating in the cartel within the meaning of that latter provision, merely facilitate the infringement of Community law committed by the members of the cartel or encourage such an infringement to be committed do not infringe Article 81(1) EC and are not liable to a fine under Article 15(2) of Regulation No 17. Consequently, by finding, in the contested decision, that the applicant had infringed Article 81(1) EC and by imposing a fine on it, the Commission infringed the principle of *nullum crimen, nulla poena sine lege* as laid down in Article 7(1) of the ECHR. In addition, according to the applicant, the broad interpretation of Article 81(1) EC adopted by the Commission means that the constituent element of the infringement laid down in Article 81(1) EC may be discerned in all manner of conduct and thus fails to have regard for the principle of *nulla poena sine lege certa*.
81. The applicant submits that, under Community competition law, a distinction must be made between, on the one hand, perpetration of an infringement and, on the other, instigation of or complicity in an infringement. That distinction forms part of the general principles of Community law, in view of the similarity between the rules to that effect contained in the national legal orders, such as those laid down in Article 27(1) of the *Strafgesetzbuch* (German penal code), Article 48 of the *Wetboek van Strafrecht* (Netherlands penal code), Article 67 of the *code pénal belge* (Belgian penal code), Article 121-7 of the *code pénal français* (French penal code), Section 8 of the *Accessories and Abettors Act 1861* (United Kingdom penal code), Article 28(2)(b) and Article 29 of the *Código penal* (Spanish penal code) relating to complicity, Articles 46 and 47 of the *Poinikos Kodikas* (Greek penal code), Articles 66 and 67 of the *code pénal luxembourgeois* (Luxembourg penal code), Articles 26 et seq. of the *Código penal* (Portuguese penal code),

Chapter 23, section 4, of the *Brottsbalk* (Swedish penal code) and Chapter 5 of the *Rikoslaki* (Finish penal code). It is also confirmed by Article 2(1) of the Convention on the protection of the European Communities' financial interests of 26 July 1995 (OJ 1995 C 316, p. 49), and by Article 11 of the *Corpus Juris* introducing penal provisions for the purpose of protecting the financial interests of the European Union (established under the responsibility of Mireille Delmas-Marty, *Economica*, 1997).

82. Consequently, where penalties are imposed under Regulation No 17, it is also necessary to distinguish perpetration of an infringement from instigation of the infringement or complicity therein. According to the applicant, in Community competition law there is no legislative provision making it possible to penalise instigation of or complicity in an infringement. Thus, only a person who, as the perpetrator of an infringement, satisfies the condition laid down in Article 81(1) EC concerning the constitution of the infringement may be penalised. Instigation of an infringement or complicity therein is not punishable.
83. A contrary and broad interpretation of Article 81(1) EC, such as that adopted by the Commission in the present case, infringes the principle of *nullum crimen, nulla poena sine lege* within the meaning of Article 7(1) of the ECHR and Article 49(1) of the Charter of Fundamental Rights of the European Union. The Eur. Court H. R. has acknowledged that Article 7 of the ECHR enshrines both that principle and the principle that the criminal law may not be applied broadly, in particular by analogy, to the detriment of the defendant. It follows that an infringement must be clearly defined by the law itself (*Streletz and Others v Germany*, judgment of 22 March 2001, Reports of Judgments and Decisions, no 34044/96 inter alia, ECHR 2001II, § 50 and the caselaw cited therein).
84. The applicant maintains that the principle of *nullum crimen, nulla poena sine lege*, as a general principle of Community law, also applies to the penalty-based administrative procedure under Regulation No 17 and, in particular, to the fines provided for in Article 15(2) of that regulation. That follows clearly from both Article 6(2) EU and the caselaw (Joined Cases C74/95 and C129/95 X [1996] ECR I6609, paragraph 25; *Brugg Rohrsysteme v Commission*, cited in paragraph 23 above, paragraphs 109 and 122; and *LR AF 1998 v Commission*, cited in paragraph 23 above, paragraphs 209 and

- 210). In addition, it is a principle intrinsic to the rule of law which ensures effective protection against arbitrary prosecution and punishment (Eur. Court H.R. *Streletz and Others v Germany*, cited in paragraph 83 above, § 50 and the caselaw cited therein).
- The concept of perpetrator for the purposes of Article 81 EC
85. The applicant states that the principle *nulla poena sine lege certa*, laid down in Article 7(1) of the ECHR (see paragraph 80 above), requires that a restrictive approach be adopted to the concept of perpetrator of an infringement for the purposes of Article 81(1) EC (see also, X, cited in paragraph 84 above, paragraph 25, and Case C195/99 P *Krupp Hoesch v Commission* [2003] ECR I10937, paragraph 86). That principle seeks to ensure that the penalty incurred for the infringement of a legal provision, such as the penalty provided for in Article 15(2) of Regulation No 17, is foreseeable for the person to whom that provision applies and that the decision-making power of the competent authority is delimited in such a way as to rule out the possibility of 'surprise' decisions. The Court of Justice has held that a penalty provided for under Community law, even where it is not a criminal penalty, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11, and Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15).
86. Moreover, according to the applicant, the greater the adverse effects for the individual, the more precise the terms in which the act of Community law must be framed. The Court has ruled to that effect in stating that the requirement of legal clarity is imperative in a sector in which any uncertainty may well lead to the application of particularly serious penalties (Case 32/79 *Commission v United Kingdom* [1980] ECR 2403, paragraph 46). In view of the particularly heavy fines which may be imposed under Article 15(2) of Regulation No 17, which is confirmed by the Commission's recent practice, the principle that penalties must have a proper legal basis justifies the application of a restrictive approach to the concept of perpetrator in the context of Article 81(1) EC. By the same token, the broad interpretation of Article 81(1) EC adopted by the Commission goes well beyond the mere gradual clarification, by means of judicial interpretation, of the rules governing criminal liability, since it is incompatible both with the generally recognised definition of the notion of 'agreement' and with the fundamental idea of autonomy which underlies the provisions in the field of competition.
87. The applicant submits that, in the present case, it was not the perpetrator of an infringement since it was neither a party to the cartel nor an association of undertakings. In reality, it merely colluded with AKZO, Atochem/Atofina and PC/Degussa, and such conduct does not constitute an infringement for the purposes of Article 81(1) EC. In the light of the national legislation referred to in paragraph 81 above, the distinction between the perpetrators of an infringement and the participants must be drawn on the basis of objective criteria. In order to be subject to punishment as the perpetrator of an infringement under Article 81(1) EC, it is necessary to belong to the categories of persons referred to in Article 81(1) EC and to commit the act referred to therein. By contrast, a person who, without satisfying the conditions relating to the constitution of an infringement for the purposes of Article 81(1) EC, knowingly facilitates, by either helping or assisting, the preparation or the commission of the infringement is merely complicit in the infringement and not subject to punishment.
88. The infringements specified in Articles 81 EC and 82 EC fall within a category known as 'special' offences since those articles restrict the circle of undertakings capable of being perpetrators of such infringements to those which satisfy specific requirements, namely, in the case of Article 81 EC, the undertakings which are contracting parties to the agreement restricting competition. That follows from the formulation 'agreements between undertakings' used in Article 81(1) EC and is confirmed by the caselaw (*Krupp Hoesch v Commission*, cited in paragraph 85 above, paragraph 86). Accordingly, only undertakings which are contracting parties to the agreement restricting competition are liable to a fine under Article 15(2) of Regulation No 17.
89. The applicant claims that the wording and purpose of Article 81(1) EC, which seeks to safeguard competition, make the status of perpetrator dependent on the question whether the undertaking in question is a competitor, hence exposed to competition and required to adopt certain competitive conduct. That provision applies only to undertakings which are subject to that specific obligation related to the objective of free competition. An agreement restricting competition can be concluded only

between undertakings which have the status, on the market concerned, of competitors, or sources of supply or demand.

90. Consequently, an undertaking may be classed as the perpetrator of an infringement only where the agreement restricting competition comes into being in the context of its own sector of activity. The restriction of the circle of perpetrators of the infringement is also clear from the caselaw relating to the requirement of 'autonomy' which underlies the Treaty competition rules, according to which each economic operator must determine autonomously the policy which it intends to follow on the common market. That requirement of autonomy thus strictly precludes any direct or indirect contact between operators, the purpose or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or which they contemplate adopting on the market (*Suiker Unie and Others v Commission*, cited in paragraph 24 above, paragraph 174, and *Case C199/92 P Hüls v Commission* [1999] ECR I4287, paragraph 160).

- The applicant's complicit and non-punishable status

91. The applicant maintains that it was not a party to the agreement restricting competition entered into by the organic peroxide producers and that, in consequence, it did not infringe the requirement of autonomy which underlies competition law. It neither contacted its own competitors nor influenced or sought to influence their conduct on the market. Given that its economic activity is unrelated to the organic peroxide market, which was the subject of the infringement, the applicant does not satisfy the conditions laid down in Article 81(1) EC relating to the constitution of the infringement and cannot be considered to be a perpetrator of the infringement. Similarly, the Commission's submission that the 1971 agreement, together with the agency agreements between the applicant, on the one hand, and AKZO, Atochem/Atofina and PC/Degussa, on the other, form an alleged 'general and single agreement' implying the applicant's participation, is erroneous. The preamble to the 1971 agreement refers exclusively to the organic peroxide producers as the parties to that agreement (recital 80 of the contested decision).

92. As it is, the applicant has never been a party

to that agreement (recital 339 of the contested decision), which formed the framework for the activities of the cartel between 1971 and 1999 (recitals 89, 90 and 316 of the contested decision); nor was it ever likely to become one since its economic activity is unrelated to the market concerned. However, by classing the applicant's participation in relation to certain aspects of the cartel as an infringement of Article 81(1) EC, the Commission fails to have regard to the wording of that provision. In addition, even supposing that the applicant had actually carried out the role which the Commission wrongly attributes to it (recital 334 of the contested decision), that role, in the absence of direct participation in the agreement which was restrictive of competition on the market concerned, is not capable of infringing Article 81(1) EC but is one of non-punishable complicity.

- The Commission's former and contrasting decision-making practice

93. In addition, the applicant submits that the Commission's approach in the contested decision is at odds with its former decision-making practice, as followed since 1983, in accordance with which consultancy firms, which are not present on the market concerned by the infringement, are not considered to be parties to the agreement restricting competition or, consequently, as perpetrators of an infringement under Article 81(1) EC. The opposite approach, which was defended by the Commission in Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article [81 EC] (IV/29.869 – Italian cast glass) (OJ 1980 L 383, p. 19; 'the Italian cast glass decision'), fails to have regard to the principle of *nullum crimen, nulla poena sine lege*, since the consultancy firm concerned was not a party to the agreement restricting competition, but merely complicit in that agreement. For that reason, the Commission was right to abandon that approach implicitly as of 1983. In Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article [81 EC] (IV/30.064 – Cast iron and steel rolls) (OJ 1983 L 317, p. 1; 'the cast iron and steel rolls decision'), the Commission classed only the undertakings which were present on the market concerned by the infringement and which were parties to the agreement restricting competition as perpetrators of an infringement for the purposes of Article 81(1) EC, and not the consultancy firm entrusted with managing, *inter alia*, the system for the exchange of information between the members of the cartel (recitals 10 et seq.). That approach was

also followed by the Commission in Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 – Polypropylene) (OJ 1986 L 230, p. 1; 'the polypropylene decision'), (see recital 66); Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81 EC] (IV/31.866, LdPE) (OJ 1989 L 74, p. 21; 'the LdPE decision') (see recitals 11 and 19); and Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article [81 EC] (IV/C/33.833 – Cartonboard) (OJ 1994 L 243, p. 1; 'the cartonboard decision') (see recitals 2, 27 et seq., 33, 37, 61 et seq., 134 and 162).

94. The Commission cannot claim that the applicant played a more important role, in the present case, than the consultancy firms in the decisions cited above. On the contrary, unlike the consultancy firms involved in the cases which gave rise to the cast iron and steel rolls decision and the cartonboard decision, the applicant almost never attended the meetings with an anticompetitive purpose (see paragraph 72 et seq. above). In addition, the other facts complained of in respect of the applicant lack relevance and have nothing to do with the cartel. Thus, the market information system based on official statistics did not infringe Article 81(1) EC (Case C179/99 P Eurofer v Commission [2003] ECR I10725, paragraph 44, and Case T136/94 Eurofer v Commission [1999] ECR II263, publication by extracts, paragraph 186) since it did not involve the transfer between competitors of information covered by business secrets. In the light of the Commission's settled decision-making practice, that applies a fortiori where a consultancy firm merely uses the sales figures sent to it without itself participating in the exchange as such of sensitive information (recital 12 to Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (IV/31.865 – PVC) (OJ 1994 L 239, p. 14); recital 11 to the LdPE decision; and recital 66 to the polypropylene decision). Finally, the auditing by independent expert accountants of the sales figures sent by the cartel members is not restrictive of competition for the purposes of Article 81(1) EC. Accordingly, the applicant's 'secretarial' activities, referred to above, which are related to the cartel, amount merely to acts of complicity.
- The absence of any control over the cartel on the part of the applicant and of a causal link between the applicant's activity and the restriction of competition
95. The applicant states that it had no control over the infringement. The decisions relating to the implementation, the management and the orientation of the cartel were taken exclusively by the three organic peroxide producers. Consequently, there is no causal link between the applicant's activity and the restriction of competition on the organic peroxide market. As an agent under the Swiss law of obligations, subject to the instructions of those producers and to an obligation of confidentiality, the applicant was merely a tool of the cartel members. However, even that is not sufficient reason for the applicant to be regarded as a cop perpetrator of the infringement on the same level as the organic peroxide producers. The applicant's lack of control over the infringement is also evident from the fact that it did not participate in the collusive activity proper, namely the exchange of information between the producers by fax, by mobile telephone and at meetings of the working group at which the applicant was not present (see paragraph 72 et seq. above).
96. In addition, the applicant claims that, contrary to the finding in recital 345 of the contested decision, as regards the services which it provided in the context of the cartel, such as the reimbursement of travel expenses, it could have been replaced at any moment by either the organic peroxide producers themselves or by another consultancy firm, without the functioning of the cartel being disrupted as it would have been if one of the producers had withdrawn.
97. In the light of all the foregoing, the applicant maintains that its relationship with the three organic peroxide producers involved in the cartel should be classed as one of non-punishable complicity. In that regard, it is irrelevant that the applicant had some knowledge of the cartel, since that knowledge is not sufficient to justify the conclusion that the applicant itself committed an infringement (Case C286/98 P Stora Kopparbergs Bergslags v Commission [2000] ECR I9925, paragraph 39, and the Opinion of Advocate General Mischo in that case, ECR I9928, paragraph 80).
- The erroneous classification of the applicant as an 'association of undertakings'
98. Finally, the applicant disputes its classification as an 'association of undertakings' in Article 1 and recitals 347, 373 and 464 of the contested decision. By adopting a broad interpretation of that concept, the Commission infringed

the prohibition against reasoning by analogy which is a corollary of the principle of *nullum crimen, nulla poena sine lege* laid down in Article 7(1) of the ECHR (see paragraph 83 above) and which also applies in the penalty-based administrative procedure laid down in Regulation No 17. A consultancy firm such as the applicant is not generally regarded as constituting an 'association of undertakings', that is to say, an organisational structure made up of member undertakings. Since it is not made up of member undertakings, the applicant is an independent undertaking controlled exclusively by natural persons as shareholders. Similarly, it is not linked to its clients by a structural link but by agency agreements which are purely contractual in nature.

99. The Commission's approach also runs counter to the meaning and purpose of the concept of 'association of undertakings'. The purpose of that concept is not to make it possible to penalise persons who are complicit in the conduct of cartel members, but merely to prevent undertakings from being able to circumvent the rules on competition simply by virtue of the form they adopt in order to coordinate their conduct on the market; and, consequently, to encompass also institutionalised forms of cooperation through a collective structure or a common body (Opinion of Advocate General Léger in Case C309/99 *Wouters and Others* [2002] ECR I1577, paragraph 62). By contrast, in the present case, the organic peroxide producers did not act through a collective structure or a common body, but coordinated their conduct directly by fax, by telephone and through the meetings of the working group. In that regard, the applicant merely provided administrative or logistical assistance, which does not mean that it represents the 'collective structure' or the 'common body' of those producers.

100. The applicant concludes from this that, having played a role of non-punishable complicity in relation to AKZO, Atochem/Atofina and PC/Degussa, it is not guilty of infringing Article 81(1) EC and that the fact that the Commission imputed to it such an infringement is contrary to the principle of *nullum crimen, nulla poena sine lege*.

(b) Arguments of the Commission

The factual context of the contested decision

101. As regards the relevant facts, the Commission essentially submits that the applicant does not question the fact that it stored in its safe,

inter alia, copies of the 1971 and 1975 agreements belonging to Atochem/Atofina and PC/Degussa. In addition, the Commission disputes the fact that the applicant classed the official market information system as a separate issue and maintains that that system must be placed back in the context of the cartel. The collecting, preparing and monitoring of figures, and the establishing of statistics, in the framework of that system, in full knowledge of the reasons why and of the anticompetitive aims, constituted – together with the attending of meetings, the proposing of quotas and the calculating of the deviations from the agreed quotas – a *condicio sine qua non* for the functioning of the cartel.

102. In addition, it is not disputed that the applicant attended five meetings in Zurich between 1994 and 1998, of which four were 'summit' meetings, as well as the meeting with the AKZO representatives in Amersfoort. The applicant also admitted to having reserved meeting rooms for three 'unofficial' meetings in Zurich between 1997 and 1998. In the light of those facts, which are not disputed, the applicant cannot minimise its participation by using words such as 'rarely' or 'almost never'. The applicant also does not dispute that it calculated the deviations from the agreed quotas until at least 1995 or 1996. It also acted as a clearing house in order to ensure that the anticompetitive meetings were not traceable from the accounts of the participating undertakings. Thus, the applicant itself ensured, when making reimbursements, that no mention was made thereof in the internal payment orders filled in and signed by Mr S. Finally, the Commission disputes the applicant's argument that the contested decision is based on statements made by AKZO to which no credibility should be attributed. In that regard, the Commission points out that the various statements regarding the relevant facts, even those whose credibility is necessarily tenuous, may be regarded as mutually supportive (*Mannesmannröhren-Werke v Commission*, cited in paragraph 77 above, paragraph 86).

Infringement of the principle of *nullum crimen, nulla poena sine lege*

103. The Commission denies that the contested decision infringes the principle of *nullum crimen, nulla poena sine lege*. It rejects the applicant's premisses that, under Community competition law, following the example of the criminal laws of a number of Member States, a formal distinc-

tion must be made between perpetration, on the one hand, and instigation or complicity, on the other. Neither the relevant primary nor secondary legislation makes such a distinction. In addition, as confirmed by Article 15(4) of Regulation No 17, the administrative procedure laid down in that regulation is not of a criminal-law nature (Case T83/91 *Tetra Pak v Commission* [1994] ECR II755, paragraph 235). Furthermore, it is not necessary to make such a formal distinction in Community competition law since, in determining the amount of the fine, account may be taken of the existence of different forms of participation and of the gravity of the contribution to the infringement (Opinion of Advocate General StixHackl in *Krupp Hoesch v Commission*, cited in paragraph 85 above, ECR I10941, footnote 15).

104. In the absence of a rule distinguishing the perpetrator from the participant, any person satisfying the conditions relating to the constitution of the infringement specified in Article 81(1) EC may be fined under Article 15(2) of Regulation No 17. The Commission adds that the imperative requirement, resulting from the principle of legal certainty, that Community legal acts be clear and that their application be sufficiently predictable for the persons concerned does not mean that it is never necessary to interpret those acts. The Eur. Court H. R. also recognises the need to strike a balance between, on the one hand, the obligation to be precise and the prohibition under Article 7(1) of the ECHR against reasoning by analogy in criminal law matters and, on the other, interpretation by the courts which is intended, in particular, to clarify the rules on criminal liability gradually, from one case to another (Eur. Court H. R., *S.W. v United Kingdom*, judgment of 22 November 1995, Series A no 335-B, § 36). Consequently, any person who satisfies the conditions laid down in Article 81(1) EC is a perpetrator of an infringement.
105. The Commission objects to the applicant's claim that it was not a party to the cartel and could not be one. The 1971 agreement, concluded between the organic peroxide producers, and the agency agreements, concluded between the applicant and those producers, should be regarded as essential elements of one and the same cartel. Given that the agency agreements served for the implementation of the 1971 agreement, they should be assessed together with that agreement as complementary and accessory agreements (recitals 339 and 340 of the contested decision; see also the Italian cast glass decision).
106. In that regard, it is not necessary, in the light of the wording of Article 81(1) EC, for the applicant, in its capacity as a consultancy firm, to be active on the market at issue as a competitor or on the side of supply or demand. Nor is it a requirement that the commercial autonomy of the undertakings concerned, and the competition between them, be restricted: rather, any restriction of competition within the common market is sufficient. That is consistent with the objective of Article 81 EC which, in accordance with Article 3(1)(g) EC, forms part of a system ensuring that competition in the internal market is not distorted (see also recital 9 to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)).
107. Article 81(1) EC is applicable not only to 'horizontal' agreements but also to 'vertical' agreements restrictive of competition, concluded between undertakings situated at different stages of the distribution chain (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299), or concluded between undertakings active on different markets. In that regard, the notion of agreement seeks merely to enable a distinction to be made between coordination which is prohibited, and parallel conduct which is permitted (see, also, Case T61/99 *Adriatica di Navigazione v Commission* [2003] ECR II5349, paragraph 89). Moreover, an infringement under Article 81(1) EC is in the nature of an *abstraktes Gefährungsdelikt* (an offence consisting in the creation of a state of affairs which is dangerous, where no specific danger need be statutorily defined) since that provision also concerns the restriction of competition, that is to say, the cartel poses a danger for competition, generally speaking and quite apart from the individual case.
108. Next, the Commission refers to caselaw to the effect that, where an undertaking merely attends meetings with an anticompetitive purpose and tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, it thereby engages in a passive form of participation in the infringement which is capable of rendering that undertaking liable in the context of a single agreement (*Aalborg Portland and Others v Commission*, cited in paragraph 23 above,

paragraphs 83 and 84; Case T7/89 Hercules Chemicals v Commission [1991] ECR II1711, paragraph 232; Case T12/89 Solvay v Commission [1992] ECR II907, paragraph 98; and Case T141/89 Tréfileurope v Commission [1995] ECR II791, paragraphs 85 and 86). That is a fortiori the case where an undertaking actively participates in a cartel, whether or not that undertaking is active on the market at issue.

109. In the present case, the applicant's role in the cartel was not one of passive complicity: it participated actively in that cartel as an organiser and by fostering its proper implementation (recital 343 of the contested decision). Through its activities, the applicant was of considerable assistance in keeping the cartel alive and in concealing its existence; thus it contributed considerably to the serious and long-term restriction of competition on the organic peroxide market. According to the Commission, those are both necessary and sufficient elements on which to base the applicant's liability under Article 81(1) EC. In that regard, it is irrelevant whether or not a participant in an infringement derives a profit from it (Krupp Hoesch v Commission, cited in paragraph 85 above), since Article 81(1) EC is not based on the criterion of enrichment but on that of jeopardising competition.

110. In any event, the applicant directly benefited from the success of the cartel (recital 342 of the contested decision). According to the Commission, another factor which is not decisive is whether or not a participant is in a position to exert a direct influence on the prices and quantities which indicate the parameters of competition (see, by analogy, Brugg Rohrsysteme v Commission, cited in paragraph 23 above, paragraph 61). Otherwise, the useful effect of the prohibition laid down in Article 81(1) EC would be frustrated, as it would be possible to circumvent that prohibition by engaging 'specialists in the provision of collusive services', who could be entrusted with organising the cartel, keeping it alive and concealing its existence.

111. The Commission therefore contends that the present plea should be rejected.

2. Findings of the Court

(a) Preliminary observations

112. It should be pointed out, first, that the applicant does not dispute as such the amount of the fine imposed on it in the contested decision. By the present plea, the applicant essen-

tially submits that, by holding it liable for an infringement of Article 81(1) EC and by imposing a fine on it, the Commission oversteps the limits of the decision-making power conferred on it under Article 15(2) of Regulation No 17 and infringes the principle of *nullum crimen, nulla poena sine lege* for the purposes of Article 7(1) of the ECHR. In that regard, according to the applicant, the Commission should have taken account of the fact that the applicant merely played a role of non-punishable complicity in the cartel, and cannot therefore be classed as an undertaking or association of undertakings which is the 'perpetrator' of an infringement, as referred to in Article 81(1) EC.

113. Next, it should be pointed out that the procedure before the Commission under Regulation 17 is merely administrative in nature (see, to that effect, Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraph 200; Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission [2000] ECR II491, paragraphs 717 and 718) and that, consequently, the general principles of Community law and, in particular, the principle of *nullum crimen, nulla poena sine lege*, as applicable to Community competition law (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I5425, paragraphs 215 to 223) need not necessarily have the same scope as when they apply to a situation covered by criminal law in the strict sense.

114. In order to determine whether it is necessary to draw a distinction, in the light of the prohibition laid down in Article 81(1) EC and the principle of *nullum crimen, nulla poena sine lege*, between an undertaking which is a 'perpetrator' of an infringement and an undertaking whose role is one of non-punishable 'complicity', it is necessary to make a literal, contextual and teleological interpretation of Article 81(1) EC (see, as regards the methodology, Case T251/00 Lagardère and Canal+ v Commission [2002] ECR II4825, paragraphs 72 et seq., and Joined Cases T22/02 and T23/02 Sumitomo Chemical and Sumika Fine Chemicals v Commission [2005] ECR II4065, paragraphs 41 et seq.).

(b) The literal interpretation of Article 81(1) EC

115. Article 81(1) EC states that '[t]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.
116. It is appropriate to consider the full implications of the term 'agreements between undertakings'.
117. In that regard, it should be noted, first, that the Community judicature has yet to give an explicit ruling on the question whether the notions of agreement and undertaking as used in Article 81(1) EC are conceived in accordance with a 'unitary' perspective, so as to cover any undertaking which has contributed to the committing of an infringement, irrespective of the economic sector in which that undertaking is normally active or – as the applicant submits – in accordance with a 'bipolar' perspective, so that a distinction is drawn between undertakings which 'perpetrate' an infringement and those whose role is one of 'complicity' in the infringement. It should also be noted that, according to the applicant, there is a lacuna in the wording of Article 81(1) EC, in that, in referring to the 'undertaking' which is the perpetrator of the infringement and to its participation in the 'agreement', that provision covers only certain undertakings with particular characteristics and refers only to certain forms of participation. Consequently, it is only on the assumption that the notions of undertaking and agreement fall to be so narrowly construed, and that the scope of Article 81(1) EC is accordingly so limited, that the principle of *nullum crimen, nulla poena sine lege* could be applied in such a way as to preclude a broad interpretation of the wording of that provision.
118. As regards the term 'agreement', it should be noted, first of all, that that term is merely another way of indicating coordinated/collusive conduct which is restrictive of competition, or a cartel in the wider sense, in which at least two distinct undertakings participate after expressing their joint intention of conducting themselves on the market in a specific way (see, to that effect, *Commission v Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 79 and 112; *Case T41/96 Bayer v Commission* [2000] ECR II3383, paragraphs 67 and 173; and *Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T60/02 OP and T-61/02 OP Dresdner Bank and Others v Commission* [2006] ECR II3567, paragraphs 53 to 55). Furthermore, in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct, albeit apparently unilateral, be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (*Case C74/04 P Commission v Volkswagen* [2006] ECR I6585, paragraph 37). That broad notion of agreement is confirmed by the fact that the prohibition laid down in Article 81(1) EC also covers concerted practice whereby there is a form of coordination between undertakings which does not lead to the conclusion of an agreement as such (see, to that effect, *Commission v Anic Partecipazioni*, cited in paragraph 65 above, paragraph 115 and the caselaw cited therein).
119. In the present case, the question arises whether, as claimed by the applicant, the cartel must concern a specific sector of activity, or even the same market for goods or services, so that only undertakings which are active in such a sector or market as competitors, or on the side of supply or demand, are capable of coordinating their conduct as undertakings which are the (co)perpetrators of an infringement.
120. In that regard, it should be noted that Article 81(1) EC applies not only to 'horizontal' agreements between undertakings exercising a commercial activity on the same market for the relevant goods and services, but also to 'vertical' agreements which entail the coordination of conduct between undertakings active at different stages of the production and/or distribution chain, and, consequently, operating on markets for different goods or services (see, in that regard, *Cour Consten and Grundig v Commission*, cited in paragraph 107 above, pp. 339 and 340; *Joined Cases C2/01 P and C3/01 P BAI and Commission v Bayer* [2004] ECR I23; *Case C551/03 P General Motors v Commission* [2006] ECR I3173; *Commission v Volkswagen*, cited in paragraph 118 above; order of the Court of Justice in *Case C552/03 P Unilever Bestfoods v Commission* [2006] ECR I9091; *Case T112/99 M6 and Others v Commission* [2001] ECR II2459, paragraph 72 et seq.; see, also, *Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices*

(OJ 1999 L 336, p. 21) and Commission notice (2000/C 291/01) – Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1)).

121. Similarly, it is apparent from the caselaw that, to fall within the ambit of the prohibition laid down in Article 81(1) EC it is sufficient that the agreement at issue restricts competition on the neighbouring and/or emerging markets on which at least one of the participating undertakings is not (yet) present (see, to that effect, Case T328/03 O2 (Germany) v Commission [2006] ECR II1231, paragraphs 65 et seq.; see also, as regards the application of Article 82 EC, Case C333/94 P Tetra Pak v Commission [1996] ECR I5951).

122. In that regard, the formulations used in the caselaw – the ‘joint intention of conducting themselves on the market in a specific way’ (Bayer v Commission, cited in paragraph 118 above, paragraph 67) or ‘expression of the joint intention of the parties to the agreement with regard to their conduct in the common market’ (ACF Chemiefarma v Commission, cited in paragraph 23 above, paragraph 112) – stress the element of ‘joint intention’ and do not require the relevant market on which the undertaking which is the ‘perpetrator’ of the restriction of competition is active to be exactly the same as the one on which that restriction is deemed to materialise. It follows that any restriction of competition within the common market may be classed as an ‘agreement between undertakings’ within the meaning of Article 81(1) EC. That conclusion is confirmed by the criterion of the existence of an agreement whose object is to restrict competition within the common market. That criterion implies that an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself.

123. It is clear from the foregoing that a literal interpretation of the term ‘agreements between undertakings’ does not require a restrictive interpretation of the notion of perpetrator of the infringement as argued by the applicant.

(c) The contextual and teleological interpretation of Article 81(1) EC

The requirement of restricted commercial autonomy

124. In support of its plea, the applicant also claims that the notion of perpetrator of the infringement necessarily implies that the latter restricts its own commercial autonomy vis-à-vis its competitors and thus contradicts the requirement of autonomy which underlies Article 81(1) EC, according to which each economic operator must determine autonomously the policy which it intends to follow on the common market.

125. As pointed out by the applicant by reference to the relevant caselaw, the requirement of autonomy was developed, inter alia, in the context of the caselaw on the distinction between prohibited concerted practices and parallel conduct which is permitted between competitors (see, to that effect, Commission v Anic Partecipazioni, cited in paragraph 65 above, paragraphs 115 to 117 and the caselaw cited therein, and Adriatica di Navigazione v Commission, cited in paragraph 107 above, paragraph 89). In addition, it is apparent from the distinction made by the caselaw between the existence of an agreement restricting competition for the purposes of Article 81(1) EC, on the one hand, and the presence of a simple unilateral measure adopted by an undertaking seeking to impose a certain form of conduct on other undertakings, on the other, that the restriction of competition must result from the manifestation, sufficiently established, of a concurrence of wills between the undertakings involved as regards the implementation of a particular line of conduct (see, to that effect, BAI and Commission v Bayer, cited in paragraph 120 above, paragraphs 96 to 102 and 141, and Commission v Volkswagen, cited in paragraph 118 above, paragraph 37). It follows that, contrary to the applicant’s submissions, the requirement of autonomy is not directly linked to the question – which is not relevant in the present case (see paragraphs 120 to 123 above) – whether or not the undertakings restricting their commercial freedom are active in the same sector of activity or on the same relevant market, but rather to the notions of ‘concerted practice’ and ‘agreement’, since those notions require proof of a sufficiently clear and precise manifestation of a concurrence of wills between the undertakings involved.

126. Furthermore, the applicant overestimates the importance of the criterion of restriction of commercial freedom in the context of assessing whether there is a restriction of competition for the purposes of Article 81(1) EC. As

- is apparent from settled caselaw, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the ambit of the prohibition laid down in Article 81(1) EC. For the purposes of applying that provision to a particular case, account must first be taken of the overall context in which that agreement or that decision was arrived at or produces its effects and, more specifically, of its objectives (Wouters and Others, cited in paragraph 99 above, paragraph 97, and Case C519/04 P MecaMedina and Majcen v Commission [2006] ECR I6991, paragraph 42). In that regard, the Court has made it clear that it was not necessary to hold, wholly abstractly and without drawing any distinctions, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 81(1) EC but that, in assessing the applicability of Article 81(1) to an agreement, account must be taken of the actual conditions in which it functioned, in particular the economic and legal context in which the undertakings operated, the products or services covered by the agreement and the actual structure and operating conditions of the market concerned (see M6 and Others v Commission, cited in paragraph 120 above, paragraph 76 and the caselaw cited therein).
127. As regards that contextual notion of restriction of competition, it is not therefore to be ruled out that an undertaking may participate in the implementation of such a restriction even if it does not restrict its own freedom of action on the market on which it is primarily active. Any other interpretation might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, as read in the light of Article 3(1)(g) EC, which is to ensure that competition in the internal market is not distorted, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked simply on the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise. It should be pointed out that, as submitted by the Commission, it is only by making all 'undertakings' within the meaning of Article 81(1) EC subject to liability that that useful effect can be fully guaranteed, since that makes it possible to penalise and to prevent the creation of new forms
- of collusion with the assistance of undertakings which are not active on the markets concerned by the restriction of competition, with the aim of circumventing the prohibition laid down in Article 81(1) EC.
128. The Court concludes from this that a reading of the term 'agreements between undertakings' in the light of the objectives pursued by Article 81(1) EC and by Article 3(1)(g) EC tends to confirm that the notions of a cartel and of an undertaking which is the perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.
- The conditions in which the participation of an undertaking in a cartel constitutes an infringement of Article 81(1) EC
129. Next, it is necessary to note the caselaw concerning the conditions which the participation of an undertaking in a cartel must satisfy for it to be possible to hold that undertaking liable as a coperpetrator of the infringement.
130. In that regard, it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel. In order to establish that an undertaking participated in a single agreement, made up of a series of unlawful acts over time, the Commission must prove that that undertaking intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk. In that regard, where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its discovery. It thereby engages in a passive form of participation in the infringement which is therefore capable of rendering that undertaking liable in the context of a single agreement (see, to that effect, Commission v Anic Partecipazioni, cited in paragraph 65 above, paragraphs 83 and 87;

Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraphs 81 to 84; and Dansk Rørindustri and Others v Commission, cited in point 113 above, paragraphs 142 and 143; see also Tréfileurope v Commission, cited in paragraph 108 above, paragraph 85 and the caselaw cited therein). It is also apparent from the caselaw that those principles apply *mutatis mutandis* in respect of meetings which are attended not only by competing producers, but also by their clients (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 Tate & Lyle and Others v Commission [2001] ECR II2035, paragraphs 62 to 66).

131. In addition, as regards the determination of the individual liability of an undertaking whose participation in the cartel is not as extensive or intense as that of the other undertakings, it is apparent from the caselaw that, although the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings, all of whom are co-perpetrators of the infringement but whose participation can take different forms – according to, *inter alia*, the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged – the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to rule out its liability for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anticompetitive object or effect (Commission v Anic Partecipazioni, cited in paragraph 65 above, paragraphs 78 to 80).

132. Accordingly, the fact that an undertaking did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate, is not material to the establishment of an infringement on its part. Although the limited importance, as the case may be, of the participation of the undertaking concerned cannot therefore call into question its individual liability for the infringement as a whole, it none the less has an influence on the assessment of the extent of that liability and thus on the severity of the penalty (see, to that effect, Commission v Anic Partecipazioni, cited in paragraph 65 above, paragraph 90; Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraph 86; and Dansk Rørindustri and Others v Commission, cited in paragraph 113 above, paragraph 145).

133. It is clear from the above considerations that, as regards the relationship between competitors on the same relevant market and the relationship between such competitors and their clients, the caselaw recognises the joint liability of the undertakings which are copерpetrators of an infringement under Article 81(1) EC and/or which have played an accessory role in such an infringement, in so far as it has been held that the objective condition for the attribution of various anticompetitive acts constituting the cartel as a whole to the undertaking concerned is satisfied where that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role, for example by tacitly approving the cartel and by failing to report it to the administrative authorities, since the potentially limited importance of that contribution may be taken into consideration for the purposes of determining the level of the fine.

134. In addition, the attribution of the infringement as a whole to the participating undertaking depends on the manifestation of its own intention, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel. That subjective condition is inherent in the criteria relating to the tacit approval of the cartel and to the undertaking having publicly distanced itself from the content of the cartel (Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraph 84; Dansk Rørindustri and Others v Commission, cited in paragraph 113 above, paragraph 143; and Tréfileurope v Commission, cited in paragraph 108 above, paragraph 85), in that those criteria imply a presumption that the undertaking concerned continues to endorse the objectives of the cartel and to support its implementation. That condition also constitutes the justification for holding the undertaking concerned to be liable together with the others, since it intended to contribute through its own conduct to the common objectives pursued by the participants as a whole and was aware of the anticompetitive conduct of the other participants, or could reasonably have foreseen that conduct, and was ready to accept the attendant risk (Commission v Anic Partecipazioni, cited in paragraph 65 above, paragraphs 83 and 87, and Aalborg Portland and Others v Commission, cited in paragraph 23 above, paragraph 83).

135. If the attribution of the infringement as a whole to the undertaking concerned is to be in line with the requirements of the principle of indi-

vidual liability, the conditions set out in paragraphs 133 and 134 above must be complied with (see, to that effect, *Commission v Anic Partecipazioni*, cited in paragraph 65 above, paragraph 84).

136. In the light of the considerations set out in paragraphs 115 to 127 above, the Court considers that those principles apply *mutatis mutandis* to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti-competitive nature of the conduct at issue and enable it to make a significant contribution to the committing of the infringement. In those circumstances, the applicant's argument that a consultancy firm cannot be regarded as a cop perpetrator of an infringement – because it does not carry out an economic activity on the relevant market affected by the restriction of competition and because its contribution to the cartel is merely subordinate – cannot be upheld.

The interpretation of Article 81(1) EC in the light of the principle of *nullum crimen, nulla poena sine lege*

137. However, the applicant submits, in essence, that such a 'unitary' conception of the perpetrator of an infringement under Article 81(1) EC is incompatible with the requirements flowing from the principle of *nullum crimen, nulla poena sine lege* under Article 7(1) of the ECHR, as well as with those flowing from the rules common to the legal systems of the Member States, concerning the distinction between perpetration and complicity, which are applicable to both criminal law and competition law.
138. In that regard, the Court notes, first, as was pointed out in paragraph 45 above, that fundamental rights are an integral part of the general principles of law whose observance the Community judicature ensures by taking account, in particular, of the ECHR as a source of inspiration.
139. Next, the Community judicature has applied the principle of *nullum crimen, nulla poena sine lege* as a general principle of Community law in cases concerning competition law, in the light of the caselaw of the Eur. Court H. R. (see *Dansk Rørindustri and Others v Commission*, cited in paragraph 113 above, paragraphs 215 et seq., and *Case T43/02 Jungbunzlauer v Commission* [2006] ECR II3435, paragraphs 71 et seq. and the caselaw cited therein). Generally speaking, that principle requires, *inter alia*, that

any Community legislation, in particular where it imposes or permits the imposition of penalties, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly. By the same token, that principle must be observed in regard both to provisions of a criminal-law nature and to specific administrative instruments imposing or permitting the imposition of administrative penalties (see, to that effect, *Maizena*, cited in paragraph 85 above, paragraphs 14 and 15, and *X*, cited in paragraph 84 above, paragraph 25), such as penalties imposed under Regulation No 17.

140. In addition, it is apparent from the consistent interpretation which the Eur. Court H. R. has given to Article 7(1) of the ECHR that the principle of *nullum crimen, nulla poena sine lege*, which is laid down therein, requires, *inter alia*, that criminal law not be applied broadly, in particular by analogy, to the detriment of the defendant. It follows that an infringement must be clearly defined by the law, a condition which is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation – what acts or omissions would make him criminally liable. In that regard, the Eur. Court H. R. has stated that the concept of law used in Article 7 of the ECHR is the same as that to be found in other articles thereof and that it encompasses both law deriving from legislation and that deriving from case-law, and implies qualitative conditions, in particular those of accessibility and foreseeability (see *Eur. Court H. R. Kokkinakis v Greece*, judgment of 25 May 1993, Series A no. 260-A, § 40, 41 and 52; *S.W. v United Kingdom*, cited in paragraph 104 above, § 35; *Cantoni v France*, judgment of 15 November 1996, Reports of Judgments and Decisions, 1996-V, p. 1627, § 29; *Başkaya and Okçuoğlu v Turkey*, judgment of 8 July 1999, Reports of Judgments and Decisions, 1999-IV, p. 308, § 36; *Coëme and Others v Belgium*, judgment of 22 June 2000, Reports of Judgments and Decisions, 2000VII, p. 1, § 145; *E.K. v Turkey*, no. 28496/95, § 51, 7 February 2002; see also *Dansk Rørindustri and Others v Commission*, cited in paragraph 113 above, paragraph 216).
141. In the light of that caselaw, the principle of *nullum crimen, nulla poena sine lege* cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability through interpretation by the courts (*Dansk Rørindustri*

and Others v Commission, cited in paragraph 113 above, paragraph 217). According to the caselaw of the Eur. Court H. R., however clearly a legal provision is drafted, including a provision of criminal law, there is inevitably a need for interpretation by the courts and it will always be necessary to elucidate points of doubt and to adapt the wording to changing circumstances. Moreover, according to the Eur. Court H. R., it is well established in the legal traditions of the contracting parties to the ECHR that caselaw, as a source of law, necessarily contributes to the progressive development of the criminal law (*S.W. v United Kingdom*, cited in paragraph 104 above, § 36). In that regard, the Eur. Court H. R. has recognised that even the wording of many statutes is not absolutely precise and that, because of the need to avoid excessive rigidity and to keep pace with changing circumstances, much legislation is inevitably couched in terms which, to a greater or lesser degree, are vague and their interpretation and application depend on practice (*Kokinakis v Greece*, cited in paragraph 140 above, § 52, and *E.K. v Turkey*, cited in paragraph 140 above, § 52, and *Jungbunzlauer v Commission*, cited in paragraph 139 above, paragraph 80). Thus, in addition to the actual wording of the legislation, the Eur. Court H. R. also takes account of the settled and published case-law when deciding whether the concepts used are definite or not (*G. v France*, judgment of 27 September 1995, Series A no. 325-B, § 25).

142. Nevertheless, although the principle of *nulum crimen, nulla poena sine lege* in principle enables the rules governing criminal liability to be gradually clarified through interpretation by the courts, it may preclude the retroactive application of a new interpretation of a rule establishing an offence. That is particularly true if the result of that interpretation was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation attributed to the provision in the case-law at the material time. Furthermore, the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it applies, and does not preclude the person concerned from taking appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in the case of persons engaged in a professional activity, who are used to having to proceed with

a high degree of caution when pursuing their occupation. They can thus be expected to take special care in assessing the risks that such an activity entails (*Dansk Rørindustri and Others v Commission*, cited in paragraph 113 above, paragraphs 217 to 219, referring to *Cantoni v France*, cited in paragraph 140 above, paragraph 35).

143. It is apparent from the above considerations that the interpretation of the full implications of Article 81(1) EC and, in particular, of the terms 'agreement' and 'undertaking', according to which any undertaking which has contributed to the implementation of the cartel falls within its scope even if that undertaking is not active on the relevant market affected by the restriction of competition, must have been sufficiently foreseeable, at the time of the perpetration of the alleged misconduct, in the light of the wording of that provision, as interpreted by the caselaw.

144. In that regard, it should be pointed out that the terms 'agreement' and 'undertaking', within the meaning of Article 81(1) EC, constitute legal concepts which have not been delimited, the full implications of which fall ultimately to be determined by the Community judicature, and the application of which by the administration is subject to full judicial review. In those circumstances, the gradual clarification of the notions of 'agreement' and 'undertaking' by the Community judicature is of decisive importance in assessing whether their application in practice is definite and foreseeable.

145. First, the Court considers that, in the light of the settled caselaw referred to in paragraphs 115 to 128 above, the term 'agreements between undertakings' in Article 81(1) EC constitutes a sufficiently precise expression of the notions of cartel and perpetrator of the infringement, as described in paragraph 128 above – in that that term covers any undertaking which acts in a collusive manner, irrespective of the sector of activity or of the relevant market on which it is active – to ensure that such an undertaking cannot be unaware, or even fail to recognise, that it is exposing itself to legal action if it adopts such conduct.

146. Second, as has been pointed out in paragraphs 129 to 135 above, settled caselaw exists in relation to the shared liability under Article 81(1) EC of undertakings which are coperpetrators of an infringement and/or which are complicit in the overall infringement, to which the anti-

competitive conduct of the other participating undertakings is also attributed. That caselaw, which is also based on a 'unitary' conception of the notions of cartel and perpetrator of an infringement, states clearly and precisely the objective and subjective conditions which must be satisfied if it is to be possible to hold an undertaking liable in respect of an infringement committed by a number of coperpetrators or complicit parties. In that regard, the mere fact that the Court of Justice did not define those principles of accountability until 1999 (*Commission v Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 78 et seq.) cannot, in itself, detract from their foreseeability at the time material to the applicant (between 1993 and 1999), since the elements determining individual liability already emerged, with sufficient precision, from the broad conception of cartel and undertaking for the purposes of Article 81(1) EC and the earlier caselaw of the Court of First Instance (see *Tréfileurope v Commission*, cited in paragraph 108 above, paragraph 85 and the caselaw cited therein). Furthermore, the fact that the Community judicature has not given a ruling on the specific question whether a consultancy firm which is not active on the same market as the main participants in the cartel can be attributed a share of the liability for an infringement is not sufficient to support the conclusion that an administrative and jurisprudential practice establishing that such an undertaking shares liability – or, at the very least, that such shared liability is possible – is not reasonably foreseeable by professionals in the light of both the wording of Article 81(1) EC and the caselaw cited above.

147. On the contrary, as regards the penalty-based administrative practice in that connection, it should be pointed out that, as the applicant itself admits, the Commission had already decided in 1980 to attribute an infringement of Article 81(1) EC to a consultancy firm which had actively participated, in a manner comparable to the way in which the applicant participated in the present case, in the implementation of the cartel in question (the Italian cast glass decision; see, in particular, point II. A. 4. at the end of the recitals). In that regard, the fact that the Commission no longer adopted that approach in a number of subsequent decisions does not justify the conclusion that such an interpretation of the full implications of Article 81(1) EC is not reasonably foreseeable. That is especially true in the case of a consultancy firm, which must be presumed, given the Commis-

sion's decision-making practice since 1980, to manage its economic activities with a very high degree of caution and to seek informed advice, in particular from legal experts, in order to assess the risks associated with its conduct (see, to that effect, *Dansk Rørindustri and Others v Commission*, cited in paragraph 113 above, paragraph 219).

148. In that context, the applicant cannot legitimately claim that such an interpretation is contrary to the rules common to the Member States on the subject of individual liability, which draw a distinction between the perpetrators of an infringement and those whose role is one of complicity. The rules cited by the applicant (see paragraph 81 above) concern only national criminal law, and the applicant does not explain whether – and, if so, to what extent – those rules also apply, in the respective national legal systems, in the context of penalty-based administrative procedures and, in particular, to procedures designed to punish anticompetitive practices.

149. Moreover, it is not apparent from either the caselaw of the Eur. Court H. R. or the decision-making practice of the former European Human Rights Commission that the principle of *nullum crimen, nulla poena sine lege* requires a distinction to be drawn, both in criminal proceedings and in the context of penalty-based administrative procedures, between the perpetrator of the infringement and a party whose role is one of complicity, so that the latter is not punishable where the relevant legal rule does not expressly provide for a penalty to be imposed in such a case. That means, on the contrary, that for that principle to be complied with, the conduct of the person to whom the misconduct is imputed must be covered by the definition of perpetrator of the offence in question, such that it can be inferred from the wording of the provision at issue, where necessary in the light of the interpretation given in the caselaw. If that definition is sufficiently broad to cover both the conduct of the main perpetrators of the infringement and that of the parties whose role is one of complicity, there can be no infringement of the principle of *nullum crimen, nulla poena sine lege* (see, for the reasoning a contrario, Eur. Court H. R. *E.K. v Turkey*, cited in paragraph 140 above, § 55 and 56, and Eur. Commission H. R., decision on admissibility *L.G. R. v Sweden*, of 15 January 1997, application no 27032/95, p. 12).

150. In the light of all the above considerations, the

Court concludes that any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community caselaw, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

(d) The applicant's classification as a co-perpetrator of the cartel

151. Next, it must be determined whether, in the present case, the objective and subjective conditions for establishing that the applicant shares liability, in that the anticompetitive conduct of the other participating undertakings can be attributed to it, are satisfied. In that regard, it should be pointed out, first of all, that in order to be able to attribute the whole of an infringement to an undertaking, that undertaking must have contributed, even in a subordinate manner, to the restriction of competition at issue, and the subjective condition relating to the manifestation of that undertaking's intention in that regard must be met.
152. Independently of the question whether the applicant was a 'contracting' party to the 1971 and 1975 agreements and whether the agency agreements concluded with the three organic peroxide producers were an integral part of the cartel in the wider sense, the Court notes that it has become apparent that the applicant actively contributed to the implementation of that cartel between 1993 and 1999.
153. First, it is common ground that the applicant stored and concealed on its premises the originals of the 1971 and 1975 agreements of Atochem/Atofina and PC/Degussa, and in the latter case, until as late as 2001 or 2002 (recitals 63 and 83 of the contested decision). Second, the applicant admits to having calculated and communicated to the members of the cartel the deviations of the respective market shares from the agreed quotas, until 1995 or 1996 at the very least, an activity which was expressly provided for in the 1971 and 1975 agreements, and to having stored secret documents on its premises, pursuant thereto. Third, as regards the meetings between the organic peroxide producers which had some anticompetitive content, the applicant admitted to having organised and partly attended five of those meetings, as well as the meeting held in Amersfoort on 19 October 1998 to prepare a proposal regarding the allocation of quotas among the producers. Fourth, it is common ground that the applicant regularly reimbursed the travel expenses which the representatives of the organic peroxide producers incurred in attending meetings with an anticompetitive purpose, and it did so with the manifest intention of covering up any traces of the implementation of the cartel in the books of those producers, or of not leaving any such traces (see paragraphs 63 and 102 above).
154. Without there being any need to assess in detail the points of dispute between the parties regarding the actual extent of the applicant's participation in the cartel, the Court concludes from the information set out in paragraph 153 above that the applicant actively contributed to the implementation of the cartel and that, contrary to its submissions, there was a sufficiently definite and decisive causal link between that activity and the restriction of competition on the organic peroxide market. At the hearing, the applicant did not dispute the existence of that causal link but merely challenged the legal classification of its contribution as an act of a perpetrator of the infringement, maintaining that its contribution could be classed only as an act of complicity which could have been carried out by any consultancy firm.
155. Accordingly, it is not relevant that the applicant was not formally and directly a contracting party to the 1971 and 1975 agreements. First, for the purposes of applying Article 81(1) EC, the question whether or not there is an agreement which is in writing, or otherwise explicit, between the participating undertakings is not decisive so long as they act in collusion (see paragraphs 115 to 123 above). Second, the applicant itself acknowledges that, by tacit agreement with the organic peroxide producers, it undertook – in its own name and on its own account – some of Fides' activities as specifically provided for under those agreements, such as the calculation and communication of the deviations from the agreed quotas. It should be added that, given that the Commission merely imposed on the applicant a fine of a minimal

amount of EUR 1 000 and that that amount as such has not been called into question by the applicant, the Court is not required to give a ruling on the exact extent of the applicant's participation for the purposes of its effect on the lawfulness of the level of the fine imposed.

156. Moreover, in the light of all the objective circumstances characterising the applicant's participation, the Court finds that the applicant acted in full knowledge of the facts and intentionally when it made its professional expertise and infrastructure available to the cartel, in order to benefit from it, at least indirectly, in the course of implementing the individual agency agreements which linked it to the three organic peroxide producers. Quite apart from the question whether the applicant thus also knowingly infringed the rules of professional ethics by which it is bound as a commercial consultant, it clearly could not have been unaware, or indeed it knew, that the objective of the cartel to which it contributed was anticompetitive and unlawful, that objective having become apparent, *inter alia*, in the context of the 1971 and 1975 agreements which the applicant stored on its premises, from the meetings which were held with an anticompetitive aim and from the exchange of sensitive information in which the applicant actively participated, at least until 1995 or 1996.
157. In the light of all of the above considerations, the Court finds that, in so far as the contested decision establishes that the applicant shares liability for the infringement committed primarily by AKZO, Atochem/Atofina and PC/De-gussa, that decision does not exceed the limits of the prohibition laid down in Article 81(1) EC and that, consequently, by imposing on the applicant a fine of EUR 1 000, the Commission did not exceed the powers conferred on it under Article 15(2) of Regulation No 17.
158. In those circumstances, the Court considers it unnecessary to give a ruling on the question whether the Commission could also have legitimately based the applicant's liability on the notion of a decision by an association of undertakings. As the Commission acknowledged at the hearing, the present case involves a purely alternative or secondary assessment, which can neither confirm nor invalidate the legal legitimacy of the Commission's main approach, as based on the notions of 'cartel' and 'undertaking'. By the same token, it is unnecessary to assess whether the Commission correctly examined and evaluated certain evidence

against the applicant which is not decisive for the outcome of the present dispute. In that regard, the applicant's arguments, as set out in paragraphs 77 to 79 above, seek merely to support the wellfoundedness of the present plea and do not constitute a separate plea.

159. Consequently, the second plea must be rejected as unfounded.

D. The third plea, alleging infringement of the principle of the protection of legitimate expectations

1. Arguments of the parties

160. The applicant maintains that, in view of the established decision-making practice of the Commission since 1983, it could legitimately expect that the Commission would assess its conduct in the same way as it assessed comparable conduct on the part of other consultancy firms in previous cases. Accordingly, the contested decision runs counter to the principle of protection of legitimate interests. According to the applicant, although the decisions of the Commission are binding only on those to whom they are addressed, they none the less constitute – particularly where they establish consistent decision-making practice – legal acts which are relevant to comparable situations. The possibility for the individual to rely on the continuance of a certain decision-making practice merits protection *a fortiori* because the application of Article 81 EC is dependent on a great number of undefined legal terms, the practical implications of which it is vital to specify through decision-making practice.
161. The applicant submits that the principle of protection of legitimate expectations, as recognised in the caselaw (Case 112/77 *Töpfer and Others* [1978] ECR 1019, paragraph 19, and Case T266/97 *Vlaamse Televisie Maatschappij v Commission* [1999] ECR II2329, paragraph 71) precludes the Commission from abandoning, without warning, its own decision-making practice in relation to Article 81 EC, or from retroactively classifying as an infringement, and imposing a fine for, conduct which has hitherto been regarded as falling outside the scope of that provision. Since 1983, contrary to its approach in the Italian case glass decision, the Commission has no longer regarded as an infringement assistance provided by consultancy firms which are not party to the agreement restricting competition (see, *inter alia*, the cast iron and steel rolls decision of 1983;

the polypropylene decision of 1986; the LdPE decision of 1988; and the cartonboard decision of 1994). Thus, at the time of its establishment at the end of 1993, the applicant could legitimately expect that the assistance provided to the three organic peroxide producers was also not classed as an infringement of Article 81(1) EC. According to the applicant, its activity did not go beyond that of other consultancy firms in the cases which gave rise to the cast iron and steel rolls decision or the cartonboard decision. Consequently, the Commission should not have held the applicant liable for an infringement of Article 81(1) EC or imposed a fine on it.

162. The Commission contends that the present plea should be rejected.

2. Findings of the Court

163. The Court considers that, in the light of the recognition under Community competition law of the principle that a consultancy firm which has participated in a cartel shares liability for the infringement, the principle of the protection of legitimate expectations cannot stand in the way of the reorientation of the Commission's decision-making practice in the present case. As is apparent from paragraphs 112 to 150 above, that reorientation is based on a correct interpretation of the full implications of the prohibition laid down in Article 81(1) EC. Since the interpretation of the undefined legal concept of 'agreements between undertakings' ultimately falls to be determined by the Community judicature, the Commission does not have any leeway enabling it, where relevant, to forgo bringing an action against a consultancy firm which satisfies the criteria for shared liability. On the contrary, by virtue of its duty under Article 85(1) EC, the Commission is required to ensure the application of the principles laid down in Article 81 EC and to investigate, on its own initiative, all cases of suspected infringement of those principles, as interpreted by the Community judicature. Accordingly, since – notwithstanding the Italian cast glass decision – the Commission's decision-making practice prior to the contested decision could appear to conflict with the above interpretation of Article 81(1) EC, that practice was not capable of giving rise to legitimate expectations on the part of the undertakings concerned.

164. Furthermore, as is apparent from paragraphs 147 and 148 above, the current reorientation of the Commission's decision-making practice was even more foreseeable for the applicant

given the existence of a precedent, namely the Italian cast glass decision of 1980. Also, as is apparent from paragraph 163 above, the Commission's post-1980 decision-making practice could not reasonably be construed as a definitive abandonment of the initial approach followed in the Italian case glass decision. Furthermore, although, in the polypropylene decision of 1986, the Commission did not class Fides Trust as a perpetrator of the infringement, it none the less clearly censured the information exchange system established and managed by that company as being incompatible with Article 81(1) EC (the polypropylene decision, recital 106 and Article 2; see also the cartonboard decision, recital 134). In those circumstances, the Commission's post-1980 decision-making practice – which does not censure or penalise the consultancy firms involved, but goes no further, that is to say, it does not disavow, as a matter of law, the approach initially followed in the Italian cast glass decision – was even less capable of giving rise to a legitimate expectation on the part of the applicant that the Commission would in future abstain from bringing actions against consultancy firms where they participate in a cartel.

165. The present plea must therefore be rejected as unfounded.

E. The fourth plea raised in the alternative, alleging infringement of the principle of legal certainty and of the principle of *nulla poena sine lege certa*

1. Arguments of the parties

166. The applicant submits that, in so far as it is concerned, the Commission's legal analysis is so vague and contradictory that it infringes the principle of legal certainty and the principle of *nulla poena sine lege certa*. The Commission refrains from indicating with the necessary clarity the parameters and limits of unlawful and punishable conduct on the part of a consultancy firm such as the applicant, and thus deprives the applicant of the legal certainty required in a society governed by the rule of law.

167. The applicant points out that the principle of *nulla poena sine lege certa*, as laid down in Article 7(1) of the ECHR and recognised as a general principle of Community law, is a corollary of the principle of legal certainty (X, cited in paragraph 84 above, paragraph 25). The latter is a fundamental principle of Community law (Case 74/74 CNTA v Commission [1975]

ECR 533, paragraph 44; Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 10; and Case 70/83 *Kloppenborg* [1984] ECR 1075, paragraph 11), which requires, in particular, that Community legislation must be certain and its application foreseeable by those subject to it. The applicant states that the decisions of the Commission adopted under Article 81 EC, which may impose very heavy fines, must be particularly precise and certain (Case 32/79 *Commission v United Kingdom* [1980] ECR 2403, paragraph 46), so that the undertakings concerned can review and determine their conduct in the light of and in accordance with criteria which are sufficiently clear and concrete in terms of indicating the unlawful nature of certain conduct.

168. Contrary to those requirements, in the contested decision the Commission devoted almost five pages to setting out the reasons why it considers that the applicant infringed Article 81(1) EC (recitals 331 et seq. of that decision). Nevertheless, that reasoning does not clearly show which aspects of the applicant's conduct actually fall within the scope of Article 81(1) EC, and which do not (see, inter alia, recitals 339, 343, 344 and 349 of the contested decision). The applicant adds that the Commission mistakenly alleges that it gave legal advice (recital 339 of the contested decision). Even if that were to be established, the fact of dispensing legal advice cannot be regarded as an infringement of the competition rules. In any event, the Commission cannot maintain that legal advice and supportive action given by the applicant, as described in the contested decision, collectively constitute an infringement of Article 81(1) EC when such acts do not amount to an infringement when considered individually. Otherwise, it would be impossible to predict at what precise moment a lawful act slides into illegality. Next, the applicant criticises the Commission's mode of expression in recitals 332 et seq. of the contested decision as vague, incomprehensible and contradictory as regards the applicant's alleged participation in the cartel. As regards the Commission's contention that the present plea is not autonomous, the applicant objects that, even supposing that it were guilty of an infringement of competition law, the grounds of the contested decision do not show, with the requisite clarity and precision, which of the specific acts imputed to it constitute an infringement of Article 81(1) EC.
169. In the absence of a clear answer to the question why and how the applicant infringed Arti-

cle 81(1) EC, the contested decision should be annulled for infringement of the principle of *nulla poena sine lege certa* and the principle of legal certainty.

170. The Commission contends that the present plea should be rejected in so far as it merely constitutes a repetition of the second plea.

2. *Findings of the Court*

171. It should be noted, first of all, that, in the context of the present plea, the applicant essentially raises the same arguments as in the context of the second and third pleas. It is thus sufficient to refer to the considerations set out in paragraphs 112 to 159 above in order to conclude that the contested decision contains sufficient information establishing the active and intentional participation of the applicant in the cartel, thus making it possible for the applicant to be held liable for an infringement of Article 81(1) EC, independently of the real extent of that participation in detail.

172. Even supposing that the present plea had also to be understood as alleging an infringement of the duty to give reasons under Article 253 EC, it is also apparent from those considerations that the contested decision contains all the relevant information for the purposes of making it possible for the applicant to dispute its wellfoundedness and for the Court to review the lawfulness of the decision in accordance with the caselaw established in that regard (see Case T228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II4665, paragraph 138 and the caselaw cited therein).

173. Accordingly, the present plea must also be rejected as unfounded.

F. **The fifth plea, alleging that the second paragraph of Article 3 of the contested decision infringes the principle of legal certainty and the principle of *nulla poena sine lege certa***

1. *Arguments of the parties*

174. According to the applicant, in the absence of a clear and precise indication of the unlawful acts imputed to it, both the legal analysis and the second paragraph of Article 3 of the contested decision are contrary to the principle of legal certainty and the principle of *nulla poena sine lege certa*. The grounds of the contested decision do not show, in a precise manner, the specific acts by virtue of which the applicant is deemed to have infringed Article 81(1) EC.

Consequently, it is also impossible for the applicant to know which of its acts are concerned by the obligation laid down in Article 3 of that decision. It follows that Article 3 infringes the 'requirement of certainty and predictability' of Community legislation, which must be observed all the more strictly in the case of rules liable to entail financial consequences, so that those concerned may know precisely the extent of the obligations thereby imposed on them (Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraphs 17 and 18; Case 325/85 *Ireland v Commission* [1987] ECR 5041, paragraph 18; Case 326/85 *Netherlands v Commission* [1987] ECR 5091, paragraph 24; Joined Cases 92/87 and 93/87 *Commission v France and United Kingdom* [1989] ECR 405, paragraph 22; Case C30/89 *Commission v France* [1990] ECR I691, paragraph 23; Case C354/95 *National Farmers' Union and Others* [1997] ECR I4559, paragraph 57; and Case C177/96 *Banque Indosuez and Others* [1997] ECR I5659, paragraph 27).

175. The lack of precision in the legal analysis and in the obligation laid down in Article 3 of the contested decision is exacerbated by the fact that, under that article, the applicant is also required to refrain from any agreement or any concerted practice with a 'similar' object or effect, and any infringement of that article may lead to the imposition of a fine, which may be very heavy by virtue of Article 15(2) of Regulation No 17. Moreover, the Commission admitted that it had addressed a 'new aspect' of law (recital 454 of the contested decision). That being so, the precision of the requirement to refrain from repeating the infringement should have to satisfy particularly strict requirements in order to enable interested undertakings to assess the true and full implications of the prohibition laid down in Article 81 EC. The ensuing legal uncertainty poses a threat to the commercial activity of consultancy firms such as the applicant, as regards the drawing up of market statistics and administering federations.

176. As regards the Commission's contention that the present plea is directed against the requirement that the infringement be brought to an end (first paragraph of Article 3 of the contested decision), the applicant states that its action concerns only the requirement to refrain from repeating the infringement (second paragraph of Article 3 of the contested decision). The first requirement does not affect it adversely since the infringement had already ceased by the end of 1999 or the beginning of 2000 (recital

91 of the contested decision).

177. The applicant maintains that Article 3 of the contested decision should therefore be annulled in so far as it concerns the applicant.

178. The Commission contends that the present plea is unfounded and should be rejected.

2. Findings of the Court

179. The Court considers that the present plea constitutes merely a reformulation of the fourth plea – which also alleges infringement of the principle of legal certainty and of the principle of *nulla poena sine lege certa* – and cannot therefore be assessed differently.

180. In so far as the present plea refers to the second paragraph of Article 3 of the contested decision, it is sufficient to point out that the Commission is empowered, on the basis of Article 3(1) of Regulation No 17, to impose on the addressees of a decision taken pursuant to Article 81(1) EC a binding instruction to put an end to the unlawful conduct and to refrain in future from practices which may have the same object or effect, or a similar object or effect (*Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 39 above, paragraphs 1252 and 1253).

181. Accordingly, the present plea must also be rejected as unfounded.

182. It follows that the action must be dismissed as unfounded in its entirety.

Costs

183. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds, THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition) hereby:

1. **Dismisses the action;**
2. **Orders AC-Treuhand AG to pay the costs.**

Jaeger Azizi Czúcz

Delivered in open court in Luxembourg on 8 July 2008.

E. Coulon, *Registrar*
M. Jaeger, *President*

NO NEED TO JUSTIFY ACCESS TO DOCUMENTS OF THE INSTITUTIONS – DENIAL OF ACCESS FOR THE PURPOSES OF THE PROTECTION OF PRIVACY AND PERSONAL DATA – PRIVATE LIFE – CONCEPT OF PERSONAL DATA – CONCEPT OF PROCESSING PERSONAL DATA – RIGHTS OF THE DATA SUBJECT – BREACH OF ARTICLE 8 OF ECHR – ‘NECESSARY IN A DEMOCRATIC SOCIETY’ – PUBLIC AND PRIVATE INTERESTS

CASE T-194/04 THE BAVARIAN LAGER CO. LTD v COMMISSION OF THE EUROPEAN COMMUNITIES

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to proceedings for failure to fulfil obligations – Decision refusing access – Protection of physical persons in relation to processing of personal data – Regulation (EC) No 45/2001 – Concept of private life)

KEYWORDS

1. *Actions for annulment – Jurisdiction of the Community judicature (Art. 230 EC)*
2. *Actions for annulment – Actionable measures (EC Treaty, Art. 169 (now Art. 226 EC))*
3. *Approximation of laws – Protection of physical persons in relation to processing of personal data – Processing of such data by Community institutions and bodies – Regulation No 45/2001 (European Parliament and Council Regulations Nos 45/2001, Art. 5(a) and (b), and 1049/2001)*
4. *European Communities – Institutions – Right of public access to documents – Regulation No 1049/2001 (European Parliament and Council Regulations Nos 45/2001, Art. 8(b), and 1049/2001, Arts 2 and 6(1))*
5. *European Communities – Institutions – Right of public access to documents – Regulation No 1049/2001 (European Parliament and Council Regulations Nos 45/2001, Art. 8(b), and 1049/2001, Art. 4(1)(b))*
6. *Approximation of laws – Protection of physical persons in relation to processing of personal data – Processing of such data by Commu-*

nity institutions and bodies – Regulation No 45/2001 (European Parliament and Council Regulations Nos 45/2001, Arts 5(b) and 18, and 1049/2001, Art. 4(1)(b))

7. *Approximation of laws – Protection of physical persons in relation to processing of personal data – Processing of such data by Community institutions and bodies – Regulation No 45/2001 (Art. 6(2) EU; European Parliament and Council Regulation No 45/2001)*
8. *European Communities – Institutions – Right of public access to documents – Regulation No 1049/2001 (Art. 6(2) EU; European Parliament and Council Regulations Nos 45/2001, Art. 10, and 1049/2001, Art. 4(1)(b); European Parliament and Council Directive 95/46)*
9. *Approximation of laws – Protection of physical persons in relation to processing of personal data – Processing of such data by Community institutions and bodies – Regulation No 45/2001 (EC Treaty, Art. 169 (now Art. 226 EC); European Parliament and Council Regulations Nos 45/2001, Art. 2(a), and 1049/2001, Art. 4(1)(b))*
10. *European Communities – Institutions – Right of public access to documents – Regulation No 1049/2001 (European Parliament and Council Regulation No 1049/2001, Art. 4(2), third indent)*
11. *European Communities – Institutions – Right of public access to documents – Regulation No 1049/2001 (European Parliament and Council Regulation No 1049/2001)*

SUMMARY OF THE JUDGMENT

1. Claims submitted in an annulment action seeking that the Commission be ordered to adopt specific measures are inadmissible. The Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents. (see paras 47-48)
2. An annulment action brought by an individual against a refusal by the Commission to institute proceedings against a Member State for failure to fulfil its obligations is inadmissible.

Under Article 169 of the Treaty (now Article

- 226 EC), the Commission is not bound to bring proceedings for failure to fulfil obligations, but has a discretionary power precluding the right of individuals to require it to adopt a particular position or to bring an action for annulment against its refusal to take action. (see paras 54-55)
3. Pursuant to Article 5(a) or (b) of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, according to which the processing must be necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation to which the controller is subject, the processing must be lawful. The right of access to documents of the institutions to which citizens of the European Union and any natural or legal person residing in or having its registered office in a Member State are entitled, laid down by Article 2 of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, constitutes a legal obligation for the purposes of Article 5(b) of Regulation No 45/2001. Therefore, if Regulation No 1049/2001 requires the communication of data, which constitutes 'processing' within the meaning of Article 2(b) of Regulation No 45/2001, Article 5 of that same regulation makes such communication lawful in that respect. (see para. 106)
 4. Access to documents containing personal data falls within the application of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents. According to Article 6(1) of the latter, a person requesting access is not required to justify his request and therefore does not have to demonstrate any interest in having access to the documents requested. Therefore, where personal data are transferred in order to give effect to Article 2 of Regulation No 1049/2001, laying down the right of access to documents for all citizens of the Union, the situation falls within the application of that regulation and, therefore, the applicant does not need to prove the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. If one were to require the applicant to demonstrate the necessity of having the data transferred, as an additional condition imposed in Regulation No 45/2001, that requirement would be contrary to the objective of Regulation No 1049/2001, namely the widest possible public access to documents held by the institutions. (see para. 107)
 5. Given that access to a document will be refused under Article 4(1)(b) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents where disclosure would undermine protection of the privacy and the integrity of the individual, a transfer of personal data that does not fall under that exception cannot, in principle, prejudice the legitimate interests of the person concerned within the meaning of Article 8(b) of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. (see para. 108)
 6. Article 18 of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data provides that the data subject has the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in cases covered by, in particular, Article 5(b) of that regulation. Therefore, given that the processing envisaged by Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents constitutes a legal obligation for the purposes of Article 5(b) of Regulation No 45/2001, the data subject does not, in principle, have a right to object. However, since Article 4(1)(b) of Regulation No 1049/2001 lays down an exception to that legal obligation, it is necessary to take into account, on that basis, the impact of the disclosure of data concerning the data subject. In that regard, if communication of those data would not undermine protection of the privacy and the integrity of the individual concerned, as required by Article 4(1)(b) of Regulation No 1049/2001, that person's objection cannot prevent such communication. (see paras 109-110)
 7. The provisions of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, in so far as they govern the processing of personal data capable of affecting fundamental freedoms, and the right to privacy in particular, must necessarily be inter-

preted in the light of fundamental rights which form an integral part of the general principles of law with which the Court of First Instance ensures compliance and have been expressly included in Article 6(2) EU as general principles of Community law. (see paras 111-112)

8. Any decision taken pursuant to Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must comply with Article 8 of the European Convention on Human Rights, in accordance with Article 6(2) EU. Regulation No 1049/2001 determines the general principles and the limits which, for reasons of public or private interest, govern the exercise of the right of access to documents, in accordance with Article 255(2) EC. Therefore, Article 4(1)(b) of that regulation provides an exception designed to ensure protection of the privacy and integrity of the individual. Since exceptions to the principle of access to documents must be interpreted restrictively, that exception concerns only personal data that are capable of actually and specifically undermining the protection of privacy and the integrity of the individual.

The fact that the concept of 'private life' is a broad one, in accordance with the case-law of the European Court of Human Rights, and that the right to the protection of personal data may constitute one of the aspects of the right to respect for private life does not mean that all personal data necessarily fall within the concept of 'private life'.

A fortiori, not all personal data are by their nature capable of undermining the private life of the person concerned. In recital 33 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, reference is made to data which are capable by their nature of infringing fundamental freedoms or privacy and which should not be processed unless the data subject gives his explicit consent, which implies that not all data are of that nature. Such sensitive data may be included in those referred to by Article 10 of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, concerning processing relating to particular categories of data, such as those revealing racial or ethnic origin, religious or philosophical beliefs, or data concerning health or sex life. (see paras 116-119)

9. A list of participants at a meeting held in the context of proceedings for failure to fulfil obligations under Article 169 of the Treaty (now Article 226 EC), appearing in the minutes of that meeting and classified by reference to the bodies in the name of which and on behalf of which those persons attended, described by their title, the initial of their forename, their surname and, where relevant, the service, department or association to which they belong within those bodies, contains personal data for the purposes of Article 2(a) of Regulation No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, since the persons who participated in that meeting can be identified in them. However, the mere fact that a document referred to in a request for access under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected, even though professional activities are not, in principle, excluded from the concept of 'private life' within the meaning of Article 8 of the European Convention on Human Rights.

The fact that the minutes contain the names of those representatives does not affect the private life of the persons in question, given that they participated in the meeting as representatives of the bodies to which they belonged. Moreover, the minutes do not contain any individual opinions attributable to those persons, but positions attributable to the bodies which those persons represented. In any event, disclosure of the names of the representatives is not capable of actually and specifically affecting the protection of the privacy and integrity of the persons concerned. The mere presence of the name of the person concerned in a list of participants at a meeting, on behalf of the body which that person represented, does not constitute such an interference, and the protection of the privacy and integrity of the persons concerned (under Article 4(1)(b) of Regulation No 1049/2001) is not compromised. (see paras 121-123, 125-126)

10. The third indent of Article 4(2) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, which is designed to protect 'the purpose of inspections, investigations and audits', applies only where disclosure of the documents in question risks jeopardising the com-

pletion of the inspections, investigations or audits. That exception, from the way in which it is formulated, is designed not to protect investigations as such but the purpose of those investigations, which consists, in the case of proceedings for failure to fulfil obligations, in causing the Member State concerned to comply with Community law.

Where the Commission has already closed infringement proceedings against a Member State six years before the request for access to documents, that Member State having amended the legislation at issue, the purpose of the investigations has been achieved. Thus, at the time the Commission decision refusing access to the minutes of a meeting held in the context of proceedings for failure to fulfil obligations was adopted, no investigation whose purpose could have been jeopardised by disclosure of the minutes containing the names of certain representatives of bodies which participated in the meeting was in progress, with the result that the exception under the third indent of Article 4(2) of Regulation No 1049/2001 cannot be applied. (see paras 148-149)

11. The assessment required for processing an application for access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must be of a concrete nature. First, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify that exception being applied. Secondly, the risk of a protected interest being affected must be reasonably foreseeable and not merely hypothetical. Therefore, the assessment which the institution must undertake in order to apply an exception must be carried out in a concrete way and be apparent from the grounds of the decision.

Thus, whilst the need to preserve the anonymity of persons providing the Commission with information on possible infringements of Community law constitutes a legitimate objective capable of justifying the Commission in not granting complete, or even partial, access to certain documents, the fact remains that, in this case, the Commission ruled in the abstract on the effect which disclosure of the document concerned with names might have on its investigative activity, without demonstrating to a sufficient legal standard that disclosure of that document would actually and specifically undermine protection of the purposes of investigations. Thus it has not been shown in

this case that the purpose of investigations was actually and specifically jeopardised by the disclosure of data requested six years after the closure of those investigations. (see paras 151-152)

JUDGMENT OF THE COURT OF FIRST INSTANCE (THIRD CHAMBER)

8 November 2007⁹

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to proceedings for failure to fulfil obligations – Decision refusing access – Protection of physical persons in relation to processing of personal data – Regulation (EC) No 45/2001 – Concept of private life)

In Case T194/04,

The Bavarian Lager Co. Ltd, established in Clitheroe (United Kingdom), represented initially by J. Pearson and C. Bright, and subsequently by J. Webber and M. Readings, solicitors, applicant, supported by European Data Protection Supervisor (EDPS), represented by H. Hijmans, acting as Agent, intervener,

v

Commission of the European Communities, represented by C. Docksey and P. Aalto, acting as Agents, defendant,

APPLICATION for annulment of the Commission's decision of 18 March 2004, rejecting an application by the applicant for access to the full minutes of a meeting held in the context of proceedings for failure to fulfil obligations and an application for a declaration that the Commission erroneously terminated the proceedings brought against the Government of the United Kingdom of Great Britain and Northern Ireland under Article 169 of the EC Treaty (now Article 226 EC),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges, Registrar: C. Kristensen, Administrator, having regard to the written procedure and further to the hearing on 13 September 2006,

gives the following Judgment

Legal background

1. According to Article 6 EU:

⁹ Language of the case: English.

'1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

...'

2. According to Article 255 EC:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 [EC] within two years of the entry into force of the Treaty of Amsterdam.

...'

3. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), defines the principles, conditions and limits for the right of access to documents of those institutions laid down by Article 255 EC. That regulation has applied since 3 December 2001.
4. Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), repealed Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 2001 L 46, p. 58), which implemented, in relation to the Commission, the Code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41; 'the Code of Conduct').
5. Recitals 4 and 11 in the preamble to Regulation No 1049/2001 state:
- '(4) The purpose of this Regulation is to give the fullest possible effect to the right of pub-

lic access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2)... EC.

...

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.'

6. According to Article 4 of Regulation No 1049/2001, concerning exceptions to the right of access:

'1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

– the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released ...'
7. Article 6(1) of Regulation No 1049/2001 provides that '[t]he applicant is not obliged to state reasons for the application'.
8. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) requires Member States to ensure the protection of the fundamental rights and freedoms of natural persons, and in particular their privacy in relation to the handling of personal data, in order to ensure the free movement of personal data in the Community.
9. Article 286 EC provides that Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data are to apply to Community institutions and bodies.
10. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1), was adopted on the basis of Article 286 EC.
11. According to recital 15 in the preamble to Regulation No 45/2001:
- '... Access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255... EC the scope of which includes Titles V and VI of the [EU] Treaty.'
12. Regulation No 45/2001 provides:

'...

Article 1

Object of the Regulation

In accordance with this Regulation, the institutions and bodies set up by, or on the basis of, the Treaties establishing the European Communities, hereinafter referred to as "Community institutions or bodies", shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and shall neither restrict nor prohibit the free flow of personal data between themselves or to recipients subject to the national

law of the Member States implementing Directive 95/46...

2. The independent supervisory authority established by this Regulation, hereinafter referred to as the European Data Protection Supervisor, shall monitor the application of the provisions of this Regulation to all processing operations carried out by a Community institution or body.

Article 2

Definitions

For the purposes of this Regulation:

- c. "personal data" shall mean any information relating to an identified or identifiable natural person...; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity;
- d. "processing of personal data"... shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;
- e. "personal data filing system"... shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
- f. ...

Article 3

Scope

This Regulation shall apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.

This Regulation shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which

form part of a filing system or are intended to form part of a filing system.

...

Article 4

Data quality

1. Personal data must be:

- (a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes ...;

...

Article 5

Lawfulness of processing

Personal data may be processed only if:

- g. processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed, or
- h. processing is necessary for compliance with a legal obligation to which the controller is subject, or
- i. ...
- j. the data subject has unambiguously given his or her consent ...

Article 8

Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46...

Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46...:

- k. if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or
- l. if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

m. ...

Article 18

The data subject's right to object

The data subject shall have the right:

- n. to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data;

o. ...'

13. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR) provides:

'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 freedoms of others.'

14. The Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1; 'the Charter') provides:

'Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to

have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

...

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

...'

Background to the dispute

15. The applicant was established on 28 May 1992 for the importation of German beer for public houses and bars in the United Kingdom, situated primarily in the North of England.
16. However, the applicant was not able to sell its product, since a large number of publicans in the United Kingdom were tied by exclusive purchasing contracts obliging them to obtain their supplies of beer from certain breweries.
17. Under the Supply of Beer (Tied Estate) Order 1989 SI 1989/2390, British breweries holding rights in more than 2 000 pubs are required to allow the managers of those establishments the possibility of buying a beer from another brewery, on condition, according to Article 7(2) (a) of the order, that it is conditioned in a cask and has an alcohol content exceeding 1.2 % by volume. That provision is commonly known as the 'Guest Beer Provision' ('the GBP').
18. However, most beers produced outside the United Kingdom cannot be regarded as 'cask-conditioned beers', within the meaning of the GBP, and thus do not fall within its scope.
19. Considering that the GBP constituted a measure having equivalent effect to a quantitative restriction on imports, and was thus incompatible with Article 30 of the EC Treaty (now, after amendment, Article 28 EC), the applicant lodged a complaint with the Commission by letter of 3 April 1993, registered under reference P/93/4490/UK.
20. Following its investigation, the Commission decided, on 12 April 1995, to institute proceedings against the United Kingdom of Great Britain and Northern Ireland under Article 169 of the EC Treaty (now Article 226 EC). It notified the applicant on 28 September 1995 of that investigation and of the fact that it had sent a letter of formal notice to the United Kingdom on 15 September 1995. On 26 June 1996, the Commission decided to send a reasoned opinion to the United Kingdom and, on 5 August 1996, issued a press release announcing that decision.
21. On 11 October 1996, a meeting was held (the 'meeting of 11 October 1996' or the 'meeting'), which was attended by officers of the Directorate-General (DG) for the Internal Market and Financial Services, officials of the United Kingdom Government Department of Trade and Industry and representatives of the Confederation des Brasseurs du Marche Commun ('CBMC'). The applicant had requested the right to attend the meeting in a letter dated 27 August 1996 but the Commission refused to grant permission to attend.
22. On 15 March 1997 the Department of Trade and Industry in the United Kingdom announced a proposal to amend the GBP under which a bottle-conditioned beer could be sold as a guest beer, as well as cask-conditioned beer. After the Commission had, on two occasions, namely 19 March 1997 and 26 June 1997, suspended its decision to issue a reasoned opinion to the United Kingdom, the head of Unit 2 'Application of Articles 30 to 36 of the EC Treaty (notification, complaints, infringements etc.) and removal of trade barriers' of Directorate B 'Free movement of goods and public procurement' of DG 'Internal Market and Financial Services', in a letter of 21 April 1997, informed the applicant that, in view of the proposed amendment of the GBP, the Article 169 procedure had been suspended and the reasoned opinion had not been served on the United Kingdom Government. He indicated that the procedure would be discontinued entirely as soon as the amended GBP came into force. The new version of the GBP became applicable on 22 August 1997. Consequently, the reasoned opinion was never sent to the United Kingdom and the Commission finally decided on 10 December 1997 to take no further action in the infringement procedure.
23. By fax of 21 March 1997, the applicant asked the Director-General of DG 'Internal Market and Financial Services' for a copy of the 'reasoned opinion', in accordance with the Code of Conduct. That request, despite being repeated, was refused.

24. By letter of 18 September 1997 ('the decision of 18 September 1997'), the Secretary-General of the Commission confirmed the refusal of the application sent to DG 'Internal Market and Financial Services'.
25. The applicant brought an action, registered as Case T309/97, before the Court of First Instance against the decision of 18 September 1997. In its judgment of 14 October 1999 in Case T309/97 *Bavarian Lager v Commission* [1999] ECR II3217, the Court of First Instance dismissed the action, stating that the preservation of the aim in question, namely allowing a Member State to comply voluntarily with the requirements of the Treaty, or, where necessary, to give it the opportunity to justify its position, justified, for the protection of the public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure under Article 169 of the Treaty.
26. On 4 May 1998, the applicant addressed a request to the Commission under the Code of Conduct for access to all of the submissions made under file reference P/93/4490/UK by 11 named companies and organisations and by three defined categories of person or company. The Commission refused the initial application on the ground that the Code of Conduct applies only to documents of which the Commission is the author. The confirmatory application was rejected on the grounds that the Commission was not the author of the document in question and that any application had to be sent to the author.
27. On 8 July 1998, the applicant complained to the European Ombudsman under reference 713/98/IJH, stating, by letter dated 2 February 1999, that it wished to obtain the names of the delegates of the CBMC who had attended the meeting on 11 October 1996 and the names of the companies and any persons who fell into one of the 14 categories identified in the original request for access to documents containing the communications to the Commission under file reference P/93/4490/UK.
28. Following an exchange of letters between the Ombudsman and the Commission, the latter indicated to the Ombudsman in October and November 1999 that, of the 45 letters that it had written to the persons concerned requesting approval to disclose their identities to the applicant, 20 replies had been received, of which 14 were positive and 6 were negative. The Commission supplied the names and addresses of those that had responded positively. The applicant stated to the Ombudsman that the information provided by the Commission was still incomplete.
29. In his draft recommendation addressed to the Commission in Complaint 713/98/IJH of 17 May 2000, the Ombudsman proposed that the Commission should inform the applicant of the names of the delegates of the CBMC who had attended the meeting of 11 October 1996 and of the companies and persons in the 14 categories identified in the applicant's original request for access to documents containing submissions made to the Commission under file reference P/93/4490/UK.
30. On 3 July 2000, the Commission sent a detailed opinion to the Ombudsman, in which it maintained that the consent of the persons concerned was still necessary, but indicated that it would be able to provide the names of those persons from whom it had received no reply to its request for their consent because, in the absence of a reply, the interests and fundamental rights and freedoms of the persons concerned did not prevail. The Commission thus included the names of 25 further persons.
31. On 23 November 2000, the Ombudsman made his special report known to the Parliament, following up the recommendation project addressed to the Commission in Complaint 713/98/IJH ('the special report') in which he concluded that there was no fundamental right to supply information to an administrative authority in secret and that Directive 95/46 did not require the Commission to keep secret the names of persons who submit views or information to it concerning the exercise of their functions.
32. On 30 September 2002, the Ombudsman wrote a letter to the Commission President, Mr Prodi, in which he expressed his concern that:
- 'data protection rules are being misinterpreted as implying the existence of a general right to participate anonymously in public activities. This misinterpretation risks subverting the principle of openness and the public's right of access to documents, both at the level of the Union and in those Member States where openness and public access are enshrined in national constitutional rules.'
33. According to a press release No 23/2001 issued by the Ombudsman on 12 December 2001, the Parliament had adopted a resolution on the special report by requesting the Commis-

- sion to provide the information required by the applicant.
34. By e-mail of 5 December 2003, the applicant sent a request to the Commission for access to the documents referred to in paragraph 26 above, based on Regulation No 1049/2001.
 35. The Commission replied to that request by letter of 27 January 2004 stating that certain documents relating to the meeting could be disclosed, but drawing the applicant's attention to the fact that five names had been blanked out from the minutes of the meeting of 11 October 1996, following two express refusals by persons to consent to the disclosure of their identity and the Commission's failure to contact the remaining three attendees.
 36. By e-mail of 9 February 2004, the applicant made a confirmatory application within the meaning of Article 7(2) of Regulation No 1049/2001, in which it requested the full minutes of the meeting of 11 October 1996, including all of the names.
 37. By letter of 18 March 2004 ('the contested decision'), the Commission rejected the confirmatory application of the applicant. It confirmed that Regulation No 45/2001 applied to the request for disclosure of the names of the other participants. As the applicant had not established an express and legitimate purpose or need for such a disclosure, the conditions set out by Article 8 of that regulation had not been met and the exception provided for in Article 4(1)(b) of Regulation No 1049/2001 applied. It added that, even if the rules on the protection of personal data did not apply, it would nevertheless have had to refuse to disclose the other names under Article 4(2), third indent, of Regulation No 1049/2001 so as not to compromise its ability to conduct inquiries.
 40. By a document lodged at the Registry of the Court on 28 February 2006, the European Data Protection Supervisor ('the EDPS') requested leave to intervene in the dispute in support of the form of order sought by the applicant. By order of 6 June 2006, the President of the Third Chamber of the Court granted the EDPS leave to intervene in support of the applicant.
 41. By way of measures of organisation of procedure, the applicant and the Commission were requested to produce certain documents. They complied with those requests within the specified time-limits.
 42. By order of 16 May 2006, in accordance with Article 65(b), Article 66(1) and Article 67(3), third subparagraph, of the Rules of Procedure of the Court of First Instance, the latter ordered the Commission to produce the complete minutes of the meeting of 11 October 1996, including the names of all the participants, whilst providing that that document would not be communicated to the applicant in the context of the current proceedings. That order was complied with.
 43. The parties presented oral argument and replied to the oral questions of the Court of First Instance at the hearing on 13 September 2006.
 44. The applicant claims that the Court should:
 - declare that the Commission's acceptance of the amendment to the GBP by the United Kingdom Government is contrary to Article 30 of the EC Treaty (now Article 28 EC);
 - declare that the Commission should not have accepted the abovementioned amendment and that it therefore breached Article 30 of the EC Treaty;
 - annul the contested decision;
 - order the Commission to produce the full set of names of persons who attended the meeting;
 - order the Commission to pay the costs.

Procedure and forms of order sought

38. The applicant brought the present action by an application lodged at the Registry of the Court of First Instance on 27 May 2004.
39. By order of 6 December 2004, the President of the Third Chamber of the Court granted the Republic of Finland leave to intervene in support of the form of order sought by the applicant. Following the withdrawal of the Republic of Finland, the President of the Third Chamber of the Court, by order of 27 April 2005, struck out that intervention.
45. At the hearing, the EDPS, supporting the applicant's application for access to the documents, contended that the Court should annul the contested decision.
46. The Commission contends that the Court should:
 - dismiss the claims concerning the infringement procedure as inadmissible;

- dismiss the application for annulment of the contested decision;
- dismiss the request that the Commission be ordered to disclose the names of the other persons who participated in the meeting as inadmissible;
- order the applicant to pay the costs.

Admissibility of the request that the Court should order the Commission to disclose the names of all persons who participated in the meeting

47. It is settled case-law that the Court of First Instance is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents (Case T204/99 *Mattila v Council and Commission* [2001] ECR II2265, paragraph 26, confirmed by the Court of Justice in Case C353/01 *P Mattila v Council and Commission* [2004] ECR I1073, paragraph 15).
48. Therefore, an application by the applicant, requesting the Court of First Instance to order the Commission to send it the names of all the persons who attended the meeting of 11 October 1996, is inadmissible.

The unlawful closure of the procedure for failure to fulfil obligations under Article 169 of the EC Treaty

Arguments of the parties

49. The applicant argues that the Commission agreed to close a procedure for failure to fulfil its obligations, in breach of Article 30 of the EC Treaty, or, alternatively, of Article 6 of the EC Treaty (now, after amendment, Article 12 EC), of which the meeting of 11 October 1996 was a crucial component.
50. Given that the Commission refused the applicant's request to attend the meeting, that it wrongly settled the proceedings for failure to fulfil obligations, that the amended GBP continued to discriminate against beers from Member States other than the United Kingdom, and that the Commission showed extreme reluctance to reveal the names of those present at the meeting, that meeting must, the applicant argues, have been used as an

opportunity for the United Kingdom Government and large United Kingdom beer producing companies to persuade the Commission to adopt an amendment that served to prevent beer importers such as the applicant from being able to sell their products to a sizeable portion of the United Kingdom market. That agreement, seeking to obtain unlawful closure of the procedure for failure to fulfil obligations, caused the applicant to suffer loss of opportunity and as a result, substantial financial loss. Therefore, it argues, there was a breach of Article 30 of the EC Treaty.

51. The applicant argues that the amended GBP is also contrary to Article 6 of the EC Treaty in that its effect is to establish discrimination based on nationality against beers produced in Member States other than the United Kingdom.
52. The Commission considers, essentially, that the applicant's claims for a declaration that the Commission's acceptance of the amendment made by the United Kingdom Government to the GBP was contrary to Article 30 of the EC Treaty, that it should not have accepted that amendment, and that it thus infringed Article 30 of the EC Treaty, are manifestly inadmissible.

Findings of the Court

53. The applicant is requesting the Court to declare that the Commission's acceptance of the amendment made by the United Kingdom Government to the GBP is contrary to Articles 30 and 6 of the EC Treaty. That request should be interpreted, in reality, as an argument by the applicant that the Commission acted wrongly in deciding to take no further action on its complaint against measures of the United Kingdom allegedly contrary to Community law.
54. In that regard, it should be noted that private individuals are not entitled to bring proceedings against a refusal by the Commission to institute proceedings against a Member State for failure to fulfil its obligations (order of 12 June 1992 in Case C29/92 *Asia Motor France v Commission* [1992] ECR I3935, paragraph 21; order of 15 March 2004 in Case T139/02 *Institutou N. Avgerinopoulou and Others v Commission* [2004] ECR II875, paragraph 76; and order of 19 September 2005 in Case T247/04 *Aseprofar and Edifa v Commission* [2005] ECR II3449, paragraph 40).
55. Under Article 169 of the EC Treaty, the Com-

mission is not bound to bring proceedings for failure to fulfil obligations, but has a discretionary power precluding the right of individuals to require it to adopt a particular position or to bring an action for annulment against its refusal to take action (order of 16 February 1998 in Case T182/97 Smanor and Others v Commission [1998] ECR II271, paragraph 27, and *Institouto N. Avgerinopoulou and Others v Commission*, paragraph 77).

56. In this case, therefore, the applicant has no standing to request the annulment of the Commission's refusal to bring an action for failure to fulfil obligations against the United Kingdom on the ground that the amended GBP infringed Articles 6 and 30 of the EC Treaty. In those circumstances, the Commission cannot be accused of itself infringing those articles by taking no further action on the proceedings in question.
57. In any event, even if the applicant's request were interpreted as seeking annulment not of that refusal but of the decision to take no further action on its complaint of 10 December 1997, it should be noted that a decision whereby the Commission decides to take no further action on a complaint informing it of conduct by a State capable of giving rise to proceedings for failure to fulfil obligations does not have binding force and is not therefore a measure that is open to challenge (order in *Aseprofar and Edifa v Commission*, paragraph 48). Moreover, the action would be clearly out of time, having regard to the date of that decision.
58. In those circumstances, the applicant's claims concerning the decision to take no further action on its complaint are inadmissible.
59. Moreover, concerning the applicant's claim that unlawful closure of the proceedings for failure to fulfil obligations caused it loss of opportunity and significant financial loss, it is sufficient to note that the applicant has not made a claim for compensation as part of its action. Therefore, there is no need to rule in that respect.

Access to documents

Arguments of the parties

60. The applicant submits that, in accordance with the conclusions drawn by the Ombudsman's Special Report, the exception contained in Article 4(1)(b) of Regulation No 1049/2001 does not apply to this case, since Directive 95/46

does not oblige the Commission to withhold the names of persons who submit views or information to it. The applicant refers in that respect to the letter from the Ombudsman to the President of the Commission on 30 September 2002, to complain about misuse of Directive 95/46.

61. Nor, the applicant argues, does Article 4(3) of Regulation No 1049/2001 apply. Given that the meeting took place in 1996, any potential undermining of the Commission's decision-making process would be at best minimal, given that over seven years have passed since the holding of that meeting and the bringing of the action. Even if that provision did apply, the Commission could not rely on it to support its refusal to disclose the information requested, because of the overwhelming public interest in disclosure in this case. For example, the Ombudsman and the Parliament have taken a particular interest, in this case, in the high level of secrecy surrounding the way in which powerful third parties can make their views known to the Commission, which is contrary to the principles of open government.
62. In its reply, the applicant argues that there is a new element in the defence, namely that the persons whose names the applicant requested were employees of the CBMC and had acted in accordance with the instructions of the body which they represented. The applicant argues that, since the Commission has revealed that those persons were representatives of the CBMC, that statement is now in the public domain, so that no further compromising of the Commission's reputation for confidentiality would occur by disclosing their names.
63. The applicant points out that trade associations, such as the CBMC, usually represent all or most of the participants in a market, and thus tend to expound views on behalf of an industry as a whole. The Commission's reputation could be damaged only if it were to transpire that, at the meeting on 11 October 1996, the CBMC representatives represented a specific group of brewers with an interest in maintaining foreclosure in the United Kingdom market for beer sold in pubs and bars. The applicant argues that, where the information providers are employees of such a trade association, there is no risk emanating from the loss of that confidentiality, unless the trade association is not accurately reflecting the views of all of its members.

64. The applicant concludes that Article 2 of Regulation No 1049/2001 obliges the Commission to make full disclosure of the attendees of the meeting and the submissions made with respect to the procedure for failure to fulfil obligations, and that none of the exceptions contained in Article 4 of Regulation No 1049/2001 apply to this case.
65. The EDPS argued at the hearing that the Commission has infringed Article 4(1)(b) of Regulation No 1049/2001. He refers in that regard to a document entitled 'Public access to documents and data protection' (Reference documents, July 2005 No 1, EDPS – European Data Protection Supervisor), which can be found on the EDPS internet site.
66. The EDPS stresses the need to establish an optimal balance between, on the one hand, the protection of data of a private nature, and, on the other, the fundamental right of the European citizen to have access to documents of the institutions. The Commission's reasoning did not correctly take account of that balance, which is explicitly governed by Article 4(1)(b) of Regulation No 1049/2001. Since a request for access to documents is based on democratic principles, it is not necessary to state the reasons why the documents are requested, so that Article 8 of Regulation No 45/2001 does not apply in this case. Similarly, the EDPS considers that data protection rules do not allow the inference of a general right to participate, anonymously, in public activities.
67. According to the EDPS, the interest protected in Article 4(1)(b) of Regulation No 1049/2001 is private life and not the protection of personal data, which is a much broader concept. Whilst the name of a participant, mentioned in the minutes of a meeting, falls within the scope of personal data, since the identity of that person would be revealed and the concept of the protection of personal data applies to those data, whether or not they fall within the scope of private life, the EDPS points out that, in the area of professional activities, the disclosure of a name does not normally have any link to private life. The EDPS concludes that the Commission cannot rely on Article 4(1)(b) of Regulation No 1049/2001 in order to refuse to disclose the names of the persons concerned.
68. The EDPS concludes that, in any case, on a proper interpretation of Article 4(1)(b) of Regulation No 1049/2001, the right to refuse disclosure is not an absolute right, but implies that private life must be affected to an important or considerable extent, which must be assessed having regard to the rules and principles on the protection of personal data. No general right is conferred on the person concerned to oppose disclosure. A person concerned who opposes disclosure must put forward a plausible reason, explaining why disclosure might be harmful to him.
69. The Commission argues that the application for annulment of the contested decision is unfounded. It notes that, in this case, what is at issue is the interaction of two rights, namely the right of the public to have access to documents and the right to the protection of private life and data.
70. On the one hand, the right of public access to documents under Regulation No 1049/2001 is generally unrestricted and automatic and is not dependent on the demonstration of any special interest peculiar to the person requesting access. The person making the request is not normally obliged to state reasons justifying it.
71. On the other hand, personal data may only be disclosed lawfully and legitimately according to the basic principles governing the right to privacy and the specific provisions governing the processing of personal data. The Commission refers to Article 8 of the ECHR, Article 286 EC and Articles 7 and 8 of the Charter. The provisions of Regulation No 45/2001 require that the person making a request for personal data must establish the necessity for disclosure of such data and the Commission must be satisfied that the data subject's interests will not be prejudiced.
72. The Commission notes that the applicant does not present any legal arguments in support of its contention that the exception of Article 4(1)(b) of Regulation 1049/2001, and subsequently Regulation No 45/2001, does not apply, but has merely relied on the Ombudsman's draft recommendation and the resolution of the European Parliament supporting it. However the Ombudsman's conclusion was based on an interpretation of Directive 95/46, and of the Code of Conduct, which was subsequently disproved by the Court (Case C41/00 P Interporc v Commission [2003] ECR I2125; Case T 92/98 Interporc v Commission [1999] ECR II3521, paragraph 70; and Case T47/01 Co-Frutta v Commission [2003] ECR II4441, paragraphs 63 and 64). Since the applicant's latest request for ac-

- cess was made after Regulations Nos 45/2001 and 1049/2001 came into force, the Commission's decision to withhold the names should be examined under those rules. In any event, the conclusive interpretation of the law is not within the remit of either the Ombudsman or the Parliament.
73. The Commission argues that the Court has confirmed the position taken by the Commission with regard to the scope of the data protection rules. The Court has ruled that the data protection rules, and in particular the principle of proportionality, apply to the publication of individuals' names even when the individuals are public employees and the processing is for a public purpose (Joined Cases C465/00, C138/01 and C139/01 *Österreichischer Rundfunk and Others* [2003] ECR I4989, paragraph 64). That approach, in relation to Directive 95/46, was subsequently confirmed by the Court in Case C101/01 *Lindqvist* [2003] ECR I12971, paragraph 24, according to which the term 'personal data' undoubtedly covers the name of a person in conjunction with his telephone number or information about his working conditions or hobbies.
74. The Commission argues that the specific means to reconcile the rights of public access and of privacy and data protection is enshrined in Article 4(1)(b) of Regulation No 1049/2001, which should be read in the light of recital 11 of that regulation, which explains that '[i]n assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities'. That exception does not have to be balanced with any overriding public interest in disclosure, but specifically requires the Community institutions to refuse access to a document where disclosure would undermine the protection of privacy and the protection of personal data.
75. Regulation No 45/2001 does not preclude disclosure or other processing of personal data by the Commission, but provides the means of assessing on a casebycase basis whether it is lawful and legitimate for an institution to process personal data, and hence whether such processing would not undermine data protection.
76. The Commission argues that, where processing is lawful and legitimate under Regulation No 45/2001 in a particular case, the exception to the right of public access in Article 4(1)(b) of Regulation No 1049/2001 does not apply and
- a document containing personal data must be disclosed. Where, however, the processing requested is not lawful and legitimate and the applicant has been unable to demonstrate why disclosure is necessary, the Commission is not required to disclose those data.
77. Since, the Commission argues, both rights are of the same nature, importance and degree, they have to be applied together, and, where a request is made for access to a public document containing personal data, a balance must be sought on a casebycase basis.
78. The Commission refers in that regard to a report on the situation of Fundamental Rights in the European Union and its Member States, drawn up in 2002 by the EU Network of Independent Experts on Fundamental Rights, according to which 'while taking into account the possibility of granting only partial access to certain documents, it is essential that the Community institution does not grant right of access to documents when the interests of the applicant do not have any reasonable relationship of proportionality with the resulting violation of the right of the person concerned to protect his privacy regarding the processing of personal data'.
79. The need for such a balanced approach has also been highlighted by the Data Protection Working Party established under Article 29 of Directive 95/46, in its Opinion 5/2001 of 17 May 2001 on the European Ombudsman Special Report. According to that Opinion:
- 'It should be noted... that the obligation to public disclosure imposed by the legislation on public access to administrative documents does not establish an absolute obligation of openness. It rather makes the obligation to grant access to documents subject to due regard being made of the right to privacy. Therefore, it does not justify unlimited or unfettered disclosure of personal data. On the contrary, a joint reading of legislation on public access and on data protection normally imposes that an analysis of the circumstances surrounding each situation is made on a casebycase basis, in order to strike a balance between those two rights. In particular, as a result of such assessment, legislation on public access may provide for different rules to apply to different categories of data or different kinds of data subjects.'
80. The Commission points out that Regulation No 1049/2001 does not impose an automatic, unrestricted obligation to disclose documents or parts of documents containing personal data,

but that that obligation exists only so far as it does not undermine the data protection rules.

81. In this case, the Commission took all the relevant circumstances into account. In the case of the representatives of UK authorities and of the CBMC, the applicant was fully informed of the interests and of the bodies represented at the meeting. As representatives, the persons present there were acting on instructions of the represented bodies in their capacity as employees of those bodies and not in a personal capacity. The effects of the decisions taken there applied to the represented bodies and not to the representatives in their personal capacity. It is therefore the information concerning the represented bodies that is relevant for the public scrutiny pursued by the principle of transparency, and the Commission's refusal to disclose the names of the individuals representing those interests is, the Commission submits, not to be considered as a breach of the rights of the applicant. The Commission also took account of the need to protect its ability to carry out investigations and its sources of information.
82. The Commission further argues that the applicant has never fulfilled the obligation to prove the need for a transfer of data, imposed by Article 8(b) of Regulation No 45/2001. Disclosure of the names of the participants would not shed any additional light on the Commission's decision to close the proceedings for failure to fulfil obligations. Since the minutes were disclosed, the public is fully aware of the facts and arguments on the basis of which the Commission took its decision. Thus, in the absence of a specific and valid reason demonstrating the need to disclose personal data to third parties, the Commission was therefore obliged to refuse to make such a disclosure.
83. According to the Commission, contrary to what the applicant argues in its reply, the fact that the names of the staff of the CBMC are in the public domain does not mean that the identity of the staff who attended the meeting with the Commission must also be in the public domain. It does not follow that the names of the particular employees of a trade association who represented that association at a meeting can necessarily be deduced from the publication of the identities of all its staff. If that were the case, the applicant would have no reason to ask for these names to be revealed to it. Moreover, the applicant has not suggested that the representatives of the CBMC did not represent the views of the association at the meeting, or demonstrated how knowing the identities of the persons concerned would provide more necessary information than was concerned in the meeting report and the other documents which were disclosed.
84. Concerning the applicant's arguments as to the alleged application of Article 4(3) of Regulation No 1049/2001, the Commission stresses that it based its refusal to disclose the names not on the exception under that paragraph, but on that laid down by the third indent of Article 4(2) of that regulation.
85. The applicant was informed that, even if the rules on data protection did not apply to the request, the Commission would have reasons to refuse to disclose the names of five persons against their will, in order to protect its ability to carry out investigations into possible infringements of Community law. The meeting of 11 October 1996 took place in the context of such an investigation. If the names of persons who provided information to the Commission could be disclosed against their will, the Commission could be deprived of a valuable source of information, putting at risk its ability to carry out such investigations.
86. The Commission argues that, under complaint and infringement procedures, complainants are given the possibility to choose between a 'confidential' and a 'non confidential' handling of their complaint, and that there are no good reasons why other parties interested in the infringement procedure should not enjoy the same right.
87. Thus, the exception mentioned in the third indent of Article 4(2) of Regulation No 1049/2001 required the Commission not to disclose the five names to the applicant.
88. Finally, the Commission argues that the applicant has not demonstrated any 'overriding public interest in disclosure' of those remaining names so as to preclude the Commission from applying that exception.
89. In this case, the disclosure of the names of the other persons, against their will and contrary to their expectation of confidentiality when contributing to the investigation into the alleged infringement, would undermine the protection of all investigations. Therefore, the Commission argues, there is a manifest public interest in favour of preserving confidentiality in investigations rather than endangering it.

Findings of the Court

Preliminary observations

90. The applicant's request for access to the full document, and its application, are based on Regulation No 1049/2001.
91. In the contested decision, the Commission held that Regulation No 45/2001 applied to the request that the names of the participants at the meeting of 11 October 1996 be revealed. The Commission took the view that, since the applicant had not established either an express and legitimate purpose or the need for such disclosure, the conditions set out by Article 8 of that regulation had not been met and the exception provided for in Article 4(1)(b) of Regulation No 1049/2001 applied. It added that, even if the rules on the protection of personal data did not apply, it would nevertheless have had to refuse to disclose the other names under Article 4(2), third indent, of Regulation No 1049/2001 so as not to compromise its ability to conduct inquiries.
92. In that regard, it should be noted that, according to Article 6(1) of Regulation No 1049/2001, a person requesting access is not required to justify his request and therefore he does not have to demonstrate any interest in having access to the documents requested (Joined Cases T391/03 and T70/04 Franchet and Byk v Commission [2006] ECR II2023, paragraph 82, and case-law cited).
93. It should also be noted that access to documents of the institutions constitutes the principle and that a decision to refuse access is valid only if it is based on one of the exceptions laid down in Article 4 of Regulation No 1049/2001.
94. According to settled case-law, those exceptions must be construed and applied restrictively so as not to defeat the general principle enshrined in that regulation (Joined Cases C174/98 P and C189/98 P Netherlands and van der Wal v Commission [2000] ECR I1, paragraph 27; Case T211/00 Kuijter v Council [2002] ECR II485, paragraph 55; and Franchet and Byk, paragraph 84).
95. It is in the light of that case-law that the Court must examine how the Commission applied the exceptions under Article 4(1)(b) and Article 4(2), third indent, of Regulation No 1049/2001.

The exception concerning the protection of privacy and the integrity of the individual, un-

der Article 4(1)(b) of Regulation No 1049/2001

- *Preliminary observations concerning the interaction between Regulations Nos 1049/2001 and 45/2001*
96. Under Article 4(1)(b) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
97. Although the applicant refers in its application only to Directive 95/46 and not to Regulation No 45/2001, its action must be understood as referring to that regulation, since the contested decision is, in part, based upon it. At the hearing, moreover, the applicant correctly referred to that regulation.
98. It is necessary at the outset to examine the relationship between Regulations Nos 1049/2001 and 45/2001 for the purpose of applying the exception under Article 4(1)(b) of Regulation No 1049/2001 to this case. For that purpose, it should be borne in mind that they have different objectives. The first is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices. The second is designed to ensure the protection of the freedoms and fundamental rights of individuals, particularly their private life, in the handling of personal data.
99. Recital 15 of Regulation No 45/2001 indicates that access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255 EC.
100. Therefore, access to documents containing personal data falls under Regulation No 1049/2001, according to which, in principle, all documents of the institutions should be accessible to the public. It also provides that certain public and private interests must be protected by a regime of exceptions.
101. Thus, for example, that regulation lays down an exception, referred to above, concerning cases where disclosure would adversely affect the protection of privacy and the integrity of the individual, particularly in accordance with

Community legislation on the protection of personal data, such as Regulation No 45/2001.

102. In addition, according to recital 11 of Regulation No 1049/2001, in assessing the need for an exception, the institutions should take account of the principles in Community legislation concerning the protection of personal data in all areas of activity of the Union, thus including principles laid down in Regulation No 45/2001.

103. In that regard, it is necessary to recall the most relevant provisions of Regulation No 45/2001.

104. Pursuant to Article 2(a) of Regulation No 45/2001, 'personal data' means any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. Personal data would therefore include, for example, surname and forenames, postal address, e-mail address, bank account number, credit card numbers, social security number, telephone number or driving licence number.

105. In addition, under Article 2(b) of Regulation No 45/2001, 'processing of personal data' means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction. Therefore, communication of data, by transmission, dissemination or otherwise making available, falls within the definition of 'processing', and thus this regulation itself provides, independently of Regulation No 1049/2001, for the possibility of making certain personal data public.

106. The processing must, in addition, be lawful under Article 5(a) or (b) of Regulation No 45/2001, according to which the processing must be necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation to which the controller is subject. The right of access to documents of the institutions recognised to citizens of the European Union and to any natural or legal person residing in or having its registered office in a Member State, laid down by Article 2 of Regulation No 1049/2001, constitutes a legal obligation for the purposes of Article 5(b)

of Regulation No 45/2001. Therefore, if Regulation No 1049/2001 requires the communication of data, which constitutes 'processing' within the meaning of Article 2(b) of Regulation No 45/2001, Article 5 of that same regulation makes such communication lawful in that respect.

107. As regards the obligation to prove the need to transfer, laid down by Article 8(b) of Regulation No 45/2001, it should be remembered that access to documents containing personal data falls within the application of Regulation No 1049/2001, and that, according to Article 6(1) of the latter, a person requesting access is not required to justify his request and therefore does not have to demonstrate any interest in having access to the documents requested (see paragraph 92 above). Therefore, where personal data are transferred in order to give effect to Article 2 of Regulation No 1049/2001, laying down the right of access to documents for all citizens of the Union, the situation falls within the application of that regulation and, therefore, the applicant does not need to prove the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001. If one were to require the applicant to demonstrate the necessity of having the data transferred, as an additional condition imposed in Regulation No 45/2001, that requirement would be contrary to the objective of Regulation No 1049/2001, namely the widest possible public access to documents held by the institutions.

108. Moreover, given that access to a document will be refused under Article 4(1)(b) of Regulation No 1049/2001 where disclosure would undermine protection of the privacy and the integrity of the individual, a transfer that does not fall under that exception cannot, in principle, prejudice the legitimate interests of the person concerned within the meaning of Article 8(b) of Regulation No 45/2001.

109. As regards the data subject's right to object, Article 18 of Regulation No 45/2001 provides that that person has the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in cases covered by, in particular, Article 5(b) of that regulation. Therefore, given that the processing envisaged by Regulation No 1049/2001 constitutes a legal obligation for the purposes of Article 5(b) of Regulation No 45/2001, the data subject does not, in principle, have a right to object. However, since Article 4(1)(b) of Reg-

ulation No 1049/2001 lays down an exception to that legal obligation, it is necessary to take into account, on that basis, the impact of the disclosure of data concerning the data subject.

110. In that regard, this Court considers that, if communication of those data would not undermine protection of the privacy and the integrity of the individual concerned, as required by Article 4(1)(b) of Regulation No 1049/2001, that person's objection cannot prevent such communication.
111. Moreover, it should be recalled that the provisions of Regulation No 45/2001, in so far as they govern the processing of personal data capable of affecting fundamental freedoms, and the right to privacy in particular, must necessarily be interpreted in the light of fundamental rights which, according to consistent case-law, form an integral part of the general principles of law with which the Court of Justice and the Court of First Instance ensure compliance (see, by analogy, as regards Directive 95/46, *Österreichischer Rundfunk*, paragraph 68).
112. Those principles have been expressly included in Article 6(2) EU, according to which the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
113. It should be noted in that respect that Article 8 of the ECHR, whilst laying down in paragraph 1 the principle that public authorities shall not interfere with the exercise of the right to private life, does acknowledge, in paragraph 2, that such interference is possible in so far as it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
114. It should also be noted that, in accordance with the case-law of the European Court of Human Rights, 'private life' is a broad concept that does not lend itself to an exhaustive definition. Article 8 of the ECHR also protects the right to identity and personal development and also the right of any individual to establish and develop relationships with other human beings and with the outside world. There is no reason in principle to exclude professional or business activities from the concept of 'private life' (see ECHR judgments in *Niemietz v Germany* of 16 December 1992, Series A No 251B, § 29; *Amann v Switzerland* of 16 February 2000, ECHR 2000II, § 65; and *Rotaru v Romania* of 4 May 2000, ECHR 2000V, § 43). There is thus an area of interaction between the individual and others which, even in a public context, may fall within the concept of 'private life' (see ECHR judgment in *Peck v United Kingdom* of 28 January 2003, ECHR 2003I, § 57, and case-law cited).
115. In order to determine whether there has been a breach of Article 8 of the ECHR, it needs to be determined, first, whether there has been an interference in the private life of the person concerned and, secondly, if so, whether that interference is justified. In order to be justified, it must be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society. Concerning that latter condition, in order to determine whether a disclosure is 'necessary in a democratic society', it needs to be examined whether the grounds relied on in justification are 'relevant and sufficient', and whether the measures adopted are proportionate to the legitimate aims pursued. In cases concerning the disclosure of personal data, the European Court of Human Rights has recognised that the competent authorities have to be granted a certain discretion in order to establish a fair balance between competing public and private interests. That margin of discretion is, however, accompanied by judicial review, and its breadth is to be determined by reference to factors such as the nature and importance of the interests at stake and the seriousness of the interference (see *Peck v United Kingdom*, especially § 76 and 77; see also the Opinion of Advocate General Léger in *Joined Cases C317/04 and C318/04 Parliament v Council and Commission* [2006] ECR I4721, I4724, points 226 to 228).
116. Any decision taken pursuant to Regulation No 1049/2001 must comply with Article 8 of the ECHR, in accordance with Article 6(2) EU. In that regard it should be noted that Regulation No 1049/2001 determines the general principles and the limits which, for reasons of public or private interest, govern the exercise of the right of access to documents, in accordance with Article 255(2) EC. Therefore, Article 4(1)(b) of that regulation provides an exception designed to ensure protection of the privacy and integrity of the individual.
117. Moreover, exceptions to the principle of access

to documents must be interpreted restrictively. The exception under Article 4(1)(b) of Regulation No 1049/2001 concerns only personal data that are capable of actually and specifically undermining the protection of privacy and the integrity of the individual.

118. It should also be emphasised that the fact that the concept of 'private life' is a broad one, in accordance with the case-law of the European Court of Human Rights, and that the right to the protection of personal data may constitute one of the aspects of the right to respect for private life (see, to that effect, the Opinion of Advocate General Leger in *Parliament v Council and Commission*, point 209), does not mean that all personal data necessarily fall within the concept of 'private life'.
119. A fortiori, not all personal data are by their nature capable of undermining the private life of the person concerned. In recital 33 of Directive 95/46, reference is made to data which are capable by their nature of infringing fundamental freedoms or privacy and which should not be processed unless the data subject gives his explicit consent, which implies that not all data are of that nature. Such sensitive data may be included in those referred to by Article 10 of Regulation No 45/2001, concerning processing relating to particular categories of data, such as those revealing racial or ethnic origin, religious or philosophical beliefs, or data concerning health or sex life.
120. It follows from the whole of the above that, in order to be able to determine whether the exception under Article 4(1)(b) of Regulation No 1049/2001 applies, it is necessary to examine whether public access to the names of the participants at the meeting of 11 October 1996 is capable of actually and specifically undermining the protection of the privacy and the integrity of the persons concerned.
- *Application to this case of the exception concerning the undermining of the protection of the privacy and integrity of the persons concerned, laid down in Article 4(1)(b) of Regulation No 1049/2001*
121. In this case, the request for access at issue concerns the minutes of a Commission meeting, attended by officers of the DG for the Internal Market and Financial Services, officials of the United Kingdom Government Department of Trade and Industry and representatives of the CBMC. Those minutes contain a list of the

participants at the meeting, classified by reference to the bodies in the name of which and on behalf of which those persons attended, described by their title, the initial of their forename, their surname and, where relevant, the service, department or association to which they belong within those bodies. The text of the minutes refers not to physical persons but to the bodies in question, such as the CBMC, the DG for the Internal Market and Financial Services, or the United Kingdom Department of Trade and Industry.

122. The list of meeting participants appearing in the minutes in question thus contains personal data for the purposes of Article 2(a) of Regulation No 45/2001, since the persons who participated in that meeting can be identified in them.
123. However, the mere fact that a document contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected, even though professional activities are not, in principle, excluded from the concept of 'private life' within the meaning of Article 8 of the ECHR (see paragraph 114 above, and the case-law of the European Court of Human Rights cited there).
124. As the Commission itself has indicated, the persons present at the meeting of 11 October 1996, whose names have not been disclosed, were present as representatives of the CBMC and not in their personal capacity. The Commission has also indicated that the consequences of the decisions taken at the meeting concerned the bodies represented and not their representatives in their personal capacity.
125. In those circumstances, this Court finds that the fact that the minutes contain the names of those representatives does not affect the private life of the persons in question, given that they participated in the meeting as representatives of the bodies to which they belonged. Moreover, as noted above, the minutes do not contain any individual opinions attributable to those persons, but positions attributable to the bodies which those persons represented.
126. In any event, disclosure of the names of the CBMC representatives is not capable of actually and specifically affecting the protection of the privacy and integrity of the persons concerned. The mere presence of the name of the person concerned in a list of participants at a meeting, on behalf of the body which that person represented, does not constitute such an

interference, and the protection of the privacy and integrity of the persons concerned is not compromised.

127. That approach is not contradicted by the judgment in *Österreichischer Rundfunk*, relied on by the Commission. In that judgment, the Court held that the gathering of data with names concerning the income of an individual, with a view to communicating those data to third parties, fell within the scope of Article 8 of the ECHR. It held that, whilst the mere recording by an employer of data by name relating to the remuneration paid to his employees could not as such constitute an interference with private life, the communication of that data to third parties, in that case a public authority, infringed the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constituted an interference within the meaning of Article 8 of the ECHR (*Österreichischer Rundfunk*, paragraph 74). The Court added that, to establish the existence of such an interference, it did not matter whether the information communicated was of a sensitive character or whether the persons concerned had been inconvenienced in any way. It was sufficient to find that data relating to the remuneration received by an employee or pensioner had been communicated by the employer to a third party (*Österreichischer Rundfunk*, paragraph 75).
128. This Court finds that the circumstances of that case are different from those at issue here. This case falls within the application of Regulation No 1049/2001, and the exception laid down by Article 4(1)(b) of that regulation concerns only the disclosure of personal data which would undermine the protection of the privacy and integrity of the individual. As established in paragraph 119 above, not all personal data are capable by their nature of undermining the private life of the person concerned. In the circumstances of this case, the mere disclosure of the participation of a physical person, acting in a professional capacity, as the representative of a collective body, at a meeting held with a Community institution, where the personal opinion expressed by that person on that occasion cannot be identified, cannot be regarded as an interference with that person's private life. A distinction must thus be drawn from the situation which obtained in *Österreichischer Rundfunk*, where the matter at issue was the gathering and communication by an employer to a public authority of a specific combination of personal data, namely the names of employees and the income received by them.
129. In its judgment in *Lindqvist*, also relied upon by the Commission, the Court held that an operation consisting of referring to various persons on an internet page and identifying them either by name or by other means, such as their telephone number or information on their working conditions and pastimes, constituted 'the processing of personal data wholly or partly by automatic means' within the meaning of Directive 95/46 (*Lindqvist*, paragraph 27). That judgment is not decisive for the present case. As stated in the previous paragraph, this case falls under Regulation No 1049/2001, and the matter at issue is therefore, in addition to whether a processing of personal data is involved, to determine whether the disclosure of the data in question would undermine the privacy and integrity of the individual.
130. Nor does the approach of the Court of First Instance contradict the case-law of the European Court of Human Rights, according to which the right to respect for private life includes the right of the individual to establish and develop relations with others and may extend to professional or business activities (*Niemietz v Germany*, § 29; *Amann v Switzerland*, § 65; *Rotaru v Romania*, § 43, and *Peck v United Kingdom*, § 57).
131. Even if one cannot, a priori, exclude the possibility that the concept of private life may cover certain aspects of the professional activity of an individual, that does not mean that any professional activity is wholly and necessarily covered by protection of the right to respect for private life. In this case, the Court takes the view that the mere participation of a representative of a collective body in a meeting held with a Community institution does not fall within the sphere of that person's private life, so that the disclosure of minutes revealing his presence at that meeting cannot constitute an interference with his private life.
132. Thus, the disclosure of the names in question does not lead to an interference with the private life of the persons who participated in the meeting and would not undermine the protection of their private life and the integrity of their person.
133. The Commission is therefore wrong in its view that the exception under Article 4(1)(b) of Regulation No 1049/2001 had to be applied in this case.

134. Moreover, the Commission does not claim that, in this case, at the time of the gathering of the data, namely at the meeting of 11 October 1996, it undertook to keep the names of the participants secret, or that the participants requested at that meeting that the Commission not reveal their identity. It was not until 1999, when the Commission requested authorisation to reveal their identity, that certain participants refused to allow their name to be disclosed.
135. Since in this case the condition under Article 4(1)(b) of Regulation No 1049/2001 that protection of the relevant person's privacy and integrity must be affected has not been fulfilled, refusal by that person cannot prevent disclosure. Moreover, the Commission has not even attempted to establish that the persons who refused, after the meeting, to allow disclosure of their name had demonstrated that protection of their privacy and integrity would be affected by disclosure.
136. It should also be noted in that respect that, in the end, the Commission received refusals from only two of the persons in question, and that it was not able to contact the three other persons in question, whose names it had also not disclosed (see paragraph 35 above).
137. The persons who participated in that meeting had no grounds for believing that the opinions expressed in the name of and on behalf of the bodies they represented enjoyed confidential treatment. This was a meeting held in the context of proceedings for failure to fulfil obligations. Although, under such proceedings, the applicant may, pursuant to internal Commission rules, choose confidential treatment, there is no provision for such treatment in respect of the other persons participating in the investigations. Moreover, since the Commission disclosed the minutes, albeit with certain names removed, it clearly took the view that this was not information covered by business secrecy. Regulation No 45/2001 does not require the Commission to keep secret the names of persons who communicate opinions or information to it concerning the exercise of its functions.
138. As for the Commission's argument that the applicant has never satisfied the obligation to prove the necessity for transfer, as provided under Article 8(b) of Regulation No 45/2001, it is sufficient to note that, as held in paragraphs 107 and 108 above, where the disclosure gives effect to Article 2 of Regulation No 1049/2001 and does not fall under the exception laid down by Article 4(1)(b) of that regulation, the applicant has no need to prove necessity for the purposes of Article 8(b) of Regulation No 45/2001. Therefore, the Commission's argument that communication of the identity of the participants would not have thrown any additional light on the decision to close the proceedings for failure to fulfil obligations cannot succeed.
139. The Commission therefore erred in law by holding, in the contested decision, that the applicant had not established either an express and legitimate purpose or any need to obtain the names of the five persons who participated in the meeting and who, after that meeting, objected to communication of their identity to the applicant.
140. It is also necessary to examine the application of the exception under the third indent of Article 4(2) of Regulation No 1049/2001.
- The exception concerning protection of the purpose of inspections, investigations and audits
141. Under the third indent of Article 4(2) of Regulation No 1049/2001, the institutions must refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.
142. Although, by confusion, the applicant cites in its application Article 4(3) of Regulation No 1049/2001, its application should be interpreted as relying on the third indent of Article 4(2) of that regulation, since it is on that provision that the Commission based, in the alternative, its refusal to grant access to the full minutes. In any event, at the hearing, the applicant referred to the third indent of Article 4(2) of Regulation No 1049/2001.
143. It is for the institution to assess in each individual case whether the documents disclosure of which has been requested actually fall within the exceptions set out in the regulation concerning access to documents.
144. The document at issue in this case is the minutes of a meeting which took place in the context of proceedings for failure to fulfil obligations.
145. However, the fact that the document at issue is

- linked to proceedings for failure to fulfil obligations, and thus concerns investigations, cannot in itself justify applicant of the exception pleaded (see, to that effect, *Bavarian Lager v Commission*, paragraph 41). As stated above, any exception to the right of access to documents under Regulation No 1049/2001 must be interpreted and applied strictly (*Case T20/99 Denavit Nederland v Commission* [2000] ECR II3011, paragraph 45).
146. In that respect, it should be remembered that the Commission's investigations were already over at the time the contested decision was adopted, on 18 March 2004. Indeed, it had already closed the infringement proceedings against the United Kingdom without taking any further action on 10 December 1997.
147. It thus needs to be examined in this case whether the document concerning investigations was covered by the exception under the third indent of Article 4(2) of Regulation No 1049/2001, whereas the investigation was complete and infringement proceedings closed for more than six years.
148. The Court of First Instance has already had occasion to hold that the third indent of Article 4(2) of Regulation No 1049/2001, which is designed to protect 'the purpose of inspections, investigations and audits', applies only where disclosure of the documents in question risks jeopardising the completion of the inspections, investigations or audits (*Franchet and Byk*, paragraph 109).
149. It should be noted that that exception, from the way in which it is formulated, is designed not to protect investigations as such but the purpose of those investigations, which, as is shown in the judgment in *Bavarian Lager v Commission* (paragraph 46), consists, in the case of proceedings for failure to fulfil obligations, in causing the Member State concerned to comply with Community law. In this case, the Commission had already closed the infringement proceedings against the United Kingdom on 10 December 1997, since the latter had amended the legislation at issue and the purpose of the investigations had thus been achieved. Thus, at the time the contested decision was adopted, no investigation whose purpose could have been jeopardised by disclosure of the minutes containing the names of certain representatives of bodies which participated in the meeting of 11 October 1996 was in progress, with the result that the exception under the third indent of Article 4(2) of Regulation No 1049/2001 cannot be applied in this case.
150. In order to justify its refusal to disclose the whole of the minutes in question, the Commission further argues that, if the names of persons who have supplied information to the Commission could be disclosed against their wishes, the Commission could be deprived of a precious source of information, which could compromise its ability to conduct investigations into presumed infringements of Community legislation.
151. In that regard it should be noted that, according to consistent case-law, the assessment required for processing an application for access to documents must be of a concrete nature. First, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify that exception being applied (see, to that effect, *Denavit Nederland*, paragraph 45). Secondly, the risk of a protected interest being affected must be reasonably foreseeable and not merely hypothetical. Therefore, the assessment which the institution must undertake in order to apply an exception must be carried out in a concrete way and be apparent from the grounds of the decision (*Case T188/98 Kuijter v Council* [2000] ECR II1959, paragraph 38; *Case T2/03 Verein für Konsumenteninformation v Commission* [2005] ECR II1121, paragraphs 69 and 72; and *Franchet and Byk*, paragraph 115).
152. Thus, whilst it must be acknowledged that the need to preserve the anonymity of persons providing the Commission with information on possible infringements of Community law constitutes a legitimate objective capable of justifying the Commission in not granting complete, or even partial, access to certain documents, the fact remains that, in this case, the Commission ruled in the abstract on the effect which disclosure of the document concerned with names might have on its investigative activity, without demonstrating to a sufficient legal standard that disclosure of that document would actually and specifically undermine protection of the purposes of investigations. Thus it has not been shown in this case that the purpose of investigations was actually and specifically jeopardised by the disclosure of data requested six years after the closure of those investigations.
153. Moreover, as stated above, the procedure for

failure to fulfil obligations does not provide for confidential treatment for persons who participated in the investigations, save for the complainant. It appears that, if the Commission disclosed the minutes in question without the names of persons who had not given authorisation for their names to be disclosed, that is because it considered, in principle, that disclosure of that document did not fall within the exception under the third indent of Article 4(2) of Regulation No 1049/2001.

154. In that respect, the Commission's reference during the hearing to Case 145/83 Adams v Commission [1985] ECR 3539 concerning the confidentiality of information covered by business secrecy is not relevant. That case concerned an informer who had denounced anti-competitive practices of his employer and whose identity the Commission had to keep secret. That informer had specifically asked it not to reveal his identity from the beginning of the proceedings. In this case, however, as stated above, the Commission has not shown that, at the time they participated in the meeting in question, the persons concerned had reasonable grounds for believing that they enjoyed confidential treatment of any kind, or that they had asked the Commission not to reveal their identity. Moreover, as stated in paragraph 137 above, given that the Commission disclosed the minutes, albeit with certain names removed, it must have taken the view that this was not information covered by business secrecy. Finally, the Commission has not put forward any argument to demonstrate in what way disclosure of the names of the persons who refused their consent could have harmed any investigations involved in this case.

155. In those circumstances, the arguments based on protection of the purposes of inspections and investigations cannot succeed.

156. There is therefore no need to examine the possible existence of a higher public interest justifying disclosure of the document concerned.

157. It follows from the whole of the above that the full minutes of the meeting of 11 October 1996, containing all the names, does not fall within the exceptions under Article 4(1)(b) or the third indent of Article 4(2) of Regulation No 1049/2001.

158. The contested decision must therefore be annulled.

159. Costs

160. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the applicant's costs, as the applicant has pleaded.

161. Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court of First Instance may order an intervener to bear his own costs. In this case, the intervener in support of the applicant is ordered to bear his own costs.

On those grounds, THE COURT OF FIRST INSTANCE (Third Chamber) hereby:

1. **Annuls the Commission's decision of 18 March 2004, rejecting an application for access to the full minutes of the meeting of 11 October 1996, containing all the names;**
2. **Orders the Commission to pay the costs incurred by The Bavarian Lager Co. Ltd;**
3. **Orders the European Data Protection Supervisor (EDPS) to bear his own costs.**

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 8 November 2007.

E. Coulon, Registrar

M. Jaeger, President

DATA PROCESSING FOR PUBLIC SECURITY PURPOSES – PRIVATE OPERATORS IN THE REALM OF ACTIVITIES OF STATE AUTHORITIES

JOINED CASES C-317/04 AND C-318/04 EUROPEAN PARLIAMENT v COUNCIL OF THE EUROPEAN UNION AND COMMISSION OF THE EUROPEAN COMMUNITIES

(Protection of individuals with regard to the processing of personal data – Air transport – Decision 2004/496/EC – Agreement between the European Community and the United States of America – Passenger Name Records of air passengers transferred to the United States Bureau of Customs and Border Protection – Directive 95/46/EC – Article 25 – Third countries – Decision 2004/535/EC – Adequate level of protection)

KEYWORDS

1. *Approximation of laws – Directive 95/46 – Scope (European Parliament and Council Directive 95/46, Art. 3(2); Commission Decision 2004/535)*
2. *International agreements – Conclusion – EEC-United States Agreement on the processing and transfer of Passenger Name Records of air passengers to the United States Bureau of Customs and Border Protection (Art. 95 EC; European Parliament and Council Directive 95/46, Arts 3(2) and 25; Council Decision 2004/496)*

SUMMARY OF THE JUDGMENT

1. Decision 2004/535 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection relates to personal-data processing operations concerning public security and the activities of the State in areas of criminal law, operations which are excluded from the scope of Directive 95/46 on the protection of individuals with regard to the processing of

personal data and on the free movement of such data, by virtue of the first indent of Article 3(2) of that directive.

The fact that the personal data are collected by private operators for commercial purposes and it is they who arrange for their transfer to a third country does not alter such a conclusion, inasmuch as their transfer falls within a framework established by the public authorities that relates to public security, and is not necessary for the supply of services by those operators.

(see paras 56-59)

2. Decision 2004/496 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR (Passenger Name Record) data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, cannot have been validly adopted on the basis of Article 95 EC, read in conjunction with Article 25 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The agreement relates to data processing operations which, since they concern public security and the activities of the State in areas of criminal law, are excluded from the scope of Directive 95/46 by virtue of the first indent of Article 3(2) of that directive.

(see paras 67-69)

JUDGMENT OF THE COURT (GRAND CHAMBER)

30 May 2006¹⁰

(Protection of individuals with regard to the processing of personal data – Air transport – Decision 2004/496/EC – Agreement between the European Community and the United States of America – Passenger Name Records of air passengers transferred to the United States Bureau of Customs and Border Protection – Directive 95/46/EC – Article 25 – Third countries – Decision 2004/535/EC – Adequate level of protection)

In Joined Cases C-317/04 and C-318/04,

ACTIONS for annulment under Article 230 EC, brought on 27 July 2004, European Parliament, represented by R. Passos, N. Lorenz, H. Duintjer

¹⁰ Language of the case: French.

Tebbens and A. Caiola, acting as Agents, with an address for service in Luxembourg, applicant, supported by European Data Protection Supervisor (EDPS), represented by H. Hijmans and V. Perez Asinari, acting as Agents, intervener,

v

Council of the European Union, represented by M.C. Giorgi Fort and M. Bishop, acting as Agents, defendant in Case C-317/04, supported by Commission of the European Communities, represented by P.J. Kuijper, A. van Solinge and C. Docksey, acting as Agents, with an address for service in Luxembourg, United Kingdom of Great Britain and Northern Ireland, represented by M. Bethell, C. White and T. Harris, acting as Agents, and by T. Ward, Barrister, with an address for service in Luxembourg, interveners,

and v

Commission of the European Communities, represented by P.J. Kuijper, A. van Solinge, C. Docksey and F. Benyon, acting as Agents, with an address for service in Luxembourg,

defendant in Case C-318/04,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by M. Bethell, C. White and T. Harris, acting as Agents, and by T. Ward, Barrister, with an address for service in Luxembourg,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovský, Presidents of Chambers, N. Colneric (Rapporteur), S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta, G. Arestis, A. Borg Barthet, M. Ilešič and J. Klučka, Judges, Advocate General: P. Léger, Registrar: M. Ferreira, Principal Administrator, having regard to the written procedure and further to the hearing on 18 October 2005, after hearing the Opinion of the Advocate General at the sitting on 22 November 2005, gives the following Judgment

1. By its application in Case C-317/04, the European Parliament seeks the annulment of Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ 2004 L 183, p. 83, and corrigendum at OJ 2005 L 255,

p. 168).

2. By its application in Case C-318/04, the Parliament seeks the annulment of Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection (OJ 2004 L 235, p. 11; 'the decision on adequacy').

Legal context

3. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'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 freedoms of others.'

4. The second sentence of Article 95(1) EC is worded as follows:

'The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

5. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1) ('the Directive'), was adopted on the basis of Article 100a of the EC Treaty

(now, after amendment, Article 95 EC).

6. The 11th recital in the preamble to the Directive states that ‘the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data’.

7. The 13th recital in the preamble reads as follows:

‘... the activities referred to in Titles V and VI of the Treaty on European Union regarding public safety, defence, State security or the activities of the State in the area of criminal laws fall outside the scope of Community law, without prejudice to the obligations incumbent upon Member States under Article 56(2), Article 57 or Article 100a of the Treaty establishing the European Community...’.

8. The 57th recital states:

‘... the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited’.

9. Article 2 of the Directive provides:

‘For the purposes of this Directive:

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...’

10. Article 3 of the Directive is worded as follows:

‘Scope

1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than

by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

...’

11. Article 6(1) of the Directive states:

‘Member States shall provide that personal data must be:

...

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

...

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed...’

12. Article 7 of the Directive provides:

‘Member States shall provide that personal data may be processed only if:

...

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

...

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests [or] fundamental rights and freedoms of the data subject which require protection under Article 1(1).'
13. The first subparagraph of Article 8(5) of the Directive is worded as follows:
- 'Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.'
14. Article 12 of the Directive provides:
- 'Member States shall guarantee every data subject the right to obtain from the controller:
- (a) without constraint at reasonable intervals and without excessive delay or expense:
- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,
 - communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,
 - knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1);
- (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
- (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.'
15. Article 13(1) of the Directive is worded as follows:
- 'Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary [measure] to safeguard:
- (a) national security;
- (b) defence;
- (c) public security;
- (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
- (e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
- (f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);
- (g) the protection of the data subject or of the rights and freedoms of others.'
16. Article 22 of the Directive provides:
- 'Remedies
- Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.'
17. Articles 25 and 26 of the Directive constitute Chapter IV, on the transfer of personal data to third countries.
18. Article 25, headed 'Principles', provides:
- '1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.
2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin

and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

3. The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.

4. Where the Commission finds, under the procedure provided for in Article 31(2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.

5. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

6. The Commission may find, in accordance with the procedure referred to in Article 31(2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.'

19. Article 26(1) of the Directive, under the heading 'Derogations', is worded as follows:

'By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) may take place on condition that:

- (a) the data subject has given his consent unambiguously to the proposed transfer; or
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or
- (c) the transfer is necessary for the conclusion or performance of a contract concluded in the

interest of the data subject between the controller and a third party; or

(d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or

(e) the transfer is necessary in order to protect the vital interests of the data subject; or

(f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.'

20. It was on the basis of the Directive, in particular Article 25(6) thereof, that the Commission of the European Communities adopted the decision on adequacy.

21. The 11th recital in the preamble to that decision states:

'The processing by CBP [the Bureau of Customs and Border Protection] of personal data contained in the PNR [Passenger Name Record] of air passengers transferred to it is governed by conditions set out in the Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection (CBP) of 11 May 2004 (hereinafter referred to as the Undertakings) and in United States domestic legislation to the extent indicated in the Undertakings.'

22. The 15th recital in the preamble to the decision states that PNR data will be used strictly for purposes of preventing and combating terrorism and related crimes, other serious crimes, including organised crime, that are transnational in nature, and flight from warrants or custody for those crimes.

23. Articles 1 to 4 of the decision on adequacy provide:

'Article 1

For the purposes of Article 25(2) of Directive 95/46/EC, the United States Bureau of Customs and Border Protection (hereinafter referred to as CBP) is considered to ensure an adequate level of protection for PNR data transferred from the Community concerning flights to or from the United States, in accordance with the Undertakings set out in the Annex.

Article 2

This Decision concerns the adequacy of protection provided by CBP with a view to meeting the requirements of Article 25(1) of Directive 95/46/EC and shall not affect other conditions or restrictions implementing other provisions of that Directive that pertain to the processing of personal data within the Member States.

Article 3

1. Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive 95/46/EC, the competent authorities in Member States may exercise their existing powers to suspend data flows to CBP in order to protect individuals with regard to the processing of their personal data in the following cases:

(a) where a competent United States authority has determined that CBP is in breach of the applicable standards of protection; or

(b) where there is a substantial likelihood that the standards of protection set out in the Annex are being infringed, there are reasonable grounds for believing that CBP is not taking or will not take adequate and timely steps to settle the case at issue, the continuing transfer would create an imminent risk of grave harm to data subjects, and the competent authorities in the Member State have made reasonable efforts in the circumstances to provide CBP with notice and an opportunity to respond.

2. Suspension shall cease as soon as the standards of protection are assured and the competent authorities of the Member States concerned are notified thereof.

Article 4

1. Member States shall inform the Commission without delay when measures are adopted pursuant to Article 3.

2. The Member States and the Commission shall inform each other of any changes in the standards of protection and of cases where the action of bodies responsible for ensuring compliance with the standards of protection by CBP as set out in the Annex fails to secure such compliance.

3. If the information collected pursuant to Article 3 and pursuant to paragraphs 1 and 2 of this Article provides evidence that the basic principles necessary for an adequate level of protection for natural persons are no longer being complied with, or that any body respon-

sible for ensuring compliance with the standards of protection by CBP as set out in the Annex is not effectively fulfilling its role, CBP shall be informed and, if necessary, the procedure referred to in Article 31(2) of Directive 95/46/EC shall apply with a view to repealing or suspending this Decision.'

24. The 'Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection (CBP)' annexed to the decision on adequacy state:

'In support of the plan of the European Commission (Commission) to exercise the powers conferred on it by Article 25(6) of Directive 95/46/EC ... and to adopt a decision recognising the Department of Homeland Security Bureau of Customs and Border Protection (CBP) as providing adequate protection for the purposes of air carrier transfers of [PNR] data which may fall within the scope of the Directive, CBP undertakes as follows...'

25. The Undertakings comprise 48 paragraphs, arranged under the following headings: 'Legal authority to obtain PNR'; 'Use of PNR data by CBP'; 'Data requirements'; 'Treatment of "sensitive" data'; 'Method of accessing PNR data'; 'Storage of PNR data'; 'CBP computer system security'; 'CBP treatment and protection of PNR data'; 'Transfer of PNR data to other government authorities'; 'Notice, access and opportunities for redress for PNR data subjects'; 'Compliance issues'; 'Reciprocity'; 'Review and termination of Undertakings'; and 'No private right or precedent created'.
26. The Undertakings include the following:

'1. By legal statute (title 49, United States Code, section 44909(c)(3)) and its implementing (interim) regulations (title 19, Code of Federal Regulations, section 122.49b), each air carrier operating passenger flights in foreign air transportation to or from the United States must provide CBP (formerly, the US Customs Service) with electronic access to PNR data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems (reservation systems).

...

3. PNR data are used by CBP strictly for purposes of preventing and combating: 1. terrorism and related crimes; 2. other serious crimes, including organised crime, that are transnational in nature; and 3. flight from warrants or custody for the crimes described above. Use of PNR data for these purposes permits CBP to focus its resources on high-risk concerns,

thereby facilitating and safeguarding bona fide travel.

4. Data elements which CBP requires are listed herein at Attachment A. ...

...

27. CBP will take the position in connection with any administrative or judicial proceeding arising out of a FOIA [Freedom of Information Act] request for PNR information accessed from air carriers, that such records are exempt from disclosure under the FOIA.

...

29. CBP, in its discretion, will only provide PNR data to other government authorities, including foreign government authorities, with counter-terrorism or law-enforcement functions, on a case-by-case basis, for purposes of preventing and combating offences identified in paragraph 3 herein. (Authorities with whom CBP may share such data shall hereinafter be referred to as the Designated Authorities).

30. CBP will judiciously exercise its discretion to transfer PNR data for the stated purposes. CBP will first determine if the reason for disclosing the PNR data to another Designated Authority fits within the stated purpose (see paragraph 29 herein). If so, CBP will determine whether that Designated Authority is responsible for preventing, investigating or prosecuting the violations of, or enforcing or implementing, a statute or regulation related to that purpose, where CBP is aware of an indication of a violation or potential violation of law. The merits of disclosure will need to be reviewed in light of all the circumstances presented.

...

35. No statement in these Undertakings shall impede the use or disclosure of PNR data in any criminal judicial proceedings or as otherwise required by law. CBP will advise the European Commission regarding the passage of any US legislation which materially affects the statements made in these Undertakings.

...

46. These Undertakings shall apply for a term of three years and six months (3.5 years), beginning on the date upon which an agreement enters into force between the United States and the European Community, authorising the processing of PNR data by air carriers for purposes of transferring such data to CBP, in accordance with the Directive. ...

47. These Undertakings do not create or con-

fer any right or benefit on any person or party, private or public.

...'

27. Attachment A to the Undertakings contains the 'PNR data elements' required by CBP from air carriers. The PNR data elements include the 'PNR record locator code', date of reservation, name, address, all forms of payment information, contact telephone numbers, travel agency, travel status of the passenger, e-mail address, general remarks, seat number, no-show history and any collected APIS (Advanced Passenger Information System) information.

28. The Council adopted Decision 2004/496 on the basis, in particular, of Article 95 EC in conjunction with the first sentence of the first subparagraph of Article 300(2) EC.

29. The three recitals in the preamble to that decision state:

'(1) On 23 February 2004 the Council authorised the Commission to negotiate, on behalf of the Community, an Agreement with the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection.

(2) The European Parliament has not given an Opinion within the time-limit which, pursuant to the first subparagraph of Article 300(3) of the Treaty, the Council laid down in view of the urgent need to remedy the situation of uncertainty in which airlines and passengers found themselves, as well as to protect the financial interests of those concerned.

(3) This Agreement should be approved.'

30. Article 1 of Decision 2004/496 provides:

'The Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection is hereby approved on behalf of the Community.

The text of the Agreement is attached to this Decision.'

31. That agreement ('the Agreement') is worded as follows:

'The European Community and the United States of America,

Recognising the importance of respecting fundamental rights and freedoms, notably pri-

vacy, and the importance of respecting these values, while preventing and combating terrorism and related crimes and other serious crimes that are transnational in nature, including organised crime,

Having regard to US statutes and regulations requiring each air carrier operating passenger flights in foreign air transportation to or from the United States to provide the Department of Homeland Security (hereinafter "DHS"), Bureau of Customs and Border Protection (hereinafter "CBP") with electronic access to Passenger Name Record (hereinafter "PNR") data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems,

Having regard to Directive 95/46/EC ..., and in particular Article 7(c) thereof,

Having regard to the Undertakings of CBP issued on 11 May 2004, which will be published in the Federal Register (hereinafter "the Undertakings"),

Having regard to Commission Decision 2004/535/EC adopted on 14 May 2004, pursuant to Article 25(6) of Directive 95/46/EC, whereby CBP is considered as providing an adequate level of protection for PNR data transferred from the European Community (hereinafter "Community") concerning flights to or from the US in accordance with the Undertakings, which are annexed thereto (hereinafter "the Decision"),

Noting that air carriers with reservation/departure control systems located within the territory of the Member States of the European Community should arrange for transmission of PNR data to CBP as soon as this is technically feasible but that, until then, the US authorities should be allowed to access the data directly, in accordance with the provisions of this Agreement,

...

Have agreed as follows:

(1) CBP may electronically access the PNR data from air carriers' reservation/departure control systems ("reservation systems") located within the territory of the Member States of the European Community strictly in accordance with the Decision and for so long as the Decision is applicable and only until there is a satisfactory system in place allowing for transmission of such data by the air carriers.

(2) Air carriers operating passenger flights in foreign air transportation to or from the United States shall process PNR data contained

in their automated reservation systems as required by CBP pursuant to US law and strictly in accordance with the Decision and for so long as the Decision is applicable.

(3) CBP takes note of the Decision and states that it is implementing the Undertakings annexed thereto.

(4) CBP shall process PNR data received and treat data subjects concerned by such processing in accordance with applicable US laws and constitutional requirements, without unlawful discrimination, in particular on the basis of nationality and country of residence.

...

(7) This Agreement shall enter into force upon signature. Either Party may terminate this Agreement at any time by notification through diplomatic channels. The termination shall take effect ninety (90) days from the date of notification of termination to the other Party. This Agreement may be amended at any time by mutual written agreement.

(8) This Agreement is not intended to derogate from or amend legislation of the Parties; nor does this Agreement create or confer any right or benefit on any other person or entity, private or public.'

32. According to Council information concerning the date of its entry into force (OJ 2004 C 158, p. 1), the Agreement, signed in Washington on 28 May 2004 by a representative of the Presidency-in-Office of the Council and the Secretary of the United States Department of Homeland Security, entered into force on the date of its signature, as provided by paragraph 7 of the Agreement.

Background

33. Following the terrorist attacks of 11 September 2001, the United States passed legislation in November 2001 providing that air carriers operating flights to or from the United States or across United States territory had to provide the United States customs authorities with electronic access to the data contained in their automated reservation and departure control systems, referred to as 'Passenger Name Records' ('PNR data'). While acknowledging the legitimacy of the security interests at stake, the Commission informed the United States authorities, in June 2002, that those provisions could come into conflict with Community and Member State legislation on data protection and with certain provisions of Council Regu-

lation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1), as amended by Council Regulation (EC) No 323/1999 of 8 February 1999 (OJ 1999 L 40, p. 1). The United States authorities postponed the entry into force of the new provisions but, ultimately, refused to waive the right to impose penalties on airlines failing to comply with the legislation on electronic access to PNR data after 5 March 2003. Since then, a number of large airlines in the European Union have granted the United States authorities access to their PNR data.

34. The Commission entered into negotiations with the United States authorities, which gave rise to a document containing undertakings on the part of CBP, with a view to the adoption by the Commission of a decision on adequacy pursuant to Article 25(6) of the Directive.
35. On 13 June 2003 the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, set up by Article 29 of the Directive, delivered an opinion in which it expressed doubts regarding the level of data protection guaranteed by those undertakings for the processing operations envisaged. It reiterated those doubts in an opinion of 29 January 2004.
36. On 1 March 2004 the Commission placed before the Parliament the draft decision on adequacy under Article 25(6) of the Directive, together with the draft undertakings of CBP.
37. On 17 March 2004 the Commission submitted to the Parliament, with a view to its consultation in accordance with the first subparagraph of Article 300(3) EC, a proposal for a Council decision concerning the conclusion of an agreement with the United States. By letter of 25 March 2004, the Council, referring to the urgent procedure, requested the Parliament to deliver an opinion on that proposal by 22 April 2004 at the latest. In that letter, the Council stated: 'The fight against terrorism, which justifies the proposed measures, is a key priority of the European Union. Air carriers and passengers are at present in a situation of uncertainty which urgently needs to be remedied. In addition, it is essential to protect the financial interests of the parties concerned.'
38. On 31 March 2004 the Parliament, acting pursuant to Article 8 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), adopted a resolution setting out a number of reservations of a legal nature regarding the proposal which had been submitted to it. In particular, the Parliament considered that the draft decision on adequacy exceeded the powers conferred on the Commission by Article 25 of the Directive. It called for the conclusion of an appropriate international agreement respecting fundamental rights that would cover a number of points set out in detail in the resolution, and asked the Commission to submit a new draft decision to it. It also reserved the right to refer the matter to the Court for review of the legality of the projected international agreement and, in particular, of its compatibility with protection of the right to privacy.
39. On 21 April 2004 the Parliament, at the request of its President, approved a recommendation from the Committee on Legal Affairs and the Internal Market that, in accordance with Article 300(6) EC, an Opinion be obtained from the Court on the compatibility of the agreement envisaged with the Treaty. That procedure was initiated on that very day.
40. The Parliament also decided, on the same day, to refer to committee the report on the proposal for a Council decision, thus implicitly rejecting, at that stage, the Council's request of 25 March 2004 for urgent consideration of the proposal.
41. On 28 April 2004 the Council, acting on the basis of the first subparagraph of Article 300(3) EC, sent a letter to the Parliament asking it to deliver its opinion on the proposal for a decision relating to the conclusion of the Agreement by 5 May 2004. To justify the urgency of that request, the Council restated the reasons set out in its letter of 25 March 2004.
42. After taking note of the continuing lack of all the language versions of the proposal for a Council decision, on 4 May 2004 the Parliament rejected the Council's request to it of 28 April for urgent consideration of that proposal.
43. On 14 May 2004 the Commission adopted the decision on adequacy, which is the subject of Case C-318/04. On 17 May 2004 the Council adopted Decision 2004/496, which is the subject of Case C-317/04.
44. By letter of 4 June 2004, the Presidency-Office of the Council informed the Parliament that Decision 2004/496 took into account the fight against terrorism – a priority of the Union – but also the need to address the uncertain

legal situation of air carriers as well as their financial interests.

45. By letter of 9 July 2004, the Parliament informed the Court of the withdrawal of its request for an Opinion, which had been registered under No 1/04.
46. In Case C-317/04, the Commission and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council, by orders of the President of the Court of 18 November 2004 and 18 January 2005.
47. In Case C-318/04, the United Kingdom was granted leave to intervene in support of the form of order sought by the Commission, by order of the President of the Court of 17 December 2004.
48. By orders of the Court of 17 March 2005, the European Data Protection Supervisor was granted leave to intervene in support of the form of order sought by the Parliament in both cases.
49. Given the connection, confirmed at the hearing, between the cases, it is appropriate to join them under Article 43 of the Rules of Procedure for the purposes of the judgment.

The application in Case C-318/04

50. The Parliament advances four pleas for annulment, alleging, respectively, *ultra vires* action, breach of the fundamental principles of the Directive, breach of fundamental rights and breach of the principle of proportionality.

The first limb of the first plea: breach of the first indent of Article 3(2) of the Directive

Arguments of the parties

51. The Parliament contends that adoption of the Commission decision was *ultra vires* because the provisions laid down in the Directive were not complied with; in particular, the first indent of Article 3(2) of the Directive, relating to the exclusion of activities which fall outside the scope of Community law, was infringed.
52. In the Parliament's submission, there is no doubt that the processing of PNR data after transfer to the United States authority covered by the decision on adequacy is, and will be, carried out in the course of activities of the State

as referred to in paragraph 43 of the judgment in Case C-101/01 Lindqvist [2003] ECR I I 2971.

53. The Commission, supported by the United Kingdom, considers that the air carriers' activities clearly fall within the scope of Community law. It submits that those private operators process the PNR data within the Community and arrange for their transfer to a third country. Activities of private parties are therefore involved, and not activities of the Member State in which the carriers concerned operate, or of its public authorities, as defined by the Court in paragraph 43 of Lindqvist. The aim pursued by the air carriers in processing PNR data is simply to comply with the requirements of Community law, including the obligation laid down in paragraph 2 of the Agreement. Article 3(2) of the Directive refers to activities of public authorities which fall outside the scope of Community law.

Findings of the Court

54. The first indent of Article 3(2) of the Directive excludes from the Directive's scope the processing of personal data in the course of an activity which falls outside the scope of Community law, such as activities provided for by Titles V and VI of the Treaty on European Union, and in any case processing operations concerning public security, defence, State security and the activities of the State in areas of criminal law.
55. The decision on adequacy concerns only PNR data transferred to CBP. It is apparent from the sixth recital in the preamble to the decision that the requirements for that transfer are based on a statute enacted by the United States in November 2001 and on implementing regulations adopted by CBP under that statute. According to the seventh recital in the preamble, the United States legislation in question concerns the enhancement of security and the conditions under which persons may enter and leave the country. The eighth recital states that the Community is fully committed to supporting the United States in the fight against terrorism within the limits imposed by Community law. The 15th recital states that PNR data will be used strictly for purposes of preventing and combating terrorism and related crimes, other serious crimes, including organised crime, that are transnational in nature, and flight from warrants or custody for those crimes.
56. It follows that the transfer of PNR data to CBP

constitutes processing operations concerning public security and the activities of the State in areas of criminal law.

57. While the view may rightly be taken that PNR data are initially collected by airlines in the course of an activity which falls within the scope of Community law, namely sale of an aeroplane ticket which provides entitlement to a supply of services, the data processing which is taken into account in the decision on adequacy is, however, quite different in nature. As pointed out in paragraph 55 of the present judgment, that decision concerns not data processing necessary for a supply of services, but data processing regarded as necessary for safeguarding public security and for law-enforcement purposes.
58. The Court held in paragraph 43 of Lindqvist, which was relied upon by the Commission in its defence, that the activities mentioned by way of example in the first indent of Article 3(2) of the Directive are, in any event, activities of the State or of State authorities and unrelated to the fields of activity of individuals. However, this does not mean that, because the PNR data have been collected by private operators for commercial purposes and it is they who arrange for their transfer to a third country, the transfer in question is not covered by that provision. The transfer falls within a framework established by the public authorities that relates to public security.
59. It follows from the foregoing considerations that the decision on adequacy concerns processing of personal data as referred to in the first indent of Article 3(2) of the Directive. That decision therefore does not fall within the scope of the Directive.
60. Accordingly, the first limb of the first plea, alleging that the first indent of Article 3(2) of the Directive was infringed, is well founded.
61. The decision on adequacy must consequently be annulled and it is not necessary to consider the other limbs of the first plea or the other pleas relied upon by the Parliament.

The application in Case C-317/04

62. The Parliament advances six pleas for annulment, concerning the incorrect choice of Article 95 EC as legal basis for Decision 2004/496 and breach of, respectively, the second subparagraph of Article 300(3) EC, Article 8 of the

ECHR, the principle of proportionality, the requirement to state reasons and the principle of cooperation in good faith.

The first plea: incorrect choice of Article 95 EC as legal basis for Decision 2004/496

Arguments of the parties

63. The Parliament submits that Article 95 EC does not constitute an appropriate legal basis for Decision 2004/496. The decision does not have as its objective and subject-matter the establishment and functioning of the internal market by contributing to the removal of obstacles to the freedom to provide services and it does not contain provisions designed to achieve such an objective. Its purpose is to make lawful the processing of personal data that is required by United States legislation. Nor can Article 95 EC justify Community competence to conclude the Agreement, because the Agreement relates to data processing operations which are excluded from the scope of the Directive.
64. The Council contends that the Directive, validly adopted on the basis of Article 100a of the Treaty, contains in Article 25 provisions enabling personal data to be transferred to a third country which ensures an adequate level of protection, including the possibility of entering, if need be, into negotiations leading to the conclusion by the Community of an agreement with that country. The Agreement concerns the free movement of PNR data between the Community and the United States under conditions which respect the fundamental freedoms and rights of individuals, in particular privacy. It is intended to eliminate any distortion of competition, between the Member States' airlines and between the latter and the airlines of third countries, which may result from the requirements imposed by the United States, for reasons relating to the protection of individual rights and freedoms. The conditions of competition between Member States' airlines operating international passenger flights to and from the United States could have been distorted because only some of them granted the United States authorities access to their databases. The Agreement is designed to impose harmonised obligations on all the airlines concerned.
65. The Commission observes that there is a 'conflict of laws', within the meaning of public international law, between the United States legislation and the Community rules and that it is

necessary to reconcile them. It complains that the Parliament, which disputes that Article 95 EC can constitute the legal basis for Decision 2004/496, has not suggested an appropriate legal basis. According to the Commission, that article is 'the natural legal basis' for the decision because the Agreement concerns the external dimension of the protection of personal data when transferred within the Community. Articles 25 and 26 of the Directive justify exclusive Community external competence.

66. In addition, the Commission submits that the initial processing of the data by the airlines is carried out for commercial purposes. The use which the United States authorities make of the data does not remove them from the effect of the Directive.

Findings of the Court

67. Article 95 EC, read in conjunction with Article 25 of the Directive, cannot justify Community competence to conclude the Agreement.
68. The Agreement relates to the same transfer of data as the decision on adequacy and therefore to data processing operations which, as has been stated above, are excluded from the scope of the Directive.
69. Consequently, Decision 2004/496 cannot have been validly adopted on the basis of Article 95 EC.
70. That decision must therefore be annulled and it is not necessary to consider the other pleas relied upon by the Parliament.

Limitation of the effects of the judgment

71. Under paragraph 7 of the Agreement, either party may terminate the Agreement at any time and the termination takes effect 90 days from the date of notification of termination to the other party.
72. However, in accordance with paragraphs 1 and 2 of the Agreement, CBP's right of access to PNR data and the obligation imposed on air carriers to process them as required by CBP exist only for so long as the decision on adequacy is applicable. In paragraph 3 of the Agreement, CBP stated that it was implementing the Undertakings annexed to that decision.
73. Given, first, the fact that the Community cannot rely on its own law as justification for not fulfill-

ing the Agreement which remains applicable during the period of 90 days from termination thereof and, second, the close link that exists between the Agreement and the decision on adequacy, it appears justified, for reasons of legal certainty and in order to protect the persons concerned, to preserve the effect of the decision on adequacy during that same period. In addition, account should be taken of the period needed for the adoption of the measures necessary to comply with this judgment.

74. It is therefore appropriate to preserve the effect of the decision on adequacy until 30 September 2006, but its effect shall not be preserved beyond the date upon which the Agreement comes to an end.

Costs

75. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament has applied for costs and the Council and the Commission have been unsuccessful, the Council and the Commission must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in the present cases must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Annuls Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, and Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection;**
2. **Preserves the effect of Decision 2004/535 until 30 September 2006, but not beyond the date upon which that Agreement comes to an end;**
3. **Orders the Council of the European Union to pay the costs in Case C317/04;**
4. **Orders the Commission of the European Communities to pay the costs in Case C318/04;**
5. **Orders the Commission of the European**

Communities to bear its own costs in Case C-317/04;

6. Orders the United Kingdom of Great Britain and Northern Ireland and the European Data Protection Supervisor to bear their own costs.

[Signatures]

GENERAL INTERNATIONAL LAW AND COMMUNITY LAW, REFERENCE TO INTERNATIONAL PEACE AND SECURITY, PRINCIPLE OF TERRITORIALITY

Judgment of the Court of First Instance (Second Chamber), 31 January 2007

CASE T-362/04 LEONID MININ v COMMISSION OF THE EUROPEAN COMMUNITIES

(Common foreign and security policy – Restrictive measures in respect of Liberia – Freezing of funds of persons associated with Charles Taylor – Competence of the Community – Fundamental rights – Action for annulment)

KEYWORDS

1. *Public international law – United Nations Charter – Obligations thereunder – Binding on the Community*
2. *Acts of the institutions – Choice of legal basis (Arts 60 EC, 301 EC and 308 EC; Council Regulation No 872/2004; Commission Regulations Nos 1149/2004 and 874/2005)*
3. *EC Treaty – Systems of property ownership – Principle of neutrality – Limits (Arts 60 EC, 83 EC, 133 EC, 295 EC and 301 EC)*
4. *Acts of the institutions – Statement of reasons (Art. 253 EC; Council Regulation No 872/2004)*
5. *Public international law – Principle of territoriality – Community act providing for restrictive measures in respect of a third country – No extraterritorial effect (Arts 60 EC and 301 EC; Council Regulation No 872/2004; Commission Regulations Nos 1149/2004 and 874/2005)*

SUMMARY OF THE JUDGMENT

1. In so far as under the EC Treaty the Community has assumed powers previously exercised by the Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community, and the latter is bound, by the very

Treaty by which it was established, to adopt, in the exercise of its powers, all the measures necessary to enable its Member States to fulfil their obligations under that Charter.

(see para. 67)

2. The Community is competent to adopt restrictive measures directly affecting individuals on the basis of Articles 60 EC and 301 EC, where a common position or a joint action adopted under the provisions of the EU Treaty relating to the Common foreign and security policy so provides, provided that those measures actually seek to interrupt or reduce, in part or completely, economic relations with one or more third countries. On the other hand, restrictive measures having no link with the territory or rulers of a third country cannot be based on those provisions alone. However, the Community does have the power to adopt such measures on the basis of Articles 60 EC, 301 EC and 308 EC.

In that regard, the Community was competent to adopt, on the basis of Articles 60 EC and 301 EC alone, Regulation No 872/2004 concerning further restrictive measures in relation to Liberia, and Regulations Nos 1149/2004 and 874/2005 amending the first regulation, which implement in the Community restrictive measures against the former president of Liberia, Charles Taylor, and his associates, as provided for by Common Position 2004/487. To the extent that the United Nations Security Council, the body to which the international community has entrusted the principal role of maintaining international peace and security, considers that that former president and his associates continue to be able to undermine peace in Liberia and in neighbouring countries, the restrictive measures adopted against them have a sufficient link with the territory or the rulers of that country to be regarded as seeking to interrupt or to reduce, in part or completely, economic relations with a third country for the purposes of Articles 60 EC and 301 EC.

(see paras 68-69, 74)

3. Notwithstanding Article 295 EC, under which the system of property ownership falls within the sphere of each Member State, other provisions of the Treaty empower the Community to adopt sanctions or preventative measures having an effect on the right of individuals to property. That is the case, in particular, in the fields of competition (Article 83 EC) and of commercial policy (Article 133 EC). That is also

the case in respect of measures to interrupt or to reduce, in part or completely, economic relations with a third country taken pursuant to Articles 60 EC and 301 EC.

(see para. 77)

4. If one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons.

(see para. 81)

5. Regulation No 872/2004 concerning further restrictive measures in relation to Liberia, and Regulations Nos 1149/2004 and 874/2005 amending the first regulation, apply only to funds and economic resources located in the territory of the Community and do not, therefore, have any extraterritorial effect. Accordingly, those regulations do not infringe the principle of territoriality. The fact that the conduct which gave rise to the adoption of the contested regulations produces its effects exclusively outside the Community is irrelevant in that respect, since the measures adopted under Articles 60 EC and 301 EC, such as those regulations, are aimed precisely at the implementation, by the Community, of common positions or common action adopted under the provisions of the EU Treaty relating to the Common foreign and security policy (CFSP) and providing for action in relation to third countries. Moreover, under Article 11(1) EU, one of the objectives of the CFSP is to preserve peace and strengthen international security, in accordance with the principles of the Charter of the United Nations. Such an objective could quite clearly not be attained if the Community were to limit its action to cases in which the situation giving rise to its intervention produces effects on its territory.

The same applies in respect of the fact that the regulations in question seek ultimately to produce their effects in the territory of Liberia, since Articles 60 EC and 301 EC precisely empower the Community to adopt measures involving economic sanctions intended to produce their effects in third countries.

(see paras 106-108)

JUDGMENT OF THE COURT OF FIRST INSTANCE (SECOND CHAMBER)

31 January 2007¹¹

(Common foreign and security policy – Restrictive measures in respect of Liberia – Freezing of funds of persons associated with Charles Taylor – Competence of the Community – Fundamental rights – Action for annulment)

In Case T362/04, Leonid Minin, residing in Tel-Aviv (Israel), represented by T. Ballarino and C. Bovio, lawyers, applicant,

v

Commission of the European Communities, represented by E. Montaguti, L. Visaggio and C. Brown, acting as Agents, defendant, supported by Council of the European Union, represented initially by S. Marquardt and F. Ruggeri Laderchi, and subsequently by S. Marquardt and A. Vitro, acting as Agents, and by United Kingdom of Great Britain and Northern Ireland, represented initially by R. Caudwell, and subsequently by E. Jenkinson, acting as Agents, interveners,

ACTION principally, originally, for the annulment of Commission Regulation (EC) No 1149/2004 of 22 June 2004 amending Council Regulation (EC) No 872/2004 concerning further restrictive measures in relation to Liberia (OJ 2004 L 222, p. 17), and, subsequently, for the annulment in part of Commission Regulation (EC) No 874/2005 of 9 June 2005 amending Regulation No 872/2004 (OJ 2005 L 146, p. 5),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Pappasavvas, Judges, Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 September 2006,

gives the following Judgment

Legal context

1. Under Article 24(1) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the members of the United Nations 'confer on the Security Council primary responsibility for the mainte-

¹¹ Language of the case: Italian.

nance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

2. Under Article 25 of the Charter of the United Nations, '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

3. According to Article 41 of the Charter of the United Nations:

'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

4. In accordance with Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

5. According to Article 103 of the Charter of the United Nations, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

6. In accordance with Article 11(1) EU:

'The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter...'

7. Under Article 301 EC:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.'

8. Article 60 EC provides:

'1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

2. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

...'

9. Lastly, Article 295 EC provides that '[t]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'.

Background to the dispute

10. In response to the serious threats to peace in Liberia, and having regard to the role played in that connection by Charles Taylor, the former president of that country, the United Nations Security Council ('the Security Council') has, since 1992, adopted a series of resolutions concerning that country on the basis of Chapter VII of the Charter of the United Nations.

11. The first of these is Resolution 788 (1992), adopted on 19 November 1992, paragraph 8 of which provides that 'all States shall, for the purposes of establishing peace and stability in Liberia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Liberia until the [Security] Council decides otherwise.'

12. On 7 March 2001, noting that the conflict in

Liberia had been resolved, the Security Council adopted Resolution 1343 (2001), in which it decided to terminate the prohibitions imposed by paragraph 8 of Resolution 788 (1992). However, the Security Council also found that the Liberian Government actively supported armed rebel groups in neighbouring countries, and accordingly it adopted a new series of sanctions against Liberia. As set out in paragraphs 5 to 7 of that resolution, all the Member States had, inter alia, to take the measures necessary to prevent the sale or supply to Liberia of arms and related materiel, the direct or indirect import from Liberia of all rough diamonds and the entry into or transit through their territories of certain persons linked to the Liberian Government or supporting it.

13. Paragraph 19 of Resolution 1343 (2001) provides for the establishment of a panel of experts responsible, inter alia, for investigating compliance with and violations of the measures imposed by that resolution and for reporting back to the Security Council in that regard. That report, bearing the number S/2001/1015, was transmitted to the President of the Security Council on 26 October 2001.
14. On 22 December 2003 the Security Council adopted Resolution 1521 (2003). Noting that the changed circumstances in Liberia, in particular the departure of former President Charles Taylor and the formation of the National Transitional Government of Liberia, and the progress achieved in the peace process in Sierra Leone, required it to revise its action under Chapter VII of the United Nations Charter, the Security Council decided to terminate the prohibitions imposed, in particular, by paragraphs 5 to 7 of its Resolution 1343 (2001). However, those measures were replaced by revised measures. Thus, under paragraphs 2, 4, 6 and 10 of Resolution 1521 (2003), all the Member States had, inter alia, to take the measures necessary to prevent the sale or supply to Liberia of arms and related materiel, the entry into or transit through their territories of individuals designated by the Sanctions Committee referred to in paragraph 15 below, the direct or indirect import of all rough diamonds from Liberia to their territories, and the import into their territories of all round logs and timber products originating in Liberia.
15. In paragraph 21 of Resolution 1521 (2003) the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members ('the Sanctions Committee'), responsible, inter alia, for designating and updating the list of the individuals who, under paragraph 4 of that resolution, constitute a threat to the peace process in Liberia, or who are engaged in activities aimed at undermining peace and stability in Liberia and the subregion, including those senior members of former President Charles Taylor's Government and their spouses, those members of Liberia's former armed forces who retain links to Charles Taylor, those individuals acting in violation of the prohibitions on arms trafficking, and any individuals associated with entities providing financial or military support to armed rebel groups in Liberia or in countries in the region.
16. Taking the view that action by the Community was necessary in order to implement that resolution, on 10 February 2004 the Council adopted Common Position 2004/137/CFSP concerning restrictive measures against Liberia and repealing Common Position 2001/357/CFSP (OJ 2004 L 40, p. 35). Article 2 of that common position provides that, under the conditions set out in Resolution 1521 (2003) of the Security Council, Member States are to take the necessary measures to prevent entry into, or transit through, their territories of all the individuals designated by the Sanctions Committee.
17. On 10 February 2004 the Council adopted, on the basis of Articles 60 EC and 301 EC, Regulation (EC) No 234/2004 concerning certain restrictive measures in respect of Liberia and repealing Regulation (EC) No 1030/2003 (OJ 2004 L 40, p. 1).
18. On 12 March 2004 the Security Council adopted Resolution 1532 (2004), intended in particular to freeze the funds of Charles Taylor and certain members of his family, his allies and associates. In the words of paragraph 1 of that resolution, the Security Council '[d]ecides that, to prevent former Liberian President Charles Taylor, his immediate family members, in particular Jewell Howard Taylor and Charles Taylor, Jr., senior officials of the former Taylor regime, or other close allies or associates as designated by the [Sanctions] Committee from using misappropriated funds and property to interfere in the restoration of peace and stability in Liberia and the sub-region, all States in which there are, at the date of adoption of this resolution or at any time thereafter, funds, other financial assets and economic resources owned or controlled directly or indirectly by Charles Taylor,

Jewell Howard Taylor, and Charles Taylor, Jr. and/or those other individuals designated by the [Sanctions] Committee, including funds, other financial assets and economic resources held by entities owned or controlled, directly or indirectly, by any of them or by any persons acting on their behalf or at their direction, as designated by the [Sanctions] Committee, shall freeze without delay all such funds, other financial assets and economic resources, and shall ensure that neither these nor any other funds, other financial assets or economic resources are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of such persons'.

19. Paragraph 2 of Resolution 1532 (2004) provides for a number of derogations from the measures referred to in paragraph 1, in particular as regards funds, other financial assets and economic resources necessary to cover the basic or extraordinary expenses of the persons concerned. Those derogations may be granted by States subject, depending on the case, to the non-opposition or approval of the Sanctions Committee.
20. In paragraph 4 of Resolution 1532 (2004), the Security Council placed the Sanctions Committee in charge of designating the individuals and entities referred to in paragraph 1, circulating to all States the list of the said individuals and entities, and of maintaining and regularly updating that list and reviewing it every six months.
21. In paragraph 5 of Resolution 1532 (2004), the Security Council decided to review the measures imposed in paragraph 1 at least once a year, the first review to take place at the latest on 22 December 2004, and to determine at that time what further action was appropriate.
22. Taking the view that action by the Community was necessary in order to implement that resolution, on 29 April 2004 the Council adopted Common Position 2004/487/CFSP concerning further restrictive measures in relation to Liberia (OJ 2004 L 162, p. 116). That common position requires the freezing of funds and economic resources held directly or indirectly by the individuals and entities referred to in paragraph 1 of Resolution 1532 (2004), subject to the same conditions as those laid down in that resolution.
23. On 29 April 2004 the Council adopted, on the basis of Articles 60 EC and 301 EC, Regulation (EC) No 872/2004 concerning further restrictive measures in relation to Liberia (OJ 2004 L 162, p. 32).
24. As provided in the fourth recital in the preamble to that regulation, the freezing of the funds of Charles Taylor and his associates is necessary '[i]n view of the negative impact on Liberia of the transfer abroad of misappropriated funds and assets, and the use of such misappropriated funds by Charles Taylor and his associates to undermine peace and stability in Liberia and the region'.
25. In the words of the sixth recital in the preamble to that regulation these measures 'fall within the scope of the Treaty' and, 'therefore, in order to avoid any distortion of competition, Community legislation is necessary to implement them as far as the Community is concerned'.
26. Article 1 of Regulation No 872/2004 defines what is to be understood by 'funds', 'freezing of funds', 'economic resources' and 'freezing of economic resource[s]':
 27. Under Article 2 of Regulation No 872/2004:
 - '1. All funds and economic resources owned, or controlled, directly or indirectly, by former Liberian President Charles Taylor, Jewell Howard Taylor and Charles Taylor Jr, and by the following persons and entities, as designated by the Sanctions Committee and listed in Annex I, shall be frozen:
 - (a) other immediate family members of former Liberian President Charles Taylor;
 - (b) senior officials of the former Taylor regime, and other close allies and associates;
 - (c) legal persons, bodies or entities owned or controlled, directly or indirectly by the persons referred to above;
 - (d) any natural or legal person acting on behalf or at the direction of the persons referred to above.
 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annex I.
 3. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1 and 2 shall be prohibited.'
 28. Annex I to Regulation No 872/2004 contains the list of natural or legal persons, bodies and entities referred to in Article 2. In its original

- version, the applicant's name does not appear.
29. Under Article 11(a) of Regulation No 872/2004, the Commission is empowered to amend Annex I to that regulation on the basis of determinations made by either the Security Council or the Sanctions Committee.
30. Under Article 3 of Regulation No 872/2004:
- '1. By way of derogation from Article 2, the competent authorities of the Member States, as listed in Annex II, may authorise the release of certain frozen funds or economic resources or the making available of certain frozen funds or economic resources, if the competent authority has determined that the funds or economic resources concerned are:
- (a) necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
- (b) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;
- (c) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources, provided it has notified the intention to authorise access to such funds and economic resources to the Sanctions Committee and has not received a negative decision by the Sanctions Committee within two working days of such notification.
2. By way of derogation from Article 2, the competent authorities of the Member States, as listed in Annex II, may authorise the release of certain frozen funds or economic resources or the making available of certain frozen funds or economic resources, if the competent authority has determined that the funds or economic resources are necessary for extraordinary expenses, and provided that competent authority has notified that determination to the Sanctions Committee and that the determination has been approved by that Committee.'
31. On 15 June 2004 the Sanctions Committee adopted the Guidelines for the application of paragraphs 1 and 4 of Resolution 1532 (2004) ('the Guidelines of the Sanctions Committee').
32. Section 2 of those guidelines, entitled 'Updating and Maintaining the Assets Freeze List', provides, in paragraph (b) thereof, that the Sanctions Committee will consider expeditiously requests to update that list, to be provided through Member States and, in paragraph (d) thereof, that the Sanctions Committee will review the assets freeze list every six months, including in connection with any outstanding requests to delist individuals and/or entities (see the following paragraph of this judgment).
33. Section 4 of the Guidelines of the Sanctions Committee, entitled 'Delisting', provides:
- '(a) without prejudice to available procedures, a petitioner (individual(s), and/or entities on the 1521 [Sanctions] Committee's assets freeze list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;
- (b) the government to which a petition is submitted (the petitioned government) should review all relevant information and then approach bilaterally the government(s) originally proposing designation (the designating government(s)) to seek additional information and to hold consultations on the de-listing request;
- (c) the original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the [Sanctions] Committee during the course of any such bilateral consultations;
- (d) if, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the [Sanctions] Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the [Sanctions] Committee, pursuant to the no-objection procedure described in section 3(b) and 3(c) above;
- (e) the Chairman will send an interim response to any delisting request that is not considered within the standard two-day consideration period or a reasonable extension thereof.'
34. On 14 June 2004 the Sanctions Committee decided to amend the list of individuals and entities to which the measures set out in paragraph 1 of Resolution 1532 (2004) of the Security Council apply. The applicant's name appears

on that amended list, and he is designated on that list as the owner of Exotic Tropical Timber Enterprises and one the main financial backers of former President Charles Taylor.

35. By Commission Regulation (EC) No 1149/2004 of 22 June 2004 amending Regulation No 872/2004 (OJ 2004 L 222, p. 17), Annex I to Regulation No 872/2004 was replaced by the Annex to Regulation No 1149/2004. That new Annex I includes, in paragraph 13, the applicant's name, identified as follows:

'Leonid Minin (alias (a) Blavstein, (b) Blyuvshstein, (c) Blyafshtein, (d) Bluvshstein, (e) Blyufshstein, (f) Vladimir Abramovich Kerler, (g) Vladimir Abramovich Popiloveski, (h) Vladimir Abramovich Popela, (i) Vladimir Abramovich Popelo, (j) Wulf Breslan, (k) Igor Osols). Date of birth: (a) 14 December 1947, (b) 18 October 1946, (c) unknown[)]. Nationality: Ukrainian. German Passports (name: Minin): (a) 5280007248D, (b) 18106739D. Israeli Passports: (a) 6019832 (6/11/94-5/11/99), (b) 9001689 (23/1/97-22/1/02), (c) 90109052 (26/11/97). Russian Passport: K10861177; Bolivian Passport: 65118; Greek Passport: no details. Owner of Exotic Tropical Timber Enterprises.'

36. On 21 December 2004 the Security Council adopted Resolution 1579 (2004). After reviewing *inter alia* the measures imposed by paragraph 1 of Resolution 1532 (2004) and determining that the situation in Liberia continued to constitute a threat to international peace and security in the region, the Security Council noted that those measures would remain in force to prevent former President Charles Taylor, his immediate family members, senior officials of the former Taylor regime, or other close allies or associates from using misappropriated funds and property to interfere in the restoration of peace and stability in Liberia and the subregion, and reconfirmed its intention to review these measures at least once a year.
37. On 2 May 2005 the Sanctions Committee decided to include additional identifying information on the entries in the list of persons, groups and entities referred to in paragraph 1 of Security Council Resolution 1532 (2004).
38. By Commission Regulation (EC) No 874/2005 of 9 June 2005 amending Regulation No 872/2004 (OJ 2005 L 146, p. 5, 'the contested regulation'), Annex I to Regulation No 872/2004 was replaced by the Annex to the contested regulation. That new Annex I includes, in paragraph 14, the applicant's name, identified as follows:

'Leonid Yukhimovich Minin (alias (a) Blavstein, (b) Blyuvshstein, (c) Blyafshtein, (d) Bluvshstein, (e) Blyufshstein, (f) Vladimir Abramovich Kerler (g) Vladimir Abramovich Kerler, (h) Vladimir Abramovich Popilo-Veski, (i) Vladimir Abramovich Popiloveski, (j) Vladimir Abramovich Popela, (k) Vladimir Abramovich Popelo, (l) Wulf Breslan, (m) Igor Osols). Date[s] of birth: (a) 14.12.1947, (b) 18.10.1946. Place of birth: Odessa, USSR (now Ukraine). Nationality: Israeli. Forged German passports (name: Minin): (a) 5280007248D, (b) 18106739D. Israeli passports: (a) 6019832 (valid 6.11.1994 to 5.11.1999), (b) 9001689 (valid 23.1.1997 to 22.1.2002), (c) 90109052 (issued on 26.11.1997). Russian passport: K10861177; Bolivian passport: 65118; Greek passport: no details. Other information: owner of Exotic Tropical Timber Enterprises.'

39. On 20 December 2005 the Security Council adopted Resolution 1647 (2005). After reviewing *inter alia* the measures imposed by paragraph 1 of Resolution 1532 (2004) and determining that the situation in Liberia continued to constitute a threat to international peace and security in the region, the Security Council noted that those measures would remain in force and reconfirmed its intention to review them at least once a year.

Procedure

40. By application lodged at the Registry of the Court of First Instance on 3 September 2004, registered under number T362/04, Leonid Minin brought this action under the fourth paragraph of Article 230 EC.
41. By orders of the President of the Second Chamber of the Court dated 8 December 2004 and 21 February 2005 respectively, the Council and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Commission. The Council lodged its intervention within the prescribed period. By letter received at the Court Registry on 19 April 2005, the United Kingdom informed the Court that it would not be lodging a statement in intervention, whilst reserving the right to take part in any hearing.
42. Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as laid down in Article 64 of the Rules of Procedure of the Court of First Instance, requested the parties

to reply in writing to written questions for the purpose of the hearing. The applicant and the defendant complied with that request.

43. Save for the United Kingdom, which presented apologies for its absence, the parties presented oral argument and answered questions put by the Court at the hearing on 13 September 2006.

Forms of order sought by the parties

44. In his application, the applicant claims that the Court should:
- annul paragraph 13 of the Annex to Regulation No 1149/2004;
 - annul that regulation in its entirety;
 - declare that Regulations Nos 872/2004 and 1149/2004 are inapplicable under Article 241 EC.
45. In its defence, the Commission contends that the Court should:
- dismiss the action as in part inadmissible and in part unfounded;
 - reject as inadmissible or unfounded the new pleas in law put forward in the reply;
 - order the applicant to pay the costs.
46. In its intervention, the Council contends that the Court should dismiss the action.
47. In his written answer to the questions put by the Court, the applicant stated that, in the light of the adoption of Regulation No 874/2005, he intended to amend his original heads of claim. Henceforth, the applicant claimed that the Court should:
- annul paragraph 14 of the Annex to the contested regulation;
 - annul Regulation No 872/2004, as amended by the contested regulation, in so far as it provides, at Article 2, for the freezing of the applicant's funds and economic resources.
48. At the hearing, the applicant (i) withdrew the second head of his claim thus amended and (ii) applied for an order that the defendant pay the costs, formal note of which was taken in the minutes of the hearing.

The admissibility and the subject-matter of the action

49. The first head of the applicant's original claim, set out in the manner indicated in paragraph 44 above, sought the annulment of paragraph 13 of the Annex to Regulation No 1149/2004, which had replaced Annex I to Regulation No 872/2004.
50. Annex I to Regulation No 872/2004, thus replaced, having in turn been replaced, during the proceedings, by the annex to the contested regulation, the parties were requested to submit their written observations on the inferences to be drawn from that new factor for the pursuit of this action.
51. The applicant therefore reformulated his heads of claim in the manner indicated in paragraph 47 above. In the light of the circumstances of the present case, the Commission did not raise any objections as regards the principle of such a reformulation. In principle, that reformulation is in fact consistent with the caselaw of this Court according to which, where one measure freezing the funds of an individual is replaced during the proceedings by another having the same subject-matter, this must be considered a new factor allowing the applicant to adapt its pleas in law, claims for relief and arguments so that they relate to the later measure (see Case T306/01 Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II3533, currently under appeal, 'Yusuf', paragraphs 71 to 74, and Case T315/01 Kadi v Council and Commission [2005] ECR II3649, currently under appeal, 'Kadi', paragraphs 52 to 55, and the caselaw cited).
52. Furthermore, since the applicant withdrew the second head of his claim thus reformulated at the hearing, the sole object of the action is henceforth a claim for annulment of paragraph 14 of the Annex to the contested regulation, which maintains the applicant's name on the list of persons whose funds must be frozen in accordance with Regulation No 872/2004.
53. In this respect, it must be borne in mind that the contested regulation is indeed a regulation within the meaning of Article 249 EC (see, to that effect and by analogy, Yusuf, paragraphs 184 to 188), and not a bundle of individual decisions, as the applicant incorrectly submits. Paragraph 14 of the Annex to that regulation is also legislative in nature and does not therefore constitute an individual decision addressed to

the applicant, contrary to what the Commission submits. The fact remains that that act is of direct and individual concern to the applicant, in so far as he is expressly named in paragraph 14 of its Annex (see, to that effect and by analogy, Yusuf, paragraph 186, and Case T253/02 Ayadi v Council [2006] ECR II0000, currently under appeal, 'Ayadi', paragraph 81). To that extent, the applicant's claim for annulment is admissible.

Substance

1. *Factual claims of the parties*

54. The applicant states that his name is Leonid Minin and that he is an Israeli citizen domiciled in Tel-Aviv (Israel), although he was resident in Italy at the time of the facts giving rise to this action. The applicant adds that all his funds and economic resources in the Community were frozen following the adoption of Regulation No 1149/2004, so that he was not even able to look after his son or pursue his activities as manager of a timber import/export company. The applicant states, moreover, that he was acquitted of the charges brought against him in Italy for arms trafficking.
55. In this respect, the Commission and the Council refer however to the report dated 26 October 2001 of the group of experts referred to in paragraph 19 of Resolution 1343 (2001) (see paragraph 13 above). According to those institutions, it is apparent from paragraphs 15 to 17 and 207 et seq. in particular of that report that, when arrested by the Italian authorities, on 5 August 2000, the applicant was found in possession of several documents implicating him in arms trafficking. When questioned in prison by the group of experts the applicant admitted his role in several transactions relating to that trafficking. Furthermore, the grounds of the applicant's acquittal in Italy were based on the fact that the Italian courts lacked territorial jurisdiction to hear the proceedings brought against him in that Member State.

2. *Law*

56. In support of his heads of claim, the applicant relies on two pleas in law, the first alleging that the Community lacks competence to adopt Regulation No 872/2004, Regulation No 1149/2004 and the contested regulation (together 'the contested regulations'), the second alleging breach of his fundamental rights.

First plea: the Commission lacks competence to adopt the contested regulations

57. This plea may be broken down into two parts, the second of which was put forward at the stage of the reply.

The first part of the plea

Arguments of the parties

58. In the first part of the plea, the applicant claims, first, that Security Council resolutions concern exclusively the States to which they are addressed and that they are not designed to apply directly to individuals, unlike Community Regulations, which produce direct effects erga omnes in the Member States. The contested regulations therefore conferred 'added value' on the sanctions provided for by the Security Council resolutions, the provisions of which they adopted, namely direct effect in the territory of the Union, which is not justified from a legislative point of view. The Community possesses only conferred powers. In particular, it is apparent from Article 295 EC that the Community does not have specific powers so far as concerns the rules governing the system of property ownership. It therefore lacks competence to adopt measures depriving individuals of their property. Responsibility for that lies with the Member States, which are, according to the applicant, alone competent to confer direct and binding effect on the individual economic sanctions adopted by the Security Council.
59. The applicant claims, second, that the addressees of measures provided for by Articles 60 EC and 301 EC are third countries. Consequently, those articles do not constitute an adequate legal basis for the purposes of adopting punitive or preventative measures affecting individuals and producing direct effect on them. Such measures do not fall within the Community's competence, unlike, firstly, the restrictive measures of a commercial nature adopted against Liberia by Regulation No 234/2004 and, secondly, the trade embargo measures against Iraq reviewed by the Court in Case T184/95 Dorsch Consult v Council and Commission [1998] ECR II667.
60. The arbitrary nature of the body of rules established by the contested regulations is apparent from a comparison between those rules and the body of rules set up by Council Regulation (EC) No 1294/1999 of 15 June 1999 concerning a freeze of funds and a ban on investment

in relation to the Federal Republic of Yugoslavia (FRY) and repealing Regulations (EC) No 1295/98 and (EC) No 1607/98 (OJ 1999 L 153, p. 63). The applicant observes that the persons affected by that regulation were, under Article 2 thereof, deemed to be persons 'acting or purporting to act for or on behalf of' the governments concerned. He adds that Regulation No 1294/1999 contained rules addressed to the Member States and that it reformulated measures to freeze funds already applied by the Member States at the national level.

61. At the hearing the applicant put forward a variant of the second part of his argument by claiming that, since Charles Taylor had been ousted from power in Liberia before the contested regulations were adopted, those regulations could no longer be based on Articles 60 EC and 301 EC alone, but should also have been founded on the additional legal basis of Article 308 EC. He relied, in support of this, on paragraph 125 et seq. of Yusuf.
62. The applicant claims, third, that the freezing of his assets bears no relation to the objective of 'avoid[ing] any distortion of competition', set out in the sixth recital in the preamble to Regulation No 872/2004, since there is no agreement between undertakings. Similarly, the applicant states that he does not see how assets wrongfully acquired, but amounting to a derisory sum in relation to the economy of the Union, could undermine the rules on the free movement of capital.
63. The Commission and the Council dispute the merits of all the arguments put forward by the applicant during the written procedure. Identical or similar arguments were moreover rejected by the Court in Yusuf, Kadi and Ayadi.
64. As regards the argument put forward by the applicant at the hearing on the basis of paragraph 125 et seq. of Yusuf (see paragraph 61 above), the Commission takes the view that it constitutes a new plea in law, which, under Article 48(2) of the Rules of Procedure, may not be introduced in the course of proceedings since it is not based on matters of law or of fact which came to light in the course of the procedure.

Findings of the Court

65. The applicant submits, in essence, that the Member States alone are competent to implement, by the adoption of measures having direct and binding effect on individuals, eco-

omic sanctions imposed against individuals by the Security Council.

66. It is necessary to reject that argument at the outset for the same reasons, in essence, as those set out in Yusuf (paragraphs 107 to 171), Kadi (paragraphs 87 to 135) and Ayadi (paragraphs 87 to 92) (with regard to the Community judiciary's power to give reasons for its judgment by reference to an earlier judgment ruling on largely identical questions, see Case C-229/04 Crailsheimer Volksbank [2005] ECR I-9273, paragraphs 47 to 49, and Ayadi, paragraph 90; see also, to that effect, order of 5 June 2002 in Case C204/00 P Aalborg Portland v Commission, not published in the ECR, paragraph 29, and, by analogy, Case C155/98 P Alexopoulou v Commission [1999] ECR I4069, paragraphs 13 and 15).
67. First, the Court of First Instance held, in Yusuf, Kadi and Ayadi, that, in so far as under the EC Treaty the Community has assumed powers previously exercised by the Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community (Yusuf, paragraph 253), and that the latter is bound, by the very Treaty by which it was established, to adopt, in the exercise of its powers, all the measures necessary to enable its Member States to fulfil their obligations under that Charter (Yusuf, paragraph 254).
68. Second, the Court held, in those judgments, that the Community is competent to adopt restrictive measures directly affecting individuals on the basis of Articles 60 EC and 301 EC, where a common position or a joint action adopted under the provisions of the EU Treaty relating to the CFSP so provides, and provided that those measures actually seek to interrupt or reduce, in part or completely, economic relations with one or more third countries (Yusuf, paragraphs 112 to 116). On the other hand, restrictive measures having no link with the territory or rulers of a third country cannot be based on those provisions alone (Yusuf, paragraphs 125 to 157). However, the Community does have the power to adopt such measures on the basis of Articles 60 EC, 301 EC and 308 EC (Yusuf, paragraphs 158 to 170, and Ayadi, paragraphs 87 to 89).
69. In this instance, the Council found in Common Position 2004/487, adopted pursuant to the provisions of Title V of the EU Treaty, that action by the Community was necessary in order

to put into effect certain restrictive measures against Charles Taylor and his associates, in accordance with Security Council Resolution 1532 (2004), and the Community put those measures into effect by adopting the contested regulations (see, in support of this and by analogy, Yusuf, paragraph 255).

70. In the specific circumstances of the present case, it must none the less be observed that the contested regulations have as their legal basis only Articles 60 EC and 301 EC. Whether or not the argument put forward in this respect by the applicant at the hearing is classified as a new plea in law, on the basis of paragraph 125 et seq. of Yusuf (see paragraph 61 above), it is therefore necessary to determine whether the sanctions imposed on the applicant, in his capacity as an associate of the former President of Liberia, Charles Taylor, actually seek to interrupt or to reduce, in part or completely, economic relations with a third country, which amounts to ascertaining whether the sanctions have a sufficient link with the territory or the rulers of such a country.
71. The Court considers that that is the case in view of the Security Council Resolutions, of the common positions of the CFSP and of the Community measures in question in the present case, even though Charles Taylor was removed from presidential power in Liberia in August 2003.
72. According to the settled assessment of the Security Council, which it is not for this Court to call in question, the situation in Liberia continues to constitute a threat to international peace and security in the region, and the restrictive measures taken against Charles Taylor and his associates remain necessary to prevent them from using misappropriated funds and property to interfere in the restoration of peace and stability in Liberia and the region (see, in particular, paragraphs 12, 14, 15, 18 and 36 above as regards the period 2001-2005, and paragraph 39 above as regards the period after 20 December 2005).
73. Similarly, as stated in the fourth recital in the preamble to Regulation No 872/2004, the freezing of the funds of Charles Taylor and his associates is necessary '[i]n view of the negative impact on Liberia of the transfer abroad of misappropriated funds and assets, and the use of such misappropriated funds by Charles Taylor and his associates to undermine peace and stability in Liberia and the region'.
74. The Court finds that, to the extent that the

body to which the international community has entrusted the principal role of maintaining international peace and security considers that Charles Taylor and his associates continue to be able to undermine peace in Liberia and in neighbouring countries, the restrictive measures adopted against them have a sufficient link with the territory or the rulers of that country to be regarded as '[seeking] to interrupt or to reduce, in part or completely, economic relations with [a] ... third countr[y]', for the purpose of Articles 60 EC and 301 EC. Therefore, the Community has the power to adopt the measures in question on the basis of those provisions.

75. The other arguments more specifically relied on by the applicant in the first part of the first plea are not capable of calling in question that assessment.
76. As regards the argument that the contested regulations wrongfully conferred 'added value' on the Security Council resolutions at issue, on account of the direct effect that they produce in the territory of the Community, the Commission is correct to dispute it by observing, first, that Articles 60 EC and 301 EC do not limit the choice of measures ensuring their application and, second, that Resolution 1532 (2004) does not impose any more specific limits on the form that can be taken by the implementing measures that the Member States of the UN must adopt, directly or, as in this case, by the intermediary of international bodies of which they are part. On the contrary, that resolution requires the adoption of 'necessary measures' for the purposes of its implementation. In this respect, the Commission and the Council rightly submit that the adoption of a Community regulation is justified by obvious reasons of uniformity and effectiveness and makes it possible to prevent the funds of the persons concerned from being transferred or concealed during the time that it takes the Member States to transpose a directive or a decision into national law.
77. As regards the argument that the Community infringes Article 295 EC by ordering the freezing of individuals' funds, even supposing that the measures in question in the present case do interfere with the rules governing the system of property ownership (see, in this respect, Yusuf, paragraph 299), it is sufficient to observe that, notwithstanding the provision in question, other provisions of the Treaty empower the Community to adopt sanctions or preven-

- tative measures having an effect on the right of individuals to property. That is the case, in particular, in the fields of competition (Article 83 EC) and of commercial policy (Article 133 EC). That is also the case in respect of measures taken, as in the present case, under Articles 60 EC and 301 EC.
78. As regards, lastly, the argument that the freezing of the applicant's assets bears no relation to the objective of 'avoid[ing] any distortion of competition', set out in the sixth recital in the preamble to Regulation No 872/2004, it is true that the assertion that there is a risk of competition's being distorted, which according to that recital that regulation seeks to prevent, is unconvincing (see, to that effect and by analogy, Yusuf, paragraphs 141 to 150, and Kadi, paragraphs 105 to 114).
79. However, as the Court observed at paragraph 165 of Ayadi, the statement of reasons for a regulation must be examined as a whole. According to the case-law, even if one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons (Case 119/86 Spain v Council and Commission [1987] ECR 4121, paragraph 51, and Joined Cases T129/95, T2/96 and T97/96 Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission [1999] ECR II-17, paragraph 160), which in this case they do.
80. In this connection, it is to be remembered that the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Council, so as to enable the persons concerned to ascertain the reasons for the measures and to enable the Community judicature to exercise its powers of review. In addition, the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. In the case of a measure intended to have general application, as in this case, the preamble may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other (see Case C344/04 International Air Transport Association and Others [2006] ECR I403, paragraphs 66 and 67, and the caselaw cited).
81. In the present case, the legal bases cited in Regulation No 872/2004 and the first to fifth recitals in the preamble thereto, in particular, fully satisfy those requirements, especially in so far as they refer, first, to Articles 60 EC and 301 EC and, second, to Security Council Resolutions 1521 (2003) and 1532 (2004), as well as to Common Positions 2004/137 and 2004/487.
82. Furthermore, in so far as the contested regulation expressly names the applicant in its annex, as a person to whom the freezing of funds must apply, sufficient reasons are supplied by the reference made in the second recital in the preamble to that regulation to the corresponding designation made by the Sanctions Committee.
83. It follows from the foregoing that the first part of the first plea must be rejected.

The second part of the plea

Arguments of the parties

84. In the second part of the plea, put forward at the stage of the reply, the applicant alleges infringement of the principle of subsidiarity, which, in his submission, is central to this dispute.
85. Whilst taking the view that that complaint is inadmissible, as a new plea put forward for the first time in the reply, the Commission submits that the applicant has not, in any event, substantiated his claims.
86. In the Commission's submission, Articles 60 EC and 301 EC have brought about an unequivocal and unconditional transfer of competence in favour of the Community. That competence is of an exclusive nature, so that the principle of subsidiarity is not applicable in the present case.
87. Lastly, the Commission and the Council maintain that, even if the principle of subsidiarity were applicable in the present case, the entirely secondary role left to Member States by Article 60 EC implies recognition that the objectives of a measure freezing funds can be achieved more effectively at Community level. That is clearly the case here.

Findings of the Court

88. It should be noted at the outset that the Community judicature is entitled to assess, depending on the circumstances of each individual case, whether the proper administration of

justice justifies the rejection of a plea on the merits without ruling beforehand on its admissibility (see, to that effect, judgment of 13 September 2006 in Joined Cases T217/99, T321/99 and T222/01 *Sinaga v Commission*, not published in the ECR, paragraph 68, and the caselaw cited).

89. In the present case, the complaint alleging breach of the principle of subsidiarity must, in any event, be rejected as unfounded for the same reasons, in essence, as those set out in paragraphs 106 to 110, 112 and 113 of *Ayadi*, in response to a substantially identical plea relied on by Mr *Ayadi*. The Court considers that that principle cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community. In any event, even assuming that that principle finds application in circumstances such as those of this case, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level.
90. It follows from the foregoing that the second part of the first plea and therefore that plea as a whole must be rejected.

Second plea: breach of fundamental rights

91. This plea may be broken down into three parts, the third of which was put forward at the stage of the reply.

The first and second parts of the plea

Arguments of the parties

92. In the first part of the plea, the applicant alleges breach of the right to property which, in his submission, is one of the fundamental rights that the Community is required to observe (Case 44/79 *Hauer* [1979] ECR 3727), in particular by taking account of the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms (ECHR).
93. The applicant recognises that, according to the caselaw, that right may be subject to restrictions if and in so far as those restrictions pursue a Community objective of general interest. He observes, however, that the contested regulations make no mention of any objective of that type. In particular, the objective of avoiding any distortion of competition, which is of no

relevance in the present case (see paragraph 61 above), cannot be considered to be such an objective. The objective of punishing the thefts committed by Taylor the dictator and his "henchmen" is one of the tasks of the States, as addressees of Security Council resolutions, and not one of the tasks of the Community.

94. In his reply, the applicant submits that the principles laid down by the Court of Justice in Case C84/95 *Bosphorus* [1996] ECR I3953, relied on by the Commission, are not applicable in the present case. First, unlike the measures in question in *Bosphorus*, the proportionality of the measures provided for by the contested regulations was not reviewed before their adoption. Second, the situation of the Federal Republic of Yugoslavia (Serbia and Montenegro), where the civil war was raging, cannot be compared to that of Liberia, where a peace process had been set up. Third, according to Articles 46 and 53 of the Regulations attached to the Hague Convention of 18 October 1907 concerning the Laws and Customs of War on Land, means of transport, such as the aircraft seized by the Irish authorities in the case which gave rise to *Bosphorus*, cited above, enjoy, during times of war, a lesser degree of protection than other forms of private property.
95. The applicant further submits, in his reply, that none of the derogations from the right to property allowed by Article 1 of the First Additional Protocol to the ECHR is applicable in the present case. In any event, the European Court of Human Rights has held that the conduct of a State which created a state of affairs such that an owner is prevented from making full use of his goods, without that owner receiving any benefit aimed at compensating the loss suffered, runs counter to that provision (Eur. Court H.R., *Papamichalopoulos v Greece*, judgment of 24 June 1993, Series A No 260-B).
96. In the second part of the plea, the applicant alleges breach of the rights of the defence, in so far as the Community adopted the contested regulations, which constitute, in essence, bundles of individual administrative decisions, without having conducted a real inquiry into the frozen funds, and in the absence of any adversarial procedure. In this respect, the applicant claims that observance of the rights of the defence is required in all administrative proceedings (Case T11/89 *Shell v Commission* [1992] ECR II757).
97. The Commission and the Council dispute the

merits of all the arguments put forward by the applicant during the written procedure. Identical or similar arguments were moreover rejected by the Court in Yusuf, Kadi and Ayadi.

Findings of the Court

98. In the present case, Regulation No 872/2004, adopted, in particular, in the light of Common Position 2004/487, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by a Community act, to the sanctions against Charles Taylor and his associates, which have been decided and later reinforced by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations. The recitals in the preamble to Regulation No 872/2004 refer expressly to Resolutions 1521 (2003) and 1532 (2004).
99. The same applies both to Regulation No 1149/2004, which was adopted following the inclusion of the applicant in the list of persons, groups and entities to which the sanctions in question must apply, that inclusion having been decided by the Sanctions Committee on 14 June 2004 (see paragraphs 34 and 35 above), and to the contested regulation, which was adopted following an amendment to that list, that amendment having been decided on 2 May 2005 by the Sanctions Committee (see paragraphs 37 and 38 above).
100. Furthermore, the Security Council resolutions and the contested regulations in the present case provide for economic sanctions (freezing of funds and other economic resources) against the persons concerned which are essentially the same in nature and scope as those which were at issue in the cases which gave rise to Yusuf, Kadi and Ayadi. All those sanctions, which are periodically reviewed by the Security Council or the competent sanctions committee (see, in particular, paragraphs 20, 21, 32, 36 and 39 above and Yusuf, paragraphs 16, 26 and 37), are coupled with similar derogations (see, in particular, paragraphs 19 and 30 above and Yusuf, paragraphs 36 and 40) and analogous mechanisms enabling the persons concerned to request review of their case by the competent sanctions committee (see, in particular, paragraphs 31 to 33 above and Yusuf, paragraphs 309 and 311).

101. In those circumstances, and in accordance

with the caselaw cited in paragraph 66 above, the applicant's arguments alleging breach of his fundamental rights, right to property and rights of defence must be rejected in the light of Yusuf (paragraphs 226 to 283, 285 to 303 and 304 to 331), Kadi (paragraphs 176 to 231, 234 to 252 and 253 to 276) and Ayadi (paragraphs 115 to 157), in which essentially identical arguments were rejected for reasons connected, in essence, with the supremacy of international law originating under the Charter of the United Nations over Community law, the corresponding restriction on the review of legality that the Court must carry out in respect of Community measures implementing decisions of the Security Council or of its Sanctions Committee, and the fact that there was no breach of *jus cogens* by measures to freeze funds of the type at issue in the present case.

102. Accordingly, the first and second parts of the second plea must be rejected.

The third part of the plea

Arguments of the parties

103. In the third part of the plea, put forward at the stage of the reply, the applicant alleges breach of the principle of territoriality. He relies, in support of this, on settled caselaw according to which the exercise of the Community's powers of coercion in respect of conduct originating outside its territory is subject to the condition that that conduct produces effects within that territory (Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* [1988] ECR 5193, and Case C286/90 *Poulsen and Diva Navigation* [1992] ECR I6019; Case T102/96 *Gencor v Commission* [1999] ECR II753).
104. In addition, the contested regulations seek ultimately to produce their effects in the territory of Liberia, and not in the territory of the Community, as is apparent from the third and fourth recitals in the preamble to Regulation No 872/2004. According to the applicant, that factor distinguishes that regulation from Regulation No 1294/1999 (see paragraph 60 above), the objective of which was to 'significantly increase the pressure' on Serbia and which therefore had a 'generic purpose entirely detached from any territorial aspect'.
105. The Commission submits that, as a new plea, the applicant's complaint relating to the alleged extraterritoriality of the effects of the contested regulations is inadmissible. In any

event, those regulations have no extraterritorial effect, since they apply only to funds and economic resources located in the territory of the Community.

Findings of the Court

106. Without there being any need to rule on its admissibility (see, in this respect, paragraph 88 above), the complaint alleging infringement of the principle of territoriality must be rejected as unfounded, since the contested regulations apply only to funds and economic resources located in the territory of the Community and do not, therefore, have any extraterritorial effect.

107. As regards the fact that the conduct which gave rise to the adoption of the contested regulations produces its effects exclusively outside the Community, it is irrelevant since the measures adopted under Articles 60 EC and 301 EC are aimed precisely at the implementation, by the Community, of common positions or common action adopted under the provisions of the EU Treaty relating to the CFSP and providing for action in relation to third countries. It must be added that, under Article 11(1) EU, one of the objectives of the CFSP is to preserve peace and strengthen international security, in accordance with the principles of the Charter of the United Nations. Such an objective could quite clearly not be attained if the Community were to limit its action to cases in which the situation giving rise to its intervention produces effects on its territory.

108. The same applies in respect of the fact that the contested regulations seek ultimately to produce their effects in the territory of Liberia, since Articles 60 EC and 301 EC precisely empower the Community to adopt measures involving economic sanctions intended to produce their effects in third countries.

109. It follows from the foregoing that the third part of the second plea and therefore that plea as a whole must be rejected.

110. Since none of the grounds raised by the applicant in support of its action is well founded, the action must be dismissed.

Costs

111. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the appli-

cant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the costs.

112. Under the first paragraph of Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds, THE COURT OF FIRST INSTANCE (Second Chamber) hereby:

1. **Dismisses the action;**
2. **Orders the applicant to bear, in addition to his own costs, those of the Commission;**
3. **Orders the Council and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 31 January 2007.

E. Coulon, *Registrar*

J. Pirrung, *President*

THE IMPLICATIONS OF THE NE BIS IN IDEM PRINCIPLE

CASE C-150/05 JEAN LEON VAN STRAATEN v STAAT DER NEDERLANDEN AND REPUBLIEK ITALIË

(Reference for a preliminary ruling from the Rechtbank's-Hertogenbosch)

(Convention implementing the Schengen Agreement – Ne bis in idem principle – Meaning of ‘the same acts’ and of ‘trial disposed of’ – Exporting in one State and importing in another State – Acquittal of the accused)

KEYWORDS

1. *Preliminary rulings – Jurisdiction of the Court – Limits (Art. 234 EC)*
2. *Preliminary rulings – Jurisdiction of the Court – Limits (Art. 234 EC)*
3. *European Union – Police and judicial cooperation in criminal matters – Protocol integrating the Schengen acquis – Convention implementing the Schengen Agreement – Ne bis in idem principle (Convention implementing the Schengen Agreement, Art. 54)*
4. *European Union – Police and judicial cooperation in criminal matters – Protocol integrating the Schengen acquis – Convention implementing the Schengen Agreement – Ne bis in idem principle (Convention implementing the Schengen Agreement, Art. 54)*

SUMMARY OF THE JUDGMENT

1. In the context of the cooperation between the Court of Justice and national courts that is provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions

which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.

The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (see paras 33-34)

2. Although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule, it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question. (see para. 37)
3. Article 54 of the Convention implementing the Schengen Agreement must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.

In the case of offences relating to narcotic drugs, first, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked. Second, punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to the Convention are, in principle, to be regarded as ‘the same acts’ for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts. (see paras 48-51, 53, operative part 1)

4. The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the

Schengen Agreement, a provision which has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

The main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is only in the subordinate clause that Article 54 refers to the case of a conviction by stating that, in that situation, the prohibition of a prosecution is subject to a specific condition. If the general rule laid down in the main clause were applicable only to judgments convicting the accused, it would be superfluous to provide that the special rule is applicable in the event of conviction.

Furthermore, not to apply Article 54 of the Convention to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement.

Finally, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of. (see paras 56-59, 61, operative part 2)

JUDGMENT OF THE COURT (FIRST CHAMBER)

28 September 2006¹²

(Convention implementing the Schengen Agreement – *Ne bis in idem* principle – Meaning of ‘the same acts’ and of ‘trial disposed of’ – Exporting in one State and importing in another State – Acquittal of the accused)

In Case C-150/05,

REFERENCE for a preliminary ruling under Article 35 EU from the *Rechtbank’s-Hertogenbosch* (Netherlands), made by decision of 23 March 2005, received at the Court on 4 April 2005, in the pro-

ceedings

Jean Leon Van Straaten

v

Staat der Nederlanden, Republiek Italië, THE COURT (First Chamber), composed of K. Schiemann, President of the Fourth Chamber, acting for the President of the First Chamber, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges, Advocate General: D. Ruiz-Jarabo Colomer, Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 4 May 2006, after considering the observations submitted on behalf of:

- the Netherlands Government, by H.G. Sevener and D.J.M. de Grave, acting as Agents,
- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,
- the Czech Government, by T. Boček, acting as Agent,
- the Spanish Government, by M. Muñoz Pérez, acting as Agent,
- the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,
- the Austrian Government, by E. Riedl, acting as Agent,
- the Polish Government, by T. Nowakowski, acting as Agent,
- the Swedish Government, by K. Wistrand, acting as Agent,
- the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2006, gives the following Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; ‘the CISA’), signed in Schengen (Luxembourg) on 19 June 1990.
2. The reference was made in proceedings between, first, Mr Van Straaten and, second, the Staat der Nederlanden (the Netherlands State) and the Republiek Italië (the Italian Repub-

¹² Language of the case: Dutch.

lic) relating to the alert concerning Mr Van Straaten's conviction in Italy for drug trafficking which the Italian authorities had entered in the Schengen Information System ('the SIS') for the purpose of his extradition.

Legal context

Community law

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam ('the Protocol'), 13 Member States of the European Union, amongst them the Italian Republic and the Kingdom of the Netherlands, are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis as set out in the annex to the Protocol.
4. The Schengen acquis thus defined includes, inter alia, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13; the Schengen Agreement'), and the CISA. The Italian Republic signed an agreement for its accession to the CISA on 27 November 1990 (OJ 2000 L 239, p. 63), and it entered into force on 26 October 1997.
5. By virtue of the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam the Schengen acquis was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.
6. Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council of the European Union adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of the decision, in conjunction with Annex A thereto, that the Council selected Articles 34 EU and 31 EU, which form part of Title VI of the Treaty on European Union entitled 'Provisions on police and judicial cooperation in criminal

matters', as the legal basis for Articles 54 to 58 of the CISA.

7. Articles 54 to 58 form Chapter 3 ('Application of the *ne bis in idem* principle') of Title III ('Police and security') of the CISA.
8. Article 54 of the CISA provides:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'
9. Article 55(1) of the CISA states:

'A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

...'
10. Article 71(1) of the CISA, for which Article 34 EU and Articles 30 EU and 31 EU were selected as the legal basis, provides:

'The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions ...', all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.'
11. Article 95(1) and (3) of the CISA are worded as follows:

'1. Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting Contracting Party.

3. A requested Contracting Party may add to the alert in the data file of its national section of the Schengen Information System a flag prohibiting arrest on the basis of the alert until the flag is deleted. The flag must be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses

to make the requested arrest on legal grounds or for special reasons of expediency. In particularly exceptional cases where this is justified by the complex nature of the facts behind the alert, the above time-limit may be extended to one week. Without prejudice to a flag or a decision to refuse the arrest, the other Contracting Parties may make the arrest requested in the alert.'

12. Article 106(1) of the CISA states:

'Only the Contracting Party issuing the alert shall be authorised to modify, add to, correct or delete data which it has entered.'

13. Article 111 of the CISA provides:

'1. Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them.

2. The Contracting Parties undertake mutually to enforce final decisions taken by the courts or authorities referred to in paragraph 1, without prejudice to the provisions of Article 116.'

14. Article 35 EU governs the Court's jurisdiction to give preliminary rulings in this field. Article 35(3) EU is worded as follows:

'A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) ...; or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.'

15. The Kingdom of the Netherlands has declared its acceptance of the Court's jurisdiction in accordance with the arrangements laid down in Article 35(2) and (3)(b) EU (OJ 1997 C 340, p. 308).

International law

16. Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is worded as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for

which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

17. Article 14(7) of the International Covenant on Civil and Political Rights, which was adopted on 16 December 1966 and entered into force on 23 March 1976, is worded as follows:

'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

18. Article 36 of the Single Convention on Narcotic Drugs, concluded in New York on 30 March 1961 under the aegis of the United Nations, is worded as follows:

'1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) ...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

...'

The main proceedings and the questions referred for a preliminary ruling

19. It is apparent from the order for reference that on or about 27 March 1983 Mr Van Straaten was in possession of a consignment of approximately 5 kilograms of heroin in Italy, that this heroin was transported from Italy to the Netherlands and that Mr Van Straaten had a quantity of 1 000 grams of that consignment of heroin at his disposal during the period from 27 to 30 March 1983.
20. Mr Van Straaten was prosecuted in the Netherlands for (i) importing a quantity of approximately 5 500 grams of heroin from Italy into the Netherlands on or about 26 March 1983, together with A. Yilmaz, (ii) having a quantity of approximately 1 000 grams of heroin at his disposal in the Netherlands during or around the period from 27 to 30 March 1983 and (iii) possessing firearms and ammunition in the Netherlands in March 1983. By judgment of 23 June 1983, the Rechtbank's-Hertogenbosch ('s-Hertogenbosch District Court, Netherlands) acquitted Mr Van Straaten on the charge of importing heroin, finding it not to have been legally and satisfactorily proved, and convicted him on the other two charges, sentencing him to a term of imprisonment of 20 months.
21. In Italy, Mr Van Straaten was prosecuted along with other persons, for possessing on or about 27 March 1983, and exporting to the Netherlands on several occasions together with Mr Karakus Coskun, a significant quantity of heroin, totalling approximately 5 kilograms. By judgment delivered in absentia on 22 November 1999 by the Tribunale ordinario di Milano (District Court, Milan, Italy), Mr Van Straaten and two other persons were, upon conviction on the charges, sentenced to a term of imprisonment of 10 years, fined ITL 50 000 000 and ordered to pay the costs.
22. The main proceedings are between, first, Mr Van Straaten and, second, the Netherlands State and the Italian Republic. The national court refers to an alert regarding Mr Van Straaten the legality of which is at issue in those proceedings, and which the national court examines in the light of the CISA. By order made on 16 July 2004, the Italian Republic was summoned to appear in the proceedings.
23. Before the national court, the Italian Republic rejected Mr Van Straaten's claims that, by virtue of Article 54 of the CISA, he should not have been prosecuted by or on behalf of the Italian State and that all acts connected with that prosecution were unlawful. According to the Italian Republic, no decision was given on Mr Van Straaten's guilt by the judgment of 23 June 1983, in so far as it concerns the charge of importing heroin, since he was acquitted on that charge. Mr Van Straaten's trial had not been disposed of, within the meaning of Article 54 of the CISA, as regards that charge. The Italian Republic further submitted that, as a result of the declaration as referred to in Article 55(1) (a) of the CISA which it had made, it was not bound by Article 54 of the CISA, a plea which was rejected by the national court.
24. No further information on the nature of the proceedings is given in the order for reference.
25. According to the Netherlands Government, the judgment of the Rechtbank's-Hertogenbosch of 23 June 1983 was upheld by a judgment of the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) of 3 January 1984, which amended the terms of the second charge against Mr Van Straaten. The Gerechtshof te 's-Hertogenbosch described the act as 'voluntary possession of a quantity of approximately 1 000 grams of heroin in the Netherlands during or around the period from 27 to 30 March 1983'. The appeal on a point of law brought by Mr Van Straaten against that judgment was dismissed by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 February 1985. That judgment became final. Mr Van Straaten served the sentence imposed upon him.
26. The Netherlands Government then states that in 2002, at the request of the Italian judicial authorities, an alert was entered in the SIS for the arrest of Mr Van Straaten with a view to his extradition, on the basis of an arrest warrant of the Milan Public Prosecutor's Office of 11 September 2001. The Kingdom of the Netherlands added to that alert a flag as referred to in Article 95(3) of the CISA, so that he could not be arrested in the Netherlands.
27. After Mr Van Straaten had, in 2003, been informed of that alert and, therefore, of his conviction in Italy, he first requested, in vain, from the Italian judicial authorities the deletion of the data in the SIS concerning him. The Korps Landelijke Politiediensten (Netherlands National Police Services; 'the KLPD') stated to him by letter of 16 April 2004 that, since the KLPD

was not the authority that issued the alert, under Article 106 of the CISA it was not authorised to delete it from the SIS.

28. The Netherlands Government further states that Mr Van Straaten then applied to the Rechtbank 's-Hertogenbosch for an order requiring the minister concerned and/or the KLPD to delete his personal data from the police register. The national court found in an order of 16 July 2004 that, by virtue of Article 106(1) of the CISA, only the Italian Republic was authorised to delete the data as requested by Mr Van Straaten. In light of that fact, the court treated the application as an application for an order requiring the Italian Republic to delete the data. The Italian Republic was consequently joined as a party to the main proceedings.
29. According to the Netherlands Government, the national court then found that, under Article 111(1) of the CISA, Mr Van Straaten had the right to bring an action before the competent court under national law challenging the entry by the Italian Republic in the SIS of data concerning him. Pursuant to Article 111(2), the Italian Republic would be required to enforce a final decision of the Netherlands court on such an action.
30. It was in those circumstances that the Rechtbank 's-Hertogenbosch decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) What is to be understood by "the same acts" within the meaning of Article 54 of the [CISA]? (Is having at one's disposal approximately 1 000 grams of heroin in the Netherlands in or around the period from 27 to 30 March 1983 the same act as being in possession of approximately 5 kilograms of heroin in Italy on or about 27 March 1983, regard being had to the fact that the consignment of heroin in the Netherlands formed part of the consignment of heroin in Italy? Is exporting a consignment of heroin from Italy to the Netherlands the same act as importing the same consignment of heroin from Italy into the Netherlands, regard also being had to the fact that Mr Van Straaten's co-accused in the Netherlands and Italy are not entirely the same? Having regard to the acts as a whole, consisting of possessing the heroin in question in Italy, exporting it from Italy, importing it into the Netherlands and having it at one's disposal in the Netherlands, are those "the same acts"?)

(2) Is a person's trial disposed of, for the purposes of Article 54 of the CISA, if the charge

brought against that person has been declared not to have been legally and satisfactorily proved and that person has been acquitted on that charge by way of a judgment?'

Admissibility of the reference for a preliminary ruling

31. In the present case, the Court has jurisdiction to rule on the interpretation of Article 54 of the CISA since the system under Article 234 EC is capable of applying to references for a preliminary ruling pursuant to Article 35 EU, subject to the conditions laid down in the latter article (see, in this regard, Case C-105/03 Pupino [2005] ECR I-5285, paragraph 28), and the Kingdom of the Netherlands made a declaration in accordance with Article 35(3)(b) EU taking effect on 1 May 1999, the date upon which the Treaty of Amsterdam entered into force.
32. The French Government expresses doubts as to the admissibility of the reference for a preliminary ruling, on the ground that the information provided by the national court is brief and does not make it possible to understand what the purpose of the action is or why answers to the two questions submitted are necessary.
33. In that regard, it must be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C-437/97 EKW and Wein & Co. [2000] ECR I1157, paragraph 52, and Case C-448/01 EVN and Wienstrom [2003] ECR I14527, paragraph 74). Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.
34. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph

39; Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 25; and Case C-13/05 *Chacón Navas* [2006] ECR I-0000, paragraph 33).

35. In the present case, although the grounds of the order for reference are succinct and lack structure, the information which they contain is sufficient, first, to rule out that the questions submitted bear no relation to the actual facts of the main action or its purpose or that the problem is hypothetical and, second, to enable the Court to give a useful answer to those questions. It is apparent from the context of the order for reference that Mr Van Straaten's action is for the annulment of the alert concerning him entered in the SIS and that, in the view of the national court, the action can succeed only if, under the *ne bis in idem* principle pursuant to Article 54 of the CISA, the conviction in the Netherlands precludes the prosecution of him in Italy which is the cause of that alert.
36. The Spanish Government submits that the first question is inadmissible. It maintains that this question concerns only the facts of the main action and that the national court is in actual fact asking the Court to apply Article 54 of the CISA to the facts which gave rise to the domestic proceedings.
37. As to those submissions, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case, it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question (Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 22).
38. By its first question, the national court seeks an interpretation of Article 54 of the CISA in light of the facts which it takes pains to specify in parentheses. The Court is not requested, on the other hand, to apply that article to the facts set out.
39. It follows from the foregoing that the reference for a preliminary ruling is admissible.

The questions

Question 1

40. By this question, the national court essentially

asks what the relevant criteria are for the purposes of applying the concept of 'the same acts' within the meaning of Article 54 of the CISA, having regard to the facts which it has specified in parentheses.

41. The Court held in Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, at paragraph 27, that the wording of Article 54 of the CISA, 'the same acts', shows that that provision refers only to the nature of the acts in dispute and not to their legal classification.
42. The wording used in that article thus differs from that in other international instruments which enshrine the *ne bis in idem* principle (*Van Esbroeck*, paragraph 28).
43. There is a necessary implication in the *ne bis in idem* principle enshrined in Article 54 of the CISA that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied (*Van Esbroeck*, paragraph 30).
44. The possibility of divergent legal classifications of the same acts in two different Contracting States is therefore no obstacle to the application of Article 54 of the CISA (*Van Esbroeck*, paragraph 31).
45. The above findings are further reinforced by the objective of Article 54 of the CISA, which seeks to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement (*Van Esbroeck*, paragraph 33, and the case-law cited).
46. That right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Contracting State, he may travel within the Schengen area without fear of prosecution in another Contracting State on the basis that the legal system of that Member State treats the act concerned as a separate offence (see *Van Esbroeck*, paragraph 34).
47. Because there is no harmonisation of national criminal law, a criterion based on the legal classification of the acts or on the legal interest protected might create as many barriers to freedom of movement within the Schengen

area as there are penal systems in the Contracting States (Van Esbroeck, paragraph 35).

48. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (Van Esbroeck, paragraph 36).
49. In the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical.
50. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked.
51. In addition, the Court has already held that punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to the CISA are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 (Van Esbroeck, paragraph 42).
52. However, as rightly pointed out by the Netherlands Government, the definitive assessment in this regard is a matter for the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (Van Esbroeck, paragraph 38).
53. In the light of the foregoing, the answer to the first question must be that Article 54 of the CISA must be interpreted as meaning that:
 - the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;
 - in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical;
 - punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in princi-

ple, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

Question 2

54. By this question, the national court essentially asks whether the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted for lack of evidence.
55. Under Article 54 of the CISA, a person may not be prosecuted in a Contracting State for the same acts as those in respect of which his trial has already been 'finally disposed of' in another Contracting State provided that, in the event of conviction, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced.
56. The main clause of the single sentence comprising Article 54 of the CISA makes no reference to the content of the judgment that has become final. It is only in the subordinate clause that Article 54 refers to the case of a conviction by stating that, in that situation, the prohibition of a prosecution is subject to a specific condition. If the general rule laid down in the main clause were applicable only to judgments convicting the accused, it would be superfluous to provide that the special rule is applicable in the event of conviction.
57. It is settled case-law that Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement (see Joined Cases C187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 38).
58. Not to apply that article to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement (see, to this effect, Van Esbroeck, paragraph 34).
59. Furthermore, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same

acts has been finally disposed of.

60. It should be added that, in Case C-469/03 *Miraglia* [2005] ECR I-2009, at paragraph 35, the Court held that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, does not fall to be applied in respect of a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. While there is no need to give a ruling in the present case as to whether an acquittal which is not based on a determination as to the merits of the case may fall within that article, it must be found that an acquittal for lack of evidence is based on such a determination.
61. Consequently, the answer to the second question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

Costs

62. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be interpreted as meaning that:**
 - the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical;

- punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

- The *ne bis in idem* principle, enshrined in Article 54 of that Convention, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

[Signatures]

GENERAL INTERNATIONAL LAW AND COMMUNITY
LAW

CASE C-306/05 SOCIEDAD GENERAL DE AUTORES Y EDITORES DE ESPAÑA (SGAE) v RAFAEL HOTELES SA

(Reference for a preliminary ruling from the Audiencia Provincial de Barcelona)

(Copyright and related rights in the information society – Directive 2001/29/EC – Article 3 – Concept of communication to the public – Works communicated by means of television sets installed in hotel rooms)

SUMMARY OF THE JUDGMENT

Approximation of laws – Copyright and related rights – Directive 2001/29 – Harmonisation of certain aspects of copyright and related rights in the information society – Communication to the public – Concept

(European Parliament and Council Directive 2001/29, Art. 3(1))

The mere provision of physical facilities, such as that of television sets installed in hotel rooms, does not as such amount to a communication to the public within the meaning of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. On the other hand, the distribution of a signal enabling works to be communicated by means of those television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.

As is explained in the Guide to the Berne Convention for the Protection of Literary and Artistic Works, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. If reception is for a larger audience, by an independent act through

which the broadcast work is communicated to a new public, such public reception falls within the scope of the author's exclusive authorisation right. The clientele of a hotel forms such a new public, inasmuch as the transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers.

The private nature of hotel rooms does not preclude a signal from constituting communication to the public. (see paras 41-42, 47, 54, operative part 1-2)

JUDGMENT OF THE COURT (THIRD CHAMBER)

7 December 2006¹³

(Copyright and related rights in the information society – Directive 2001/29/EC – Article 3 – Concept of communication to the public – Works communicated by means of television sets installed in hotel rooms)

In Case C-306/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Barcelona (Spain), made by decision of 7 June 2005, received at the Court on 3 August 2005, in the proceedings *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský (Rapporteur), U. Lohmus and A. Ó Caoimh, Judges, Advocate General: E. Sharpston, Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 May 2006, after considering the observations submitted on behalf of:

- the Sociedad General de Autores y Editores de España (SGAE), by R. Gimeno-Bayón Cobos and P. Hernández Arroyo, abogados,
- Rafael Hoteles SA, by R. Tornero Moreno, abogado,
- the French Government, by G. de Bergues and J.C. Niollet, acting as Agents,

¹³ Language of the case: Spanish.

- Ireland, by D.J. O'Hagan, acting as Agent, assisted by N. Travers BL,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Polish Government, by K. Murawski, U. Rutkowska and P. Derwicz, acting as Agents,
- the Commission of the European Communities, by J.R. Vidal Puig and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006, gives the following Judgment

1. The reference for a preliminary ruling concerns the interpretation of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
2. This reference was made in the context of proceedings between the Sociedad General de Autores y Editores de España (SGAE) and Rafael Hoteles SA ('Rafael'), concerning the alleged infringement, by the latter, of intellectual property rights managed by SGAE.

Legal context

Applicable international law

3. The Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, was approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).
4. Article 9(1) of the TRIPs Agreement provides:

'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.'
5. Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act

of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention') provides:

'1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.'

6. Article 11bis(1) of the Berne Convention provides:

'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

7. The World Intellectual Property Organisation (WIPO) adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).
8. Article 8 of the WIPO Copyright Treaty provides:

'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'
9. Joint declarations concerning the WIPO Copyright Treaty were adopted by the Diplomatic

Conference on 20 December 1996.

10. The joint declaration concerning Article 8 of that Treaty provides:

'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).'

Community legislation

11. The ninth recital in the preamble to Directive 2001/29 states:

'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.'

12. The 10th recital in the preamble to that directive states:

'If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

13. The 15th recital in the preamble to that directive states:

'The Diplomatic Conference held under the auspices of the [WIPO] in December 1996 led to the adoption of two new Treaties, the [WIPO Copyright Treaty] and the [WIPO Performances and Phonograms Treaty], dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States

have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.'

14. The 23rd recital in the preamble to that directive states:

'This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.'

15. The 27th recital in the preamble to Directive 2001/29 states:

'The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.'

16. Article 3 of that directive provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the

public as set out in this Article.'

National legislation

17. The codified text of the Law on intellectual property, which rectifies, clarifies and harmonises the legislative provisions in force in that area ('the LIP'), was approved by Royal Legislative Decree No 1/1996 of 12 April 1996 (BOE No 97 of 22 April 1996).

18. Article 17 of the LIP provides:

'The author has the exclusive rights of exploitation of his works regardless of their form and, inter alia, the exclusive rights of reproduction, distribution, public communication and conversion which cannot be exercised without his permission except in circumstances laid down in this Law.'

19. Article 20(1) of the LIP provides:

'Public communication shall mean any act by which a number of persons can have access to the work without prior distribution of copies to each of those persons.

Communication which takes place within a strictly domestic location which is not integrated into or connected to a distribution network of any kind shall not be classified as public.'

The main proceedings and the questions referred for a preliminary ruling

20. SGAE is the body responsible for the management of intellectual property rights in Spain.

21. SGAE took the view that the use of television sets and the playing of ambient music within the hotel owned by Rafael, during the period from June 2002 to March 2003, involved communication to the public of works belonging to the repertoire which it manages. Considering that those acts were carried out in breach of the intellectual property rights attached to the works, SGAE brought an action for compensation against Rafael before the Juzgado de Primera Instancia (Court of First Instance) No 28, Barcelona (Spain).

22. By decision of 6 June 2003, that court partially rejected the claim. It took the view that the use of television sets in the hotel's rooms did not involve communication to the public of works managed by SGAE. It considered, on the other hand, that the claim was well founded

as regards the well-known existence in hotels of communal areas with television sets and where ambient music is played.

23. SGAE and Rafael both brought appeals before the Audiencia Provincial (Provincial Court) de Barcelona, which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public which is covered by the harmonisation of national laws protecting copyright provided for in Article 3 of Directive [2001/29]?'

(2) Is the fact of deeming a hotel room to be a strictly domestic location, so that communication by means of television sets to which is fed a signal previously received by the hotel is not regarded as communication to the public, contrary to the protection of copyright pursued by Directive [2001/29]?'

(3) For the purposes of protecting copyright in relation to acts of communication to the public provided for in Directive [2001/29], can a communication that is effected through a television set inside a hotel bedroom be regarded as public because successive viewers have access to the work?'

The request to have the oral procedure reopened

24. By letter received at the Court of Justice on 12 September 2006, Rafael requested the reopening of the oral procedure, pursuant to Article 61 of the Rules of Procedure of the Court of Justice.

25. That request is based on the alleged inconsistency of the Advocate General's Opinion. Rafael submits that the negative response in the Opinion to the first question unavoidably implies a negative response to the second and third questions, whereas the Advocate General suggests that the answer to the latter questions should be in the affirmative.

26. On that point, it is appropriate to recall that neither the Statute of the Court of Justice nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, Case C-259/04 Emanuel [2006] ECR I3089, paragraph 15).

27. The Court may, certainly, of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure should be reopened in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-209/01 Schilling and Fleck-Schilling [2003] ECR I13389, paragraph 19, and Case C-30/02 Recheio – Cash & Carry [2004] ECR I6051, paragraph 12).
28. However, the Court finds that in the present case it has all the information necessary to give judgment.
29. Consequently, there is no need to order the reopening of the oral procedure.

The questions

Preliminary observations

30. It should be stated at the outset that, contrary to Rafael's submissions, the situation at issue in the main proceedings does not fall within Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), but within Directive 2001/29. The latter applies to all communications to the public of protected works, whereas Directive 93/83 only provides for minimal harmonisation of certain aspects of protection of copyright and related rights in the case of communication to the public by satellite or cable retransmission of programmes from other Member States. As the Court has already held, unlike Directive 2001/29, this minimal harmonisation does not provide information to enable the Court to reply to a question concerning a situation similar to that which is the subject of the questions referred for a preliminary ruling (see, to that effect, Case C-293/98 Egeda [2000] ECR I629, paragraphs 25 et 26).
31. Next, it should be noted that the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Directive 2001/29/EC, they must normally be given an autonomous

and uniform interpretation throughout the Community (see, in particular, Case C-357/98 *Yiadam* [2000] ECR I9265, paragraph 26, and Case C-245/00 *SENA* [2003] ECR I1251, paragraph 23). It follows that the Austrian Government cannot reasonably maintain that it is for the Member States to provide the definition of 'public' to which Directive 2001/29 refers but does not define.

The first and third questions

32. By its first and third questions, which it is appropriate to examine together, the referring court asks, essentially, whether the distribution of a signal through television sets to customers in hotel rooms constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29, and whether the installation of television sets in hotel rooms constitutes, in itself, an act of that nature.
33. In that respect, it should be noted that that Directive does not define 'communication to the public'.
34. According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, Case C156/98 *Germany v Commission* [2000] ECR I6857, paragraph 50, and Case C53/05 *Commission v Portugal* [2006] ECR I-0000, paragraph 20).
35. Moreover, Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community (see, in particular, Case C341/95 *Bettati* [1998] ECR I4355, paragraph 20 and the case-law cited).
36. It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that directive, which, as can be seen from its ninth and tenth recitals, is to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public.
37. The Court has held that, in the context of this concept, the term 'public' refers to an indeter-

- minate number of potential television viewers (Case C89/04 *Mediakabel* [2005] ECR I4891, paragraph 30, and Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I7199, paragraph 31).
38. In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of Directive 2001/29, as referred to in paragraph 36 of this judgment.
39. In view, moreover, of the cumulative effects of making the works available to such potential television viewers, the latter act could become very significant in such a context. It matters little, accordingly, that the only recipients are the occupants of rooms and that, taken separately, they are of limited economic interest for the hotel.
40. It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.
41. As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right.
42. The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.
43. It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions of Rafael and Ireland, that customers who have not switched on the television have not actually had access to the works.
44. Moreover, it is apparent from the documents submitted to the Court that the action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be seriously disputed that the provision of that service has an influence on the hotel's standing and, therefore, on the price of rooms. Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings.
45. With reference to the question whether the installation of television sets in hotel rooms constitutes, in itself, a communication to the public within the meaning of Article 3(1) of Directive 2001/29, it should be pointed out that the 27th recital in the preamble to that directive states, in accordance with Article 8 of the WIPO Copyright Treaty, that '[t]he mere provision of physical facilities for enabling or making

a communication does not in itself amount to communication within the meaning of [that] Directive.’

46. While the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication within the meaning of Directive 2001/29, the installation of such facilities may nevertheless make public access to broadcast works technically possible. Therefore, if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal.
47. Consequently, the answer to the first and second questions is that, while the mere provision of physical facilities does not as such amount to a communication within the meaning of Directive 2001/29, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.

The second question

48. By its second question, the referring court asks, essentially, whether the private nature of hotel rooms precludes the communication of a work to those rooms by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.
49. In that respect, Ireland submits that communication or making available of works in the private context of hotel rooms should be distinguished from the same acts which take place in public areas of the hotel. This argument cannot however be accepted.
50. It is apparent from both the letter and the spirit of Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty – both of which require authorisation by the author not for re-transmissions in a public place or one which is open to the public but for communications by which the work is made accessible to the public – that the private or public nature of the place where the communication takes place is immaterial.
51. Moreover, according to the provisions of Directive 2001/29 and of the WIPO Copyright Treaty,

the right of communication to the public covers the making available to the public of works in such a way that they may access them from a place and at a time individually chosen by them. That right of making available to the public and, therefore, of communication to the public would clearly be meaningless if it did not also cover communications carried out in private places.

52. In support of the argument concerning the private nature of hotel rooms, Ireland also invokes the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’), and in particular its Article 8, which prohibits any arbitrary or disproportionate interference by a public authority in the sphere of private activity. However, this argument cannot be accepted either.
53. In that respect, it should be pointed out that Ireland does not make clear who, in a context such as that of the main proceedings, would be the victim of such an arbitrary or disproportionate intervention. Ireland can hardly have in mind the customers who benefit from the signal which they receive and who are under no obligation to pay the authors. Nor can the victim be the hotel since, even though it must be concluded that the hotel is obliged to make such payment, it cannot claim to be a victim of an infringement of Article 8 of the ECHR in so far as the rooms, once made available to its customers, cannot be considered as coming within its private sphere.
54. Having regard to all of the foregoing considerations, the answer to the second question is that the private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.

Costs

55. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.
2. The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.

[Signatures]

FUNDAMENTAL RIGHTS (INTEGRAL PART OF COMMUNITY LAW), INTERPRETATION RULES FOR THE NATIONAL COURT, PROTECTION OF FUNDAMENTAL RIGHTS, COMPETENCE OF THE COMMUNITY, INTERNATIONAL LAW AND COMMUNITY LAW, SECURITY COUNCIL RESOLUTIONS

JOINED CASES C-402/05 P AND C-415/05P YASSIN ABDULLAH KADI AND AL BARAKAAT INTERNATIONAL FOUNDATION v COUNCIL OF THE EUROPEAN UNION AND COMMISSION OF THE EUROPEAN COMMUNITIES

(Common foreign and security policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – United Nations – Security Council – Resolutions adopted under Chapter VII of the Charter of the United Nations – Implementation in the Community – Common Position 2002/402/CFSP – Regulation (EC) No 881/2002 – Measures against persons and entities included in a list drawn up by a body of the United Nations – Freezing of funds and economic resources – Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) – Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 – Actions for annulment – Competence of the Community – Joint legal basis of Articles 60 EC, 301 EC and 308 EC – Fundamental rights – Right to respect for property, right to be heard and right to effective judicial review)

KEYWORDS

1. *Acts of the institutions – Choice of legal basis – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban* (Arts 57(2) EC, 60 EC, 133 EC and 301 EC; Council Regulation No 881/2002)
2. *Acts of the institutions – Choice of legal basis – Community measures concerning objectives under the EU Treaty in the sphere of external relations – Article 308 EC – Not permissible* (Arts 60 EC, 301 EC and 308 EC; Art. 3 EU)
3. *Acts of the institutions – Choice of legal basis – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban* (Arts 60 EC, 301 EC and 308 EC; Council Regulation No 881/2002)
4. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Community measure giving effect to resolutions of the United Nations Security Council – Indirect review of the lawfulness of decisions of the Security Council – Unacceptable* (Art. 220 EC; Council Regulation No 881/2002)
5. *Community law – Principles – Fundamental rights – Taking into consideration the European Convention on Human Rights* (Arts 220 EC, 307 EC; Art. 6(1) EU)
6. *Public international law – Charter of the United Nations – Resolutions of the Security Council adopted under the Charter of the United Nations*
7. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
8. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
9. *European Communities – Judicial review of the lawfulness of the acts of the institutions – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
10. *Actions for annulment – Judgment annulling a measure – Effects – Limitation by the Court – Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban* (Art. 231 EC)

SUMMARY OF THE JUDGMENT

1. To accept the interpretation of Articles 60 EC and 301 EC that it is enough for the restrictive measures laid down by Resolution 1390 (2002) of the United Nations Security Council and given effect by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.

Interpreting Article 301 EC as building a procedural bridge between the Community and the European Union, so that it must be construed as broadly as the relevant Community competences, including those relating to the common commercial policy and the free movement of capital, threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital. Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.

Having regard to the purpose and subject-matter of that regulation, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade, and it could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy. A Community measure falls within the competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the

products concerned. Nor can that regulation be regarded as falling within the ambit of the provisions of the EC Treaty on free movement of capital and payments, in so far as it prohibits the transfer of economic resources to individuals in third countries. With regard, first of all, to Article 57(2) EC, the restrictive measures at issue do not fall within one of the categories of measures listed in that provision. Next, so far as Article 60(1) EC is concerned, that provision cannot furnish the basis for the regulation in question either, for its ambit is determined by that of Article 301 EC. As regards, finally, Article 60(2) EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures. (see paras 168, 176-178, 183, 185, 187-191, 193)

2. The view that Article 308 EC allows, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the common foreign and security policy (the CFSP), runs counter to the very wording of Article 308 EC.

While it is correct to consider that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC.

Recourse to Article 308 EC demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the Community'. That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.

The coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pil-

lars, as intended by the framers of the Treaties now in force, constitute considerations of an institutional kind militating against any extension of that bridge to articles of the EC Treaty other than those with which it explicitly creates a link.

In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community.

Likewise, Article 3 EU, in particular its second paragraph, cannot supply a base for any widening of Community powers beyond the objects of the Community. (see paras 197-204)

3. Article 308 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC. Since those articles do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom that regulation applies, that lack of power, attributable to the limited ambit *ratione personae* of those provisions, may be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject have been satisfied.

The objective pursued by the contested regulation being to prevent persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to im-

pede the financing of terrorist activities, it may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the common foreign and security policy, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

Implementing such measures through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because by their very nature they offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC. If economic and financial measures such as those imposed by the regulation were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market. (see paras 211, 213, 216, 222, 225-227, 229-230)

4. The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the Community.

With regard to a Community act which, like Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not for the Community judiciary, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of

such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*, but rather to review the lawfulness of the implementing Community measure.

Any judgment given by the Community judiciary deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law. (see paras 281-282, 286-288)

5. Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. Such immunity from jurisdiction for a Community measure, as a corollary of the principle of the primacy at the level of international law of obligations under

the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of that Charter, cannot find a basis in the EC Treaty. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. If Article 300(7) EC, providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

The Community judiciary must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations. (see paras 283-285, 299, 303-304, 306-308, 326)

6. The Community must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

In the exercise of its power to adopt Community measures taken on the basis of Articles 60 EC and 301 EC, in order to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Community must attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine

what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

The Charter of the United Nations does not, however, impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council under Chapter VII, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order. (see paras 291, 293-294, 298)

7. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, the Community authorities cannot be required to communicate, before the name of a person or entity is included for the first time in the list of persons or entities concerned by those measures, the grounds on which that inclusion is based. Such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation. Nor, for reasons also connected to the objective pursued by that regulation and to the effectiveness of the measures provided by the latter, were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

Nevertheless, the rights of the defence, in particular the right to be heard, were patently not respected, for neither the regulation at issue nor Common Position 2002/402 concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, under-

takings and entities associated with them, to which that regulation refers, provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later and, furthermore, the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted. (see paras 334, 338-339, 341-342, 345, 348)

8. The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed. (see paras 335-337, 349, 351)

9. The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.

With reference to an objective of public interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban constitute restrictions of the right to property which may, in principle, be justified.

The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of putting his or its case to the competent authorities, as required by Article 1 of Protocol No 1 to the European Convention on Human Rights.

Thus, the imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list contained in its Annex I, constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it. (see paras 361, 363, 366, 368-370)

10. In so far as a regulation such as Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the

procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.

Annulment of that regulation with immediate effect would thus be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation the appellants might take steps seeking to prevent measures freezing funds from being applied to them again. In those circumstances, Article 231 EC will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment. (see paras 373-374, 376)

JUDGMENT OF THE COURT (GRAND CHAMBER)

3 September 2008¹⁴

(Common foreign and security policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – United Nations – Security Council – Resolutions adopted under Chapter VII of the Charter of the United Nations – Implementation in the Community – Common Position 2002/402/CFSP – Regulation (EC) No 881/2002 Measures against persons and entities included in a list drawn up by a body of the United Nations – Freezing of funds and economic resources – Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) – Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 – Actions for annulment – Competence of the Community – Joint legal basis of Articles 60 EC, 301 EC and 308 EC – Fundamental rights – Right to respect for property, right to be heard and right to effective judicial review)

In Joined Cases C-402/05 P and C-415/05 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 17 and 21 November 2005, respectively,

¹⁴ Languages of the case: English and Swedish.

Yassin Abdullah Kadi, residing in Jeddah (Saudi Arabia), represented by I. Brownlie QC, D. Anderson QC and P. Saini, Barrister, instructed by G. Martin, Solicitor, with an address for service in Luxembourg,

Al Barakaat International Foundation, established in Spånga (Sweden), represented by L. Silbersky and T. Olsson, advokater, appellants,

the other parties to the proceedings being: Council of the European Union, represented by M. Bishop, E. Finnegan and E. Karlsson, acting as Agents, defendant at first instance, supported by Kingdom of Spain, represented by J. Rodríguez Cárcomo, acting as Agent, with an address for service in Luxembourg, French Republic, represented by G. de Bergues, E. Belliard and S. Gasri, acting as Agents, Kingdom of the Netherlands, represented by H.G. Sevenster and M. de Mol, acting as Agents, interveners on appeal, Commission of the European Communities, represented by C. Brown, J. Enegren and P.J. Kuijper, acting as Agents, with an address for service in Luxembourg, defendant at first instance, supported by: French Republic, represented by G. de Bergues, E. Belliard and S. Gasri, acting as Agents, intervener on appeal, United Kingdom of Great Britain and Northern Ireland, represented by R. Caudwell, E. Jenkinson and S. Behzadi-Spencer, acting as Agents, assisted by C. Greenwood QC and A. Dashwood, Barrister, with an address for service in Luxembourg, intervener at first instance,

THE COURT (Grand Chamber), composed of: V. Skouris, President, C.W.A. Timmemans (Rapporteur), A. Rosas and K. Lenaerts, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Küris, P. Lindh, J.-C. Bonichot, T. von Danwitz and A. Arabadjiev, Judges, Advocate General: M. Poiares Maduro, Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2007, after hearing the Opinion of the Advocate General at the sitting on 16 January 2008 (C-402/05 P) and 23 January 2008 (C-415/05 P), gives the following Judgment

1. By their appeals, Mr Kadi (C-402/05 P) and Al Barakaat International Foundation ('Al Barakaat') (C-415/05 P) seek to have set aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in Case T315/01 Kadi v Council and Commission [2005] ECR II3649 ('Kadi') and Case T306/01 Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II3533 ('Yusuf and Al Barakaat') (together, the judgments under appeal).
 2. By those judgments the Court of First Instance rejected the actions brought by Mr Kadi and Al Barakaat against Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9, 'the contested regulation'), in so far as that act relates to them.
- ### Legal context
3. Under Article 1(1) and (3) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the purposes of the United Nations are *inter alia* '[t]o maintain international peace and security' and '[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.
 4. Under Article 24(1) and (2) of the Charter of the United Nations:
 - '1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.'
 5. Article 25 of the Charter of the United Nations provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.
 6. Articles 39, 41 and 48 of the Charter of the United Nations form part of Chapter VII thereof, headed 'Action with respect to threats to the peace, breaches of the peace, and acts of

aggression’.

7. In accordance with Article 39 of the Charter of the United Nations:

‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’

8. Article 41 of the Charter of the United Nations is worded as follows:

‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’

9. By virtue of Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members’.
10. Article 103 of the Charter of the United Nations states that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.

Background to the disputes

11. The background to the disputes has been set out in paragraphs 10 to 36 of Kadi and in paragraphs 10 to 41 of Yusuf and Al Barakaat.
12. For the purposes of this judgment it may be summarised as follows.
13. On 15 October 1999 the Security Council adopted Resolution 1267 (1999), in which it, *inter alia*, condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security and deplored the fact that

the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international terrorist operations.

14. In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Usama bin Laden over to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be arrested and effectively brought to justice. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need’.
15. In paragraph 6 of Resolution 1267 (1999), the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members (‘the Sanctions Committee’), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4.
16. Taking the view that action by the Community was necessary in order to implement Resolution 1267 (1999), on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1).
17. Article 2 of that Common Position prescribes the freezing of funds and other financial resources held abroad by the Taliban under the conditions set out in Security Council Resolu-

tion 1267 (1999).

18. On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2000 L 43, p. 1).
19. On 19 December 2000 the Security Council adopted Resolution 1333 (2000), demanding, *inter alia*, that the Taliban should comply with Resolution 1267 (1999), and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organisations and turn Usama bin Laden over to appropriate authorities to be brought to justice. The Security Council decided, in particular, to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999).
20. Accordingly, paragraph 8(c) of Resolution 1333 (2000) provides that the States are, *inter alia*, '[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee], including those in the Al-Qaeda organisation, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaeda organisation'.
21. In the same provision, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation.
22. In paragraph 23 of Resolution 1333 (2000), the Security Council decided that the measures imposed, *inter alia*, by paragraph 8 were to be established for 12 months and that, at the end of that period, it would decide whether to extend them for a further period on the same conditions.
23. Taking the view that action by the European Community was necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1).
24. Article 4 of that common position provides:
 - 'Funds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee, under the conditions set out in [Resolution 1333 (2000)].'
25. On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).
26. The third recital in the preamble to that regulation states that the measures provided for by Resolution 1333 (2000) 'fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned'.
27. Article 1 of Regulation No 467/2001 defines what is meant by 'funds' and 'freezing of funds'.
28. Under Article 2 of Regulation No 467/2001:
 - '1. All funds and other financial resources belonging to any natural or legal person, entity or body designated by the... Sanctions Committee and listed in Annex I shall be frozen.
 2. No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of, persons, entities or bodies designated by the Taliban Sanctions Committee and listed in Annex I.
 3. Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained through the competent authorities of the Member States listed in Annex II.'
29. Annex I to Regulation No 467/2001 contains

- the list of persons, entities and bodies affected by the freezing of funds imposed by Article 2. Under Article 10(1) of Regulation No 467/2001, the Commission was empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.
30. On 8 March 2001 the Sanctions Committee published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000) (see the Committee's press release AFG/131 SC/7028 of 8 March 2001). That list has since been amended and supplemented several times. The Commission has in consequence adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.
 31. On 17 October and 9 November 2001 the Sanctions Committee published two new additions to its summary list, including in particular the names of the following entity and person:
 - 'Al-Qadi, Yasin (A.K.A. Kadi, Shaykh Yassin Abdullah; A.K.A. Kahdi, Yasin), Jeddah, Saudi Arabia', and
 - 'Barakaat International Foundation, Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden'.
 32. By Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25), Mr Kadi's name was added, with others, to Annex I.
 33. By Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16), the name Al Barakaat was added, with others, to Annex I.
 34. On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Paragraphs 1 and 2 of that resolution provide, in essence, for the continuance of the measures freezing funds imposed by paragraphs 4(b) of Resolution 1267 (1999) and 8(c) of Resolution 1333 (2000). In accordance with paragraph 3 of Resolution 1390 (2002), those measures were to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council would either allow those measures to continue or decide to improve them.
 35. Taking the view that action by the Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of that Common Position prescribes, inter alia, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).
 36. On 27 May 2002 the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.
 37. According to the fourth recital in the preamble to that regulation, the measures laid down by, inter alia, Resolution 1390 (2002) fall within the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned'.
 38. Article 1 of Regulation No 881/2002 defines 'funds' and 'freezing of funds' in terms which are essentially identical to those used in Article 1 of Regulation No 467/2001.
 39. Under Article 2 of Regulation No 881/2002:
 1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.
 2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.
 3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or ser-

vices.’

40. Annex I to the contested regulation contains the list of persons, groups and entities affected by the freezing of funds imposed by Article 2 of that regulation. That list includes, inter alia, the names of the following entity and persons:

– ‘Al Barakaat International Foundation; Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden’, and

– ‘Al-Qadi, Yasin (alias KADI, Shaykh Yassin Abdullah; alias KAHDI, Yasin), Jeddah, Saudi Arabia’.

41. On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999) and 1390 (2002) which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.

42. On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraphs 4(b) of Resolution 1267 (1999), 8(c) of Resolution 1333 (2000) and 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures are again to be improved after 12 months or earlier if necessary.

43. Taking the view that action by the Community was necessary in order to implement Resolution 1452 (2002), on 27 February 2003 the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402 (OJ 2003 L 53, p. 62). Article 1 of Common Position 2003/140 provides that, when implementing the measures set out in Article 3 of Common Position 2002/402, the Community is to provide for the exceptions permitted by that resolution (2002).

44. On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of Resolution 1452 (2002), to adjust the measures imposed by the Community.

45. In accordance with Article 1 of Regulation No 561/2003, the following article is to be inserted in the contested regulation:

‘Article 2a

1. Article 2 shall not apply to funds or economic resources where:

(a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:

(i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;

(iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or

(iv) necessary for extraordinary expenses; and

(b) such determination has been notified to the Sanctions Committee; and

(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or

(ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.

2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II.

The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted.

The competent authority shall also inform other Member States whether the request for such an exception has been granted.

3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.

...'

The actions before the Court of First Instance and the judgments under appeal

46. By applications lodged at the Registry of the Court of First Instance, Mr Kadi and Al Barakaat both brought actions seeking annulment of Regulation No 467/2001, the former seeking annulment also of Regulation No 2062/2001 and the latter annulment also of Regulation No 2199/2001, in so far as those measures concern them. During the proceedings before the Court of First Instance, the appellants amended their claims and pleas in law, so as to refer thenceforth to the contested regulation, in so far as that measure concerns them.
 47. By orders of the President of the First Chamber of the Court of First Instance, the United Kingdom of Great Britain and Northern Ireland was given leave to intervene in support of the forms of order sought by the defendants at first instance.
 48. In the judgments under appeal, the Court of First Instance decided as a preliminary point that each action must be regarded as being directed thenceforth against the Council alone, supported by the Commission and the United Kingdom, and the sole object of each must be considered to be a claim for annulment of the contested regulation, in so far as it concerned the respective applicants (Kadi, paragraph 58, and Yusuf and Al Barakaat, paragraph 77).
 49. In support of his claims, Mr Kadi put forward in his application before the Court of First Instance three grounds of annulment alleging, in essence, breaches of his fundamental rights. The first alleges breach of the right to be heard, the second, breach of the right to respect for property and of the principle of proportionality, and the third, breach of the right to effective judicial review.
 50. For its part, Al Barakaat based its claims on three grounds of annulment: the first alleges that the Council was incompetent to adopt the contested regulation, the second alleges infringement of Article 249 EC and the third alleges breach of its fundamental rights.
- As regards the Council's competence concerning the adoption of the contested regulation*
51. In the contested judgments, the Court of First Instance first of all considered whether the Council was competent to adopt the contested regulation on the legal basis of Articles 60 EC, 301 EC and 308 EC, taking the view, in paragraph 61 of Kadi, that that was a matter of public policy which could therefore be raised by the Community judicature of its own motion.
 52. In Yusuf and Al Barakaat, the Court of First Instance at the outset dismissed the applicants' claim alleging that there was no legal basis for Regulation No 467/2001.
 53. In paragraph 107 of that judgment, the Court of First Instance found it appropriate to take such a step, even though the ground of challenge had become devoid of purpose because of the repeal of that regulation by the contested regulation, for it considered that the grounds on which it dismissed that claim formed part of the premisses of its reasoning concerning the legal basis of the latter regulation, thenceforth the sole subject of the action for annulment.
 54. In this connection, it first rejected, in Yusuf and Al Barakaat, paragraphs 112 to 116, the argument that the acts in question affected individuals, who were moreover nationals of a Member State, whereas Articles 60 EC and 301 EC authorised the Council to take measures against third countries only.
 55. In paragraph 115 of that judgment, the Court of First Instance held that, just as economic or financial sanctions may legitimately be directed specifically at the rulers of a third country, rather than at the country as such, they may be directed at the persons or entities associated with those rulers or directly or indirectly controlled by them, wherever they may be.
 56. According to paragraph 116, that interpretation, which is not contrary to the letter of Article 60 EC or Article 301 EC, is justified both by considerations of effectiveness and by humanitarian concerns.
 57. Next, in Yusuf and Al Barakaat, paragraphs 117 to 121, the Court of First Instance rejected the argument that the measures at issue in that case were not intended to interrupt or reduce economic relations with a third country but to combat international terrorism and, more particularly, Usama bin Laden.

58. Finally, in paragraphs 122 and 123 of that judgment, it rejected the argument that those measures were disproportionate to the objective pursued by Articles 60 EC and 301 EC.
59. With regard, next, to the challenge to the legal basis of the contested regulation, the Court of First Instance first held, that, as the Council and the Commission have maintained, Articles 60 EC and 301 EC did not constitute in themselves a sufficient legal basis for that regulation (Kadi, paragraphs 92 to 97, and Yusuf and Al Barakaat, paragraphs 128 to 133).
60. It found, in particular, that that regulation was intended to enforce what are known as 'smart' sanctions of a new kind, a feature of which is that there is nothing at all to link the sanctions to the territory or the governing regime of a third country, for after the collapse of the Taliban regime the measures at issue, as provided for by Resolution 1390 (2002), were aimed directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them.
61. According to the Court of First Instance, in the light of the wording of Articles 60 EC and 301 EC, and especially of the expressions 'as regards the third countries concerned' and 'with one or more third countries' appearing there, it is not possible to have recourse to those articles to impose that new kind of sanction. They in fact authorise only the adoption of measures against a third country, which may include the rulers of such a country and the individuals and entities associated with them or controlled by them, directly or indirectly. When, however, the regime targeted by those measures has disappeared, there no longer exists a sufficient link between those individuals or entities and the third country concerned.
62. The Court of First Instance held, secondly, that the Council had rightly considered that Article 308 EC did not on its own constitute an adequate legal basis for the adoption of the contested regulation (Kadi, paragraphs 98 to 121, and Yusuf and Al Barakaat, paragraphs 134 to 157).
63. In that regard it decided that the fight against international terrorism, particularly by the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, cannot be made to refer to one of the objects which Articles 2 EC and 3 EC expressly entrust to the Community (Kadi, paragraph 116, and Yusuf and Al Barakaat, paragraph 152).
64. According to the Court of First Instance, the measures provided for by the contested regulation could not be authorised by the object of establishing a common commercial policy (Article 3(1)(b) EC), since the Community's commercial relations with a third country are not at issue in a situation such as that in the cases before it. Nor could the objective of creating a system ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC) be validly relied on, for in any event the elements presented to the Court of First Instance provided no grounds for considering that the contested regulation actually helps to avoid the risk of impediments to the free movement of capital or of appreciable distortion of competition.
65. The Court of First Instance held, thirdly, that the Council was competent to adopt the contested regulation which sets in motion in the Community the economic and financial sanctions provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC (Kadi, paragraph 135, and Yusuf and Al Barakaat, paragraph 170).
66. On this point, the Court of First Instance considered that account had to be taken of the bridge, explicitly established at the time of the revision caused by the Maastricht Treaty, between Community actions imposing economic sanctions under Articles 60 EC and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations (Kadi, paragraph 123, and Yusuf and Al Barakaat, paragraph 159).
67. According to the Court of First Instance, Articles 60 EC and 301 EC are wholly special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may prove to be necessary in order to achieve not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the European Union by Article 2 EU, namely, the implementation of a common foreign and security policy ('CFSP') (Kadi, paragraph 124, and Yusuf and Al Barakaat, paragraph 160).
68. Under Articles 60 EC and 301 EC, action by the Community is in actual fact, according to the Court of First Instance, action by the Union, the implementation of which finds its basis in the Community pillar after the Council has adopt-

ed a common position or a joint action under the CFSP (Kadi, paragraph 125, and Yusuf and Al Barakaat, paragraph 161).

Observance of Article 249 EC

69. In Yusuf and Al Barakaat, the Court of First Instance then went on to examine a plea raised only in the case giving rise to that judgment, alleging that the contested regulation, in so far as it directly prejudiced the rights of individuals and prescribed the imposition of individual sanctions, had no general application and therefore contravened Article 249 EC. That regulation could not, as a result, be understood to be a regulation, but rather a bundle of individual decisions.
70. In paragraphs 184 to 188 of that judgment the Court of First Instance rejected that plea.
71. In paragraph 186 of that judgment, it held that the contested regulation unarguably had general application within the meaning of the second paragraph of Article 249 EC, since it prohibits anyone to make available funds or economic resources to certain persons.
72. The Court of First Instance added that the fact that those persons are expressly named in Annex I to the regulation, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, in no way affects the general nature of that prohibition which is effective erga omnes, as is made clear, in particular, by Article 11 of the regulation.

Concerning respect of certain fundamental rights

73. As regards, last, the pleas alleging, in both cases, breach of the applicants' fundamental rights, the Court of First Instance considered it appropriate to consider, in the first place, the relationship between the international legal order under the United Nations and the domestic or Community legal order, and also the extent to which the exercise by the Community and its Member States of their powers is bound by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations. This consideration would effectively determine the scope of the review of lawfulness, particularly having regard to fundamental rights, which that court must carry out in respect of the Community acts giving effect to such resolutions. It is only if it should
- find that they fall within the scope of its judicial review and that they are capable of leading to annulment of the contested regulation that the Court of First Instance would have to rule on those alleged breaches (Kadi, paragraphs 178 to 180, and Yusuf and Al Barakaat, paragraphs 228 to 230).
74. Examining first the relationship between the international legal order under the United Nations and the domestic legal orders or the Community legal order, the Court of First Instance ruled that, from the standpoint of international law, the Member States, as Members of the United Nations, are bound to respect the principle of the primacy of their obligations 'under the Charter' of the United Nations, enshrined in Article 103 thereof, which means, in particular, that the obligation, laid down in Article 25 of the Charter, to carry out the decisions of the Security Council prevails over any other obligation they may have entered into under an international agreement (Kadi, paragraphs 181 to 184, and Yusuf and Al Barakaat, paragraphs 231 to 234).
75. According to the Court of First Instance, that obligation of the Member States to respect the principle of the primacy of obligations undertaken by virtue of the Charter of the United Nations is not affected by the EC Treaty, for it is an obligation arising from an agreement concluded before the Treaty, and so falling within the scope of Article 307 EC. What is more, Article 297 EC is intended to ensure that that principle is observed (Kadi, paragraphs 185 to 188, and Yusuf and Al Barakaat, paragraphs 235 to 238).
76. The Court of First Instance concluded that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect and may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of Community law, that raises any impediment to the proper performance of their obligations under that Charter (Kadi, paragraphs 189 and 190, and Yusuf and Al Barakaat, paragraphs 239 and 240).
77. However, according to the Court of First Instance, the mandatory nature of those resolutions stemming from an obligation under international law does not bind the Community,

for the latter is not, as such, directly bound by the Charter of the United Nations, not being a Member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law (Kadi, paragraph 192, and Yusuf and Al Barakaat, paragraph 242).

78. Nevertheless, that mandatory force binds the Community by virtue of Community law (Kadi, paragraph 193, and Yusuf and Al Barakaat, paragraph 243).
79. In that regard, the Court of First Instance referring, by analogy, to Joined Cases 21/72 to 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 18, in particular, held that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community (Kadi, paragraph 203, and Yusuf and Al Barakaat, paragraph 253).
80. In the following paragraph in those judgments, the Court of First Instance concluded, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.
81. Being thus called upon, in the second place, to determine the scope of the review of legality, especially in the light of fundamental rights, that it must carry out concerning Community measures giving effect to resolutions of the Security Council, such as the contested regulation, the Court of First Instance first recalled, in Kadi, paragraph 209, and Yusuf and Al Barakaat, paragraph 260, that, according to case-law, the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.
82. In Kadi, paragraph 212, and Yusuf and Al Barakaat, paragraph 263, the Court of First Instance considered, however, that the question

arising in the cases before it was whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on that judicial review.

83. In that connection the Court of First Instance recalled, in Kadi, paragraph 213, and Yusuf and Al Barakaat, paragraph 264, that the contested regulation, adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations.
84. In that situation, the Community acted, according to the Court of First Instance, under circumscribed powers leaving it no autonomous discretion in their exercise, so that it could, in particular, neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration (Kadi, paragraph 214, and Yusuf and Al Barakaat, paragraph 265).
85. The Court of First Instance inferred therefrom that the applicants' challenging of the internal lawfulness of the contested regulation implied that the Court of First Instance should undertake a review, direct or indirect, of the lawfulness of the resolutions put into effect by that regulation in the light of fundamental rights as protected by the Community legal order (Kadi, paragraphs 215 and 216, and Yusuf and Al Barakaat, paragraphs 266 and 267).
86. In paragraphs 217 to 225 of Kadi, drawn up in terms identical to those of paragraphs 268 to 276 of Yusuf and Al Barakaat, the Court of First Instance held as follows:
- '217 The institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the Member States of the Community, are mandatory for the Court as they are for all the Community institutions. Those parties are of the view, essentially, that the Court's review ought to be confined, on the one hand,

to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect.

218 It must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order.

219 As has already been explained, the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the Charter.

220 Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.

221 In light of the considerations set out in paragraphs 193 to 204 above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law.

222 First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25, 48 and 103 thereof, and also with Article 27 of the Vienna Convention on the Law of Treaties [concluded in Vienna on 25 May 1969].

223 Second, such jurisdiction would be contrary to provisions both of the EC Treaty, especially Articles 5 EC, 10 EC, 297 EC and the first paragraph of Article 307 EC, and of the Treaty on European Union, in particular Article 5 EU, in accordance with which the Community judiciary is to exercise its powers on the con-

ditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union. It would, what is more, be incompatible with the principle that the Community's powers and, therefore, those of the Court of First Instance, must be exercised in compliance with international law (Case C286/90 Poulsen and Diva Navigation [1992] ECR I6019, paragraph 9, and Case C162/96 Racke [1998] ECR I3655, paragraph 45).

224 It has to be added that, with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community (see, by analogy, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3; Case 234/85 Keller [1986] ECR 2897, paragraph 7, and Joined Cases 97/87 to 99/87 Dow Chemical Ibérica and Others v Commission [1989] ECR 3165, paragraph 38).

225 It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.'

87. In Kadi, paragraph 226, and Yusuf and Al Barakaat, paragraph 277, the Court of First Instance found that it was, none the less, empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

88. In paragraphs 227 to 231 of Kadi, drawn up in terms identical to those of paragraphs 278 to 282 of Yusuf and Al Barakaat, the Court of First Instance held as follows:

'227 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply "to any Treaty which is the constituent instrument of an international organisation and to any Treaty adopted within an international organisation", provides in Article

53 for a Treaty to be void if it conflicts with a peremptory norm of general international law (*jus cogens*), defined as “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Similarly, Article 64 of the Vienna Convention provides that: “If a new peremptory norm of general international law emerges, any existing Treaty which is in conflict with that norm becomes void and terminates”.

228 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to “re-affirm faith in fundamental human rights, in the dignity and worth of the human person”. In addition, it is apparent from Chapter I of the Charter, headed “Purposes and Principles”, that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

229 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act “in accordance with the Purposes and Principles of the United Nations”. The Security Council’s powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

230 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

231 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling

within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute “intransgressible principles of international customary law” (Advisory Opinion of the International Court of Justice of 8 July 1996, *The Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p. 226, paragraph 79; see also, to that effect, Advocate General Jacobs’s Opinion in Case C84/95 *Bosphorus* [1996] ECR I3953, paragraph 65).’

89. Firstly, with particular regard to the alleged breach of the fundamental right to respect for property, the Court of First Instance considered, in *Kadi*, paragraph 237, and *Yusuf and Al Barakaat*, paragraph 288, that it fell to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringed the applicant’s fundamental rights.
90. In *Kadi*, paragraph 238, and *Yusuf and Al Barakaat*, paragraph 289, the Court of First Instance decided that such was not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.
91. In *Kadi*, paragraphs 239 and 240, and *Yusuf and Al Barakaat*, paragraphs 290 and 291, the Court of First Instance held that the exemptions to and derogations from the obligation to freeze funds provided for in the contested regulation as a result of its amendment by Regulation No 561/2003, itself putting into effect Resolution 1452 (2002), show that it is neither the purpose nor the effect of that measure to submit the persons entered in the summary list to inhuman or degrading treatment.
92. In *Kadi*, paragraphs 243 to 251, and *Yusuf and Al Barakaat*, paragraphs 294 to 302, the Court of First Instance held, in addition, that the freezing of funds did not constitute an arbitrary, inappropriate or disproportionate interference with the right to private property of the persons concerned and could not, therefore, be regarded as contrary to *jus cogens*, having regard to the following facts:
 - the measures in question pursue an objective of fundamental public interest for the international community, that is to say, the campaign against international terrorism,

and the United Nations are entitled to undertake protective action against the activities of terrorist organisations;

- freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof;
 - the resolutions of the Security Council at issue provide for a means of reviewing, after certain periods, the overall system of sanctions;
 - those resolutions set up a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.
93. As regards, secondly, the alleged breach of the right to be heard, and more particularly, first, the applicants' alleged right to be heard by the Community institutions before the contested regulation had been adopted, the Court of First Instance held as follows in paragraph 258 of Kadi, to which paragraph 328 of Yusuf and Al Barakaat corresponds, *mutatis mutandis*:

'In this instance, as is apparent from the preliminary observations above on the relationship between the international legal order under the United Nations and the Community legal order, the Community institutions were required to transpose into the Community legal order resolutions of the Security Council and decisions of the Sanctions Committee that in no way authorised them, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations, since both the substance of the measures in question and the mechanisms for re-examination (see paragraphs 262 et seq. ...) fell wholly within the purview of the Security Council and its Sanctions Committee. As a result, the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants. The principle of Community law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position.'

94. The Court of First Instance concluded in Kadi, paragraph 259, that the Council was not obliged to hear the applicant on the subject of his inclusion in the list of persons and entities affected by the sanctions, in the context of the adoption and implementation of the contested regulation and, in Yusuf and Al Barakaat, paragraph 329, that the Council was not obliged to hear the applicants before the contested regulation was adopted.
95. With regard, second, to breach of the applicants' alleged right to be heard by the Sanctions Committee in connection with their inclusion in the summary list, the Court of First Instance held in paragraph 261 of Kadi and paragraph 306 of Yusuf and Al Barakaat that no such right was provided for by the Security Council's resolutions at issue.
96. It further held in Yusuf and Al Barakaat, paragraph 307, that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of the case in point.
97. The Court of First Instance observed, moreover, that although the resolutions of the Security Council concerned and the subsequent regulations that put them into effect in the Community do not provide for any right of audience for individual persons, they nevertheless set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the summary list or to obtain exemption from the freezing of funds (Kadi, paragraph 262, and Yusuf and Al Barakaat, paragraph 309).
98. Referring, in Kadi, paragraph 264, and in Yusuf and Al Barakaat, paragraph 311, to the 'Guidelines of the [Sanctions] Committee for the conduct of its work', as adopted by that committee on 7 November 2002 and amended on 10 April 2003 ('the Sanctions Committee's Guidelines'), and, in Kadi, paragraph 266, and Yusuf and Al Barakaat, paragraph 313, to various resolutions of the Security Council, the Court of First Instance noted, in those paragraphs, the importance attached by the Security Council, in so far as possible, to the fundamental rights of the persons entered in the list, and especially to their right to be heard.
99. In Kadi, paragraph 268, and in Yusuf and Al Barakaat, paragraph 315, the Court of First Instance found that the fact, noted in the pre-

vious paragraph of both judgments, that the re-examination procedure confers no right directly on the persons concerned themselves to be heard by the Sanctions Committee the only authority competent to give a decision, on a State's petition, on the re-examination of their case with the result that those persons are dependent, essentially, on the diplomatic protection afforded by the States to their nationals, is not to be deemed improper in the light of the mandatory prescriptions of the public international order.

100. The Court of First Instance added that it is open to the persons involved to bring an action for judicial review based on domestic law, indeed even directly on the contested regulation and the relevant resolutions of the Security Council which it puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination (Kadi, paragraph 270, and Yusuf and Al Barakaat, paragraph 317).

101. The Court of First Instance held, in addition, that in circumstances such as those of the cases in point, in which what is at issue is a temporary precautionary measure restricting the availability of the applicants' property, observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (Kadi, paragraph 274, and Yusuf and Al Barakaat, paragraph 320).

102. Having regard to those considerations, the Court of First Instance held in Kadi, paragraph 276, and Yusuf and Al Barakaat, paragraph 330, that the applicants' plea alleging breach of the right to be heard must be rejected.

103. Lastly, with regard to the plea alleging breach of the right to effective judicial review, the Court of First Instance found as follows in paragraphs 278 to 285 of Kadi, drawn up in terms essentially identical to those of paragraphs 333 to 340 of Yusuf and Al Barakaat:

'278 In the circumstances of this case, the applicant has been able to bring an action for annulment before the Court of First Instance under Article 230 EC.

279 In dealing with that action, the Court carries out a complete review of the lawfulness of the contested regulation with regard to ob-

servance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions.

280 The Court also reviews the lawfulness of the contested regulation having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions.

281 Giving a decision pursuant to that review, the Court finds that it is not disputed that the applicant is indeed one of the natural persons entered in the summary list on 19 October 2001.

282 In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.

283 On the other hand, as has already been observed in paragraph 225 above, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order.

284 Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 282 above, to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted *vis-à-vis* the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted

primary responsibility for the maintenance of international peace and security.

285 It must thus be concluded that, to the extent set out in paragraph 284 above, there is no judicial remedy available to the applicant, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.'

104. In Kadi, paragraph 268, and Yusuf and Al Barakaat, paragraph 315, the Court of First Instance held that any such lacuna in the judicial protection available to the applicant is not in itself contrary to *jus cogens*.

105. In this respect, the Court of First Instance found as follows in paragraphs 288 to 290 of Kadi, drawn up in terms essentially identical to those of paragraphs 343 to 345 of Yusuf and Al Barakaat:

'288 In this instance, the Court considers that the limitation of the applicant's right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of [that] Charter), is inherent in that right as it is guaranteed by *jus cogens*.

289 Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, the applicant's interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed ...

290 Last, the Court considers that, in the absence of an international court having jurisdiction to ascertain whether acts of the Security

Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the "petitioned government" and the "designating government" ..., constitute another reasonable method of affording adequate protection of the applicant's fundamental rights as recognised by *jus cogens*.'

106. Consequently the Court of First Instance dismissed the pleas alleging breach of the right to effective judicial review and, as a result, the actions in their entirety.

Forms of order sought by the parties to the appeal

107. By his appeal, Mr Kadi claims that the Court should:

- set aside in whole the judgment in Kadi;
- declare the contested regulation null and void, and
- order the Council and/or the Commission to pay the costs in this appeal and those incurred in the proceedings before the Court of First Instance.

108. By its appeal, Al Barakaat claims that the Court should:

- set aside the judgment in Yusuf and Al Barakaat;
- declare the contested regulation null and void, and
- order the Council and the Commission to pay the costs relating to the present appeal and to the proceedings before the Court of First Instance.

109. The Council contends in both cases that the Court should reject the appeal and order the appellant to pay the costs.

110. In Case C-402/05 P the Commission contends that the Court should:

- declare that none of the grounds of appeal put forward by the appellant is capable of impugning the operative part of the judgment in Kadi, and replace the grounds of that judgment with those proposed in its response;
- in consequence, reject the appeal; and

- order the appellant to pay the costs.

111. In Case C-415/05 P the Commission contends that the Court should:

- reject the appeal in its entirety, and
- order the appellant to pay the costs.

112. The United Kingdom has brought a cross-appeal contending that the Court should:

- dismiss the appeals, and
- set aside that part of the judgments under appeal which deal with the question of *jus cogens*, that is to say, paragraphs 226 to 231 of Kadi and paragraphs 277 to 281 of Yusuf and Al Barakaat.

113. The Kingdom of Spain, granted leave to intervene in support of the forms of order sought by the Council by orders of the President of the Court of 27 April 2006 (Case C402/05 P) and 15 May 2006 (Case C-415/05 P), contends that the Court should:

- reject the appellants' appeals in their entirety and uphold in their entirety the judgments under appeal, and
- order the appellants to pay the costs;
- dismiss the Commission's contentions in relation to the first ground of each appeal, upholding the judgments under appeal, and
- order the Commission to pay the costs;
- in the alternative, if the Court should set aside the judgment under appeal and, consequently, annul Regulation No 881/2002, order the effects of that regulation to be maintained, pursuant to Article 231 EC, until a new regulation is adopted replacing it.

114. The French Republic, granted leave to intervene in support of the forms of order sought by the Council by orders of the President of the Court of 27 April 2006 (Case C402/05 P) and 15 May 2006 (Case C-415/05 P), contends that the Court should:

- reject the appellants' appeals, allow the cross-appeal of the United Kingdom and carry out a substitution of the grounds as regards the part of the judgments under appeal which concerns *jus cogens*, and
- order the appellants to pay the costs.

115. The Kingdom of the Netherlands, granted

leave to intervene in support of the form of order sought by the Council by orders of the President of the Court of 27 April 2006 (Case C402/05 P) and 15 May 2006 (Case C-415/05 P), contends in both cases that the Court should dismiss the appeal, with the proviso that there should be substitution of the grounds with regard to the scope of the review of legality or, alternatively, to the question whether norms of *jus cogens* have been infringed.

The grounds of challenge to the judgments under appeal

116. Mr Kadi puts forward two grounds of appeal, the first alleging lack of any legal basis for the contested regulation and the second concerning breach of several rules of international law by the Court of First Instance and the consequences of that breach as regards the assessment of his arguments relating to the infringement of certain of his fundamental rights which he pleaded before the Court of First Instance.

117. Al Barakaat puts forward three grounds of appeal, the first alleging lack of any legal basis for the contested regulation, the second infringement of Article 249 EC and the third infringement of certain of its fundamental rights.

118. In its cross-appeal the United Kingdom puts forward a single ground relating to the error of law allegedly committed by the Court of First Instance in concluding in the judgments under appeal that it was competent to consider whether the Security Council's resolutions at issue were compatible with the rules of *jus cogens*.

Concerning the appeals

119. By order of 13 November 2007 the President of the Court ordered the name of Ahmed Ali Yusuf to be struck from the Court's register in response to his abandonment of the appeal that he had brought jointly with Al Barakaat in Case C415/05 P.

120. The parties and the Advocate General having been heard in this regard, it is appropriate, on account of the connection between them, to join the present cases for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure of the Court.

Concerning the grounds of appeal relating to the legal basis of the contested regulation

Arguments of the parties

121. By his first ground of appeal Mr Kadi claims that the Court of First Instance erred in law when it held, in paragraph 135 of Kadi, that it was possible for the contested regulation to be adopted on the joint basis of Articles 60 EC, 301 EC and 308 EC.
122. That plea falls into three parts.
123. In the first part Mr Kadi maintains that the Court of First Instance erred in law in ruling that Articles 60 EC and 301 EC could be regarded as constituting a partial legal basis for the contested regulation. Furthermore, the Court of First Instance did not explain how those provisions, which can provide a basis only for measures against third countries, could be envisaged, together with Article 308 EC, as the legal basis of the contested regulation, when the latter contains only restrictive measures directed against individuals and non-State entities.
124. In the second part, Mr Kadi asserts that, if Articles 60 EC and 301 EC were nevertheless to be held to constitute a partial legal basis for the contested regulation, the Court of First Instance erred in law because it misconstrued Article 301 EC and its function as a 'bridge', for that article in no circumstances includes the power to take measures intended to attain an objective of the EU Treaty.
125. In the third part, Mr Kadi argues that the Court of First Instance erred in law by interpreting Article 308 EC in such a way that that article might provide a legal basis for legislation for which the necessary powers have not been provided in the EC Treaty and which was not necessary in order to attain one of the Community's objectives. In Kadi, paragraphs 122 to 134, the Court of First Instance wrongly assimilated the objectives of the two integrated but separate legal orders constituted by the Union and the Community and thus misinterpreted the limitations of Article 308 EC.
126. Furthermore, such a view is, to his mind, incompatible with the principle of conferred powers laid down in Article 5 EC. It follows from paragraphs 28 to 35 of Opinion 2/94 of 28 March 1996 (ECR I1759) that the fact that an objective is mentioned in the Treaty on European Union cannot make good the lack of that objective in the list of the objectives of the EC Treaty.
127. The Council and the French Republic contest the first part of Mr Kadi's first ground of appeal, arguing *inter alia* that the reference to Articles 60 EC and 301 EC in the legal basis of the contested regulation is warranted by the fact that those provisions enact restrictive measures whose ambit was to be extended, by means of recourse to Article 308 EC, to persons or non-State entities that were not, therefore, covered by those two articles.
128. For its part, the United Kingdom maintains that Article 308 EC was used as a means of supplementing the instrumental powers provided for by Articles 60 EC and 301 EC, those articles not constituting, therefore, a partial legal basis for the contested regulation. The Kingdom of Spain raises in essence the same line of argument.
129. With regard to the second part of that ground of appeal, the Council maintains that the *raison d'être* of the bridge provided for in Article 301 EC is precisely to give it the power to adopt measures intended to attain an objective of the EU Treaty.
130. The Kingdom of Spain, the French Republic and the United Kingdom maintain that it is Article 308 EC, and not Articles 60 EC and 301 EC, that enabled the adoption of restrictive measures aimed at individuals and non-State entities, so enlarging the ambit of those two articles.
131. So far as the third part of Mr Kadi's first ground of appeal is concerned, the Council argues that the whole point of the bridge provided by Article 301 EC is, exceptionally, to use those powers conferred on the Community to impose economic and financial sanctions for the purpose of attaining an objective of the CFSP, and so of the Union, rather than a Community objective.
132. The United Kingdom and the Member States intervening in the appeal broadly support that position.
133. The United Kingdom clarifies its position by stating that, in its view, the action provided for by the contested regulation can be regarded as contributing to the attainment, not of an objective of the Union but of an objective of the Community, namely, the implicit and purely instrumental objective underlying Articles 60 EC and 301 EC of providing effective means

of giving effect, exclusively by way of coercive economic measures, to acts adopted under the power conferred upon the Union by Title V of the EU Treaty.

134. According to that Member State, when attainment of that instrumental objective requires forms of economic coercion going beyond the powers specifically conferred on the Council by Articles 60 EC and 301 EC, it is appropriate to have recourse to Article 308 EC to supplement those powers.

135. The Commission, having declared that it had reconsidered its point of view, argues, primarily, that Articles 60 EC and 301 EC, having regard to their wording and context, constituted in themselves appropriate and sufficient legal bases for the adoption of the contested regulation.

136. In this connection the Commission raises the following arguments:

- the wording of Article 301 EC is sufficiently broad to cover economic sanctions against individuals – provided that they are present in or otherwise associated with a third country. The expression ‘economic relations’ covers a vast range of activities. Any economic sanction, even directed at a third country, such as an embargo, directly affects the individuals concerned and the country only indirectly. The wording of Article 301 EC, especially the term ‘in part’, does not call for a partial measure to be directed against a particular section of the countries in question, such as the government. Allowing, as it does, the Community to break off completely economic relations with all countries, that provision must also authorise it to interrupt economic relations with a limited number of individuals in a limited number of countries;

- the fact that similar words are used in Article 41 of the Charter of the United Nations and in Article 301 EC shows that the authors of that latter provision clearly intended to provide a platform for the implementation by the Community of all measures adopted by the Security Council that call for action by the Community;

- Article 301 EC puts in place a procedural bridge between the Community and the Union, but seeks neither to increase nor to reduce the ambit of Community competence. As a result, that provision has to be interpreted as broadly as the relevant Community powers.

137. The Commission maintains that the measures at issue fall within the ambit of the common

commercial policy, having regard to the effect on trade of measures prohibiting the movement of economic resources, and even that those measures constitute provisions relating to the free movement of capital, since they involve the prohibition of transferring economic resources to individuals in third countries.

138. The Commission also argues that it is clear from Article 56(1) and (2) EC that movements of capital and payments between the Community and third countries fall within Community competence, the Member States being able to adopt sanction measures only within the framework of Article 60(2) EC and not of Article 58(l)(b) EC.

139. In consequence, the Commission believes that recourse may not be had to Article 308 EC for the adoption of the contested regulation, since power to act is provided for in Articles 60 EC and 301 EC. The Commission, referring in particular to Case C-94/03 *Commission v Council* [2006] ECR I I, paragraph 35, argues that those articles provide the basis for the main or predominant component of the contested regulation, in relation to which other components such as the freezing of the assets of persons who are both nationals of Member States of the Union and associated with a foreign terrorist group are merely secondary.

140. Alternatively, the Commission contends that, before resorting to Article 308 EC, it is necessary to examine the applicability of the articles of the EC Treaty dealing with the common commercial policy and the free movement of capital and payments.

141. In the further alternative, it maintains that, if Article 308 EC were to be held to be the legal basis of the contested regulation, it would be the sole legal basis, for recourse to that provision must be based on the consideration that action by the Community is necessary in order to attain one of the objectives of the Community and not, as the Court of First Instance held, the objectives of the EU Treaty in the sphere of external relations, in this case the CFSP.

142. The Community objectives involved in this instance are the common commercial policy, mentioned in Article 3(1)(b) EC, and the free movement of capital, referred to by implication in Article 3(1)(c) EC, read in conjunction with the relevant provisions of the EC Treaty, namely those contained in Article 56 EC relating to the free movement of capital to and from third countries. The measures at issue,

producing effects on trade, regardless of the fact that they were adopted in pursuit of foreign policy objectives, fall within the ambit of those Community objectives.

143. Mr Kadi, the Kingdom of Spain, the French Republic and the United Kingdom, contest the view principally put forward by the Commission, objecting as follows:

- it is an extensive interpretation of Articles 60 EC and 301 EC misconstruing the radically different and new nature of what are known as the ‘smart’ sanctions in question, in that they are no longer linked to any third country, and a hazardous interpretation, for those articles were introduced at a time when such a link was a feature of sanctions;

- unlike the ‘smart’ sanctions in question, a total embargo is essentially directed against the rulers of a third country on whom such a measure is designed to exert pressure, and only indirectly against economic operators in the country concerned, so that it cannot be argued that all sanctions, including embargoes, are primarily directed at individuals;

- unlike Article 41 of the Charter of the United Nations, Article 301 EC is specifically concerned with the interruption of economic relations ‘with one or more third countries’, with the result that no argument can be drawn from the similarity of the wording of those two provisions;

- Article 301 EC is not just a procedural provision. It institutes a specific legal basis and procedure and clearly confers material competence upon the Community;

- the measures imposed by the contested regulation do not concern commercial relations between the Community and third countries, and cannot, therefore, rely on the objective of the common commercial policy;

- the Court of First Instance correctly held that those measures do not help to avoid the risk of obstacles to the free movement of capital and that Article 60(2) EC cannot be used as the basis for restrictive measures aimed at individuals or entities. That provision concerning only measures against third countries, the measures at issue could have been adopted only pursuant to Article 58(1)(b) EC.

144. The Commission’s alternative argument is also challenged by both Mr Kadi and the Kingdom of Spain and the French Republic.

145. Recourse to Articles 133 EC or 57(2) EC is not permitted, given that the measures laid down

by the contested regulation do not concern commercial relations with third countries and do not fall within the category of movements of capital referred to in Article 57(2) EC.

146. Nor can it be argued that the contested regulation is designed to attain any Community objectives within the meaning of Article 308 EC. The objective of the free movement of capital is excluded, for application of the measure freezing funds provided for by that regulation is not capable of giving rise to any credible and serious danger of divergence between Member States. The objective of the common commercial policy is not relevant either, given that the freezing of the funds of an individual in no way linked to the government of a third country does not concern trade with such a country and does not pursue an objective of commercial policy.

147. If the submission it principally advances should be accepted, the Commission asks the Court, for reasons of legal certainty and for the sake of the proper performance of the obligations undertaken vis-à-vis the United Nations, to consider as definitive the effects of the contested regulation as a whole, pursuant to Article 231 EC.

148. In the same situation, the Kingdom of Spain and the French Republic have also made a request to that effect.

149. In contrast, Mr Kadi objects to those requests, claiming that the contested regulation constitutes a serious breach of fundamental rights. In any case, an exception must be made for persons who, like the applicant, have already brought an action against the regulation.

150. Al Barakaat’s first ground of challenge is that the Court of First Instance held in paragraphs 158 to 170 of Yusuf and Al Barakaat that it was possible for the contested regulation to be adopted on the joint basis of Articles 60 EC, 301 EC and 308 EC.

151. In its view, the Court of First Instance erred in law when it held, in paragraphs 160 and 164 of that judgment, that Articles 60 EC and 301 EC are not concerned solely with the performance of an action by the Community but may also concern one of the objectives specifically assigned to the Union by Article 2 EU, namely, the implementation of the CFSP.

152. Second, Al Barakaat criticises the Court of First Instance for finding, in paragraphs 112, 113,

115 and 116 of that judgment, that sanctions decided on against individuals for the purpose of influencing economic relations with one or more third countries are covered by the provisions of Articles 60 EC and 301 EC, and that that interpretation is justified both by considerations of effectiveness and by humanitarian concerns.

153. The Council counters that the Court of First Instance was right to rule, in paragraph 161 of Yusuf and Al Barakaat, that, by reason of the bridge supplied by Articles 60 EC and 301 EC, sanctions laid down on the basis of those provisions, as a result of the adoption of a common position or of a joint action under the CFSP providing for the interruption or reduction of the economic relations of the Community with one or more third countries, are intended to attain the CFSP objective pursued by those acts of the Union.
154. The Council also argues that the Court of First Instance was entitled to find that recourse to Article 308 EC as an additional legal basis for the contested regulation was justified, given that that article serves only to enable the extension of the economic and financial sanctions already provided for in Articles 60 EC and 301 EC to individuals and entities not sufficiently linked to any given third country.
155. Finally, the Council is of the view that the applicant's complaint concerning the efficiency and proportionality of the sanctions provided for by that regulation is irrelevant to the issue of the appropriateness of the legal basis of the regulation.
156. With regard to that second complaint, the United Kingdom too takes the view that it has no bearing on the appeal brought by Al Barakaat, given that, as held in paragraph 1 of the operative part of the judgment under appeal, the Court of First Instance found that there was no longer any need to adjudicate on the legality of Regulation No 467/2001.
157. As to the rest, the arguments raised by the Kingdom of Spain, the French Republic, the United Kingdom and the Commission, are, in substance, the same as those raised by those parties in connection with Mr Kadi's appeal.

Findings of the Court

158. With regard, first, to the challenges made by Al Barakaat to paragraphs 112, 113, 115 and 116 of Yusuf and Al Barakaat, it must be held that

those paragraphs relate to the legal basis of Regulation No 467/2001.

159. Now, that regulation has been repealed and replaced by the contested regulation. Moreover, as indicated by the Court of First Instance in Yusuf and Al Barakaat, paragraph 77, without challenge from Al Barakaat in its appeal, the sole object of the action before the Court of First Instance, after Al Barakaat had adjusted its claims for relief and pleas in law to the contested regulation, was annulment of that latter regulation, in so far as it concerns that applicant.
160. In those circumstances, those claims cannot in any case lead to the setting aside of that judgment and must therefore be regarded as immaterial.
161. In any event, the considerations of Yusuf and Al Barakaat to which those claims relate, treated by the Court of First Instance as premisses of its reasoning with regard to the legal basis of the contested regulation, are reproduced in later paragraphs of that judgment and in Kadi and will be examined during the assessment of the grounds of appeal challenging those paragraphs.
162. There is, therefore, no reason to examine those heads of claim in so far as they relate to the legal basis of Regulation No 467/2001.
163. It is appropriate to rule in the second place on the merits of the principal argument put forward by the Commission, that Articles 60 EC and 301 EC, in the light of their wording and context, are in themselves an appropriate and sufficient legal base for the contested regulation.
164. That argument is directed against paragraphs 92 to 97 of Kadi and paragraphs 128 to 133 of Yusuf and Al Barakaat, in which the Court of First Instance ruled to the contrary.
165. That argument must be rejected.
166. The Court of First Instance in fact rightly ruled that, having regard to the wording of Articles 60 EC and 301 EC, especially to the expressions 'as regards the third countries concerned' and 'with one or more third countries' used there, those provisions concern the adoption of measures vis-à-vis third countries, since that concept may include the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them.

167. The restrictive measures provided for by Resolution 1390 (2002), which the contested regulation was intended to put into effect, are measures notable for the absence of any link to the governing regime of a third country. Following the collapse of the Taliban regime, those measures were aimed directly at Osama bin Laden, the Al-Qaeda network and the persons and entities associated with them, as they appear in the summary list. They do not, therefore, as such, fall within the ambit of Articles 60 EC and 301 EC.
168. To accept the interpretation of Articles 60 EC and 301 EC proposed by the Commission, that it is enough for the restrictive measures at issue to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.
169. In addition, the essential purpose and object of the contested regulation is to combat international terrorism, in particular to cut it off from its financial resources by freezing the economic funds and resources of persons or entities suspected of involvement in activities linked to terrorism, and not to affect economic relations between the Community and each of the third countries where those persons or entities are, always supposing, moreover, that their place of residence is known.
170. The restrictive measures provided for by Resolution 1390 (2002) and put into effect by the contested regulation cannot be considered to be measures intended to reduce economic relations with each of those third countries, or, indeed, with certain Member States of the Community, in which are to be found persons or entities whose names are included in the list reproduced in Annex I to that regulation.
171. Nor can the argument supported by the Commission be justified by the expression 'in part' appearing in Article 301 EC.
172. In point of fact, that expression refers to the possible limitation of the scope *ratione materiae* or *personae* of the measures that might, by definition, be taken under that provision. It has, however, no effect on the necessary status of the persons to whom those measures might be addressed and cannot, therefore, warrant extending the application of the measures to such persons who are in no way linked to the governing regime of a third country and who, by the same token, do not fall within the ambit of that provision.
173. The Commission's argument relating to the similarity of the words used in Article 41 of the Charter of the United Nations and in Article 301 EC, from which it deduces that the latter provision constitutes a platform for the implementation by the Community of all measures adopted by the Security Council that call for action by the Community, cannot succeed either.
174. Article 301 EC specifically refers to the interruption of economic relations 'with one or more third countries', whereas such an expression is not used in Article 41 of the Charter of the United Nations.
175. What is more, in other respects the ambit of Article 41 of the Charter of the United Nations does not coincide with that of Article 301 EC, for the first provision enables the adoption of a series of measures other than those referred to by the second, including measures of a fundamentally different nature from those intended to interrupt or reduce economic relations with third countries, such as the breaking off of diplomatic relations.
176. The Commission's argument that Article 301 EC builds a procedural bridge between the Community and the European Union, so that it must be interpreted as broadly as the relevant Community competences, including those relating to the common commercial policy and the free movement of capital, must also be rejected.
177. That interpretation of Article 301 EC threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital.
178. Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.

179. It is necessary to examine in the third place the alternative argument raised by the Commission that, if it was not possible for the contested regulation to be adopted on the sole legal basis of Articles 60 EC and 301 EC, recourse to Article 308 EC would not be justified, for that latter provision is, in particular, applicable only if no other provision of the EC Treaty confers the powers necessary to adopt the measure concerned. The restrictive measures imposed by the contested regulation fall within the Community's powers of action, in particular its powers in the sphere of the common commercial policy and free movement of capital.
180. In this connection, the Court of First Instance held, in paragraphs 100 of *Kadi* and 136 of *Yusuf and Al Barakaat*, that no specific provision of the EC Treaty provides for the adoption of measures of the kind laid down in the contested regulation relating to the campaign against international terrorism and, more particularly, to the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of international terrorism, where no connection whatsoever has been established with the governing regime of a third State, with the result that the first condition for the applicability of Article 301 EC was satisfied in the case in point.
181. That conclusion must be upheld.
182. According to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including, in particular, the aim and the content of the measure (see, *inter alia*, Case C440/05 *Commission v Council* [2007] ECR I9097, paragraph 61 and the case-law there cited).
183. A Community measure falls within the competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned (see, *inter alia*, Case C347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I3785, paragraph 75 and the case-law there cited).
184. With regard to its essential purpose and object, as explained in paragraph 169 above, the contested regulation is intended to combat international terrorism and it provides to that end a series of restrictive measures of an economic and financial kind, such as freezing the economic funds and resources of persons or entities suspected of contributing to the funding of international terrorism.
185. Having regard to that purpose and object, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade.
186. Furthermore, although that regulation may indeed produce effects on international trade, it is plainly not its purpose to give rise to direct and immediate effects of that nature.
187. The contested regulation could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy.
188. On the other hand, according to the Commission, in so far as the contested regulation prohibits the transfer of economic resources to individuals in third countries, it falls within the ambit of the provisions of the EC Treaty on free movement of capital and payments.
189. That assertion too must be rejected.
190. With regard, first of all, to Article 57(2) EC, the restrictive measures imposed by the contested regulation do not fall within one of the categories of measures listed in that provision.
191. Nor can Article 60(1) EC furnish the basis for the contested regulation, for its ambit is determined by that of Article 301 EC.
192. As has earlier been held in paragraph 167 above, that latter provision is not concerned with the adoption of restrictive measures such as those at issue, which are notable for the absence of any link to the governing regime of a third country.
193. As regards, finally, Article 60(2) EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures.
194. In the fourth place it is appropriate to examine the claims directed by Mr Kadi, in the second and third parts of his first ground of appeal, against paragraphs 122 to 135 of *Kadi*, by *Al Barakaat* against paragraphs 158 to 170 of *Yusuf and Al Barakaat*, and the Commission's criti-

- cisms of those same paragraphs of the judgments under appeal.
195. In those paragraphs, the Court of First Instance ruled that it was possible for the contested regulation to be adopted on the joint basis of Articles 60 EC, 301 EC and 308 EC, on the ground that, by reason of the bridge explicitly established between Community actions imposing economic sanctions under Articles 60 EC and 301 EC, on the one hand, and the objectives of the EU Treaty in the sphere of external relations, on the other, recourse to Article 308 EC in the particular context envisaged by the two former articles is justified in order to attain such objectives, in this instance the objective of the CFSP pursued by the contested regulation, that is to say, the campaign against international terrorism and its funding.
196. In this regard it must be held that the judgments under appeal are indeed vitiated by an error of law.
197. In point of fact, while it is correct to consider, as did the Court of First Instance, that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC.
198. With specific regard to Article 308 EC, if the position of the Court of First Instance were to be accepted, that provision would allow, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the CFSP.
199. The inevitable conclusion is that such a view runs counter to the very wording of Article 308 EC.
200. Recourse to that provision demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the Community'.
201. That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.
202. Furthermore, the coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, referred to by the Court of First Instance in paragraphs 120 of Kadi and 156 of Yusuf and Al Barakaat, constitute considerations of an institutional kind militating against any extension of the bridge to articles of the EC Treaty other than those with which it explicitly creates a link.
203. In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community (Opinion 2/94, paragraph 30).
204. Likewise, Article 3 EU, referred to by the Court of First Instance in paragraphs 126 to 128 of Kadi and 162 to 164 of Yusuf and Al Barakaat, in particular its second paragraph, cannot supply a base for any widening of Community powers beyond the objects of the Community.
205. The effect of that error in law on the validity of the judgments under appeal will be considered later, after the evaluation of the other claims raised against the explanations given in those judgments concerning the possibility of including Article 308 EC in the legal basis of the contested regulation jointly with Articles 60 EC and 301 EC.
206. Those other claims may be divided into two categories.
207. The first category includes, in particular, the first part of Mr Kadi's first ground of appeal, in which he argues that the Court of First Instance erred in law when it accepted that it was possible for Article 308 EC to supplement the legal basis of the contested regulation formed by Articles 60 EC and 301 EC. In his submission, those two latter articles cannot form the legal basis, even in part, of the contested regulation because, according to the interpretation given by the Court of First Instance itself, measures directed against persons or entities in no way linked to the governing regime of a third country the only persons to whom the contested regulation is addressed do not fall within the

ambit of those articles.

208. That criticism may be compared with that made by the Commission, to the effect that, if it were to be held that recourse to Article 308 EC could be allowed, it would have to be as the sole legal basis, and not jointly with Articles 60 EC and 301 EC.
209. The second category includes the Commission's criticisms of the Court of First Instance's decision, in paragraphs 116 and 121 of Kadi and 152 and 157 of Yusuf and Al Barakaat, that, for the purposes of the application of Article 308 EC, the objective of the contested regulation, namely, according to the Court of First Instance, the fight against international terrorism, and more particularly the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, cannot be made to refer to one of the objects which the EC Treaty entrusts to the Community.
210. The Commission maintains in this respect that the implementing measures imposed by the contested regulation in the area of economic and financial sanctions fall, by their very nature, within the scope of the objects of the Community, that is to say, first, the common commercial policy and, second, the free movement of capital.
211. With regard to that first category of claims, it is to be borne in mind that Article 308 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty (Opinion 2/94, paragraph 29).
212. The Court of First Instance correctly held that Article 308 EC could be included in the legal basis of the contested regulation, jointly with Articles 60 EC and 301 EC.
213. The contested regulation, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC.
214. To that extent, the inclusion of those articles in the legal basis of the contested regulation was therefore justified.
215. Furthermore, those provisions are part of the extension of a practice based, before the introduction of Articles 60 EC and 301 EC by the Maastricht Treaty, on Article 113 of the EC Treaty (now, after amendment, Article 133 EC) (see, to that effect, Case C70/94 Werner [1995] ECR I3189, paragraphs 8 to 10, and Case C124/95 Centro-Com [1997] ECR I81, paragraphs 28 and 29), which consisted of entrusting to the Community the implementation of actions decided on in the context of European political cooperation and involving the imposition of restrictive measures of an economic nature in respect of third countries.
216. Since Articles 60 EC and 301 EC do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom the contested regulation applies, that lack of power, attributable to the limited ambit *ratione materiae* of those provisions, could be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject had been satisfied.
217. The claims in that first category must therefore be rejected as unfounded.
218. With regard to the other conditions for the applicability of Article 308 EC, the second category of claims will now be considered.
219. The Commission maintains that, although Common Position 2002/402, which the contested regulation is intended to put into effect, pursues the objective of the campaign against international terrorism, an objective covered by the CFSP, that regulation must be considered to lay down an implementing measure intended to impose economic and financial sanctions.
220. That objective falls within the scope of the objectives of the Community for the purpose of Article 308 EC, in particular those relating to the common commercial policy and the free movement of capital.
221. The United Kingdom takes the view that the purely instrumental specific objective of the contested regulation, namely, the introduction of coercive economic measures, must be distinguished from the underlying CFSP objective of maintaining international peace and

- security. That specific objective contributes to the implicit Community objective underlying Articles 60 EC and 301 EC, which is to supply effective means to put into effect, solely by coercive economic measures, acts adopted under the CFSP.
222. The objective pursued by the contested regulation is immediately to prevent persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities (Case C117/06 Möllendorf and Möllendorf-Niehuus [2007] ECR I8361, paragraph 63).
223. Contrary to what the Court of First Instance held in paragraphs 116 of Kadi and 152 of Yusuf and Al Barakaat, that objective can be made to refer to one of the objects which the EC Treaty entrusts to the Community. The judgments under appeal are therefore vitiated by an error of law on this point also.
224. In this regard it may be recalled that, as explained in paragraph 203 above, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole.
225. The objective pursued by the contested regulation may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC, with the result that the adoption of that regulation did not amount to disregard of the scope of Community powers stemming from the provisions of the EC Treaty as a whole.
226. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument.
227. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.
228. That interpretation is supported by Article 60(2) EC. Although the first paragraph thereof provides the power, within strict limits, for Member States to take unilateral measures against a third country with regard to capital movements and payments, that power may, as provided for by that paragraph, be exercised only so long as Community measures have not been taken pursuant to paragraph 1 of that article.
229. Implementing restrictive measures of an economic nature through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because such measures by their very nature offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC, as set out in paragraph 200 above.
230. If economic and financial measures such as those imposed by the contested regulation, consisting of the, in principle generalised, freezing of all the funds and other economic resources of the persons and entities concerned, were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market. Such measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage.
231. The Council's statement in the fourth recital in the preamble to the contested regulation that Community legislation was necessary 'notably with a view to avoiding distortion of competition' is shown, therefore, to be relevant in this connection.
232. At this point it is appropriate to rule on the effect of the errors of law, recorded in paragraphs 196 and 223 above, on the validity of the judgments under appeal.
233. It is to be borne in mind that, according to case-law, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but its operative part appears well founded on other legal grounds the appeal must be dismissed (see, in particular, Case C167/04 P JCB Service v Commission [2006] ECR I8935, paragraph 186 and the case-law cited).

234. Clearly the conclusion reached by the Court of First Instance in paragraphs 135 of Kadi and 158 of Yusuf and Al Barakaat concerning the legal basis of the contested regulation, that is to say, that the Council was competent to adopt that regulation on the joint basis of Articles 60 EC, 301 EC and 308 EC, appears justified on other legal grounds.

235. Although, as held in paragraphs 196 to 204 above, the inclusion of Article 308 EC in the legal basis of the contested regulation cannot be justified by the fact that that measure pursued an objective covered by the CFSP, that provision could nevertheless be held to provide a foundation for the regulation because, as shown in paragraphs 225 to 231 above, that regulation could legitimately be regarded as designed to attain an objective of the Community and as, furthermore, linked to the operation of the common market within the meaning of Article 308 EC. Moreover, adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution.

236. Accordingly, the grounds of appeal directed against the judgments under appeal inasmuch as by the latter the Court of First Instance decided that Articles 60 EC, 301 EC and 308 EC constituted the legal basis of the contested regulation must be dismissed in their entirety as unfounded.

Concerning the ground of appeal relating to infringement of Article 249 EC

Arguments of the parties

237. By its second ground of appeal Al Barakaat complains that the Court of First Instance held, in paragraph 188 of Yusuf and Al Barakaat, that the contested regulation satisfies the condition of general application laid down in Article 249 EC, given that it is addressed in a general and abstract manner to all persons who might actually hold funds belonging to one or more persons mentioned in the Annex to the regulation.

238. Al Barakaat maintains that it is wrong not to consider the person whose funds are frozen as the addressee of the act concerned, because the implementation of the decision must rea-

sonably be founded on a legal measure directed against the person in possession of the resources.

239. What is more, according to that appellant, it is contradictory to state, on the one hand, in paragraph 112 of Yusuf and Al Barakaat, that the measures at issue were restrictive measures directly affecting individuals or organisations and, on the other, in paragraph 188 of that judgment, that those measures were not addressed to those individuals or organisations, but rather constituted a kind of implementing measure addressed to other persons.

240. The Kingdom of Spain, the United Kingdom, the Council and the Commission broadly endorse the analysis of the Court of First Instance.

Findings of the Court

241. The Court of First Instance rightly held in paragraphs 184 to 188 of Yusuf and Al Barakaat that the fact that the persons and entities who are the subject of the restrictive measures imposed by the contested regulation are expressly named in Annex I thereto, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, does not mean that that act is not of general application within the meaning of the second paragraph of Article 249 EC or that it is not to be classified as a regulation.

242. In fact, while it is true that the contested regulation imposes restrictive measures on the persons and entities whose names appear in the exhaustive list that constitutes Annex I thereto, a list which is, moreover, regularly amended by the removal or addition of names, so that it is kept in line with the summary list, the fact remains that the persons to whom it is addressed are determined in a general and abstract manner.

243. The contested regulation, like Resolution 1390 (2002) which it is designed to put into effect, lays down a prohibition, worded exceptionally broadly, of making available funds and economic resources to those persons or entities (see, to that effect, Möllendorf and Möllendorf-Niehuus, paragraphs 50 to 55).

244. As the Court of First Instance quite rightly held in paragraphs 186 and 188 of Yusuf and Al Barakaat, that prohibition is addressed to whoever might actually hold the funds or economic resources in question.

245. That is how that prohibition falls to be applied

in circumstances such as those of the case giving rise to the judgment in Möllendorf and Möllendorf-Niehuus, which concerned the question whether the contested regulation forbids the final registration of the transfer of ownership of real property in a land register following the conclusion of a contract of sale if one of the purchasers is a natural person appearing in the list in Annex I to the regulation.

246. In paragraph 60 of that judgment, the Court decided that a transaction such as that registration is prohibited under Article 2(3) of the contested regulation if, in consequence of that transaction, an economic resource would be made available to a person entered in that list, which would enable that person to obtain funds, goods or services.
247. In the light of the foregoing, Al Barakaat's ground of appeal relating to infringement of Article 249 EC must also be dismissed as unfounded.

Concerning the grounds of appeal relating to infringement of certain fundamental rights

The heads of claim concerning the part of the judgments under appeal relating to the limits of the review by the Community judicature, in the light of fundamental rights, of the internal lawfulness of the contested regulation

248. In the first part of his second ground of appeal, Mr Kadi maintains that inasmuch as the judgment in Kadi takes a view, first, of the relationships between the United Nations and the members of that organisation and, second, of the procedure for the application of resolutions of the Security Council, it is vitiated by errors of law as regards the interpretation of the principles of international law concerned, which gave rise to other errors of law in the assessment of the pleas in law relating to breach of certain of the applicant's specific fundamental rights.
249. That part contains five claims.
250. By his first claim, Mr Kadi argues that in paragraphs 183 and 184 of the judgment the Court of First Instance erred in law in confusing the question of the primacy of the States' obligations under the Charter of the United Nations, enshrined in Article 103 thereof, with the related but separate question of the binding effect of decisions of the Security Council laid down in Article 25 of that Charter.

251. By his second claim, Mr Kadi complains that the Court of First Instance erred in law when, in paragraphs 217 to 225 of that judgment, it took as its premiss that, like obligations under Treaty law, resolutions adopted by virtue of Chapter VII of the Charter of the United Nations must automatically form part of the sphere of law and competence of the members of the United Nations.

252. By the third claim, Mr Kadi alleges that the Court of First Instance erred in law when it held, in paragraphs 212 to 225 and 283 and 284 of that judgment, that it had no power enabling it to review the lawfulness of resolutions of the Security Council adopted by virtue of Chapter VII of the Charter of the United Nations.

253. By the fourth claim, Mr Kadi maintains that the reasoning of the Court of First Instance in paragraphs 225 to 232 of that judgment on the subject of jus cogens displays considerable incoherence, in so far as, if it must prevail, the principle that resolutions of the Security Council may not be the subject of judicial review and in support of this enjoy immunity from jurisdiction would have to apply generally, and the matters covered by jus cogens would not then constitute an exception to that principle.

254. By the fifth claim, Mr Kadi argues that the fact that the Security Council has not established an independent international court responsible for ruling, in law and on the facts, on actions brought against individual decisions taken by the Sanctions Committee, does not mean that the Member States have no lawful power, by adopting reasonable measures, to improve the finding of facts underlying the imposition of sanctions and the identification of the persons affected by them, or that the Member States are prohibited from creating an appropriate legal remedy by reason of the latitude they enjoy in the performance of their obligations.

255. In his reply, referring to Bosphorus, Mr Kadi maintains, in addition, that Community law requires all Community legislative measures to be subject to the judicial review carried out by the Court, which also concerns observance of fundamental rights, even if the origin of the measure in question is an act of international law such as a resolution of the Security Council.

256. So long as the law of the United Nations offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to

give effect to resolutions of the Security Council. According to Mr Kadi, the re-examination procedure before the Sanctions Committee, based on diplomatic protection, does not afford protection of human rights equivalent to that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), as demanded by the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* of 30 June 2005, Reports of Judgments and Decisions 2005-VI, § 155.

257. Mr Kadi submits that that line of argument, an alternative to the arguments based on international law, is raised in case the Court should hold that there is a conflict between the objectives of faithful implementation of resolutions of the Security Council and the principles of due process or judicial protection.
258. Furthermore, he states that that head of claim is not a new ground of appeal but a development of the fundamental proposition, raised in the notice of appeal, that the Community is bound, when it decides to act by legislative means to give effect to a resolution of the Security Council, to ensure, as a condition of the lawfulness of the legislation it intends thus to introduce, that that legislation should observe the minimum criteria in the field of human rights.
259. By the first part of its third ground of appeal, *Al Barakaat* criticises the Court of First Instance's preliminary observations in *Yusuf and Al Barakaat* on the relationship between the international legal order under the United Nations and the domestic legal order or the Community legal order and on the extent of the review of lawfulness which the Court of First Instance had to carry out.
260. A resolution of the Security Council, binding *per se* in public international law, can have legal effect *vis-à-vis* persons in a State only if it has been implemented in accordance with the law in force.
261. In this appellant's view, there are no legal grounds for inferring the existence of special treatment or of an exception with regard to implementation of resolutions of the Security Council to the effect that a Community regulation intended to carry out such implementation need not accord with Community rules on the adoption of regulations.
262. Conversely, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Council approve, in essence, the analysis made in that connection by the Court of First Instance in the judgments under appeal and endorse the conclusion drawn therefrom that, so far as concerns the internal lawfulness of the contested regulation, the latter, inasmuch as it puts into effect resolutions adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations, in principle escapes all review by the Community judicature, even concerning observance of fundamental rights, and so for that reason enjoys immunity from jurisdiction.
263. However, unlike the Court of First Instance, those parties take the view that no review of the internal lawfulness of resolutions of the Security Council may be carried out by the Community judicature. They therefore complain that the Court of First Instance decided that such review was possible in the light of *jus cogens*.
264. They argue that the judgments under appeal, by allowing an exception in that regard, but without identifying its legal basis, in particular under the provisions of the Treaty, are inconsistent, inasmuch as the arguments excluding in a general manner the exercise of judicial review by the Community judicature of resolutions of the Security Council also militate against the recognition of powers to carry out such a review solely in the light of *jus cogens*.
265. Further, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Commission consider that the Court of First Instance erred in law when it ruled that the fundamental rights at issue in these cases fell within the scope of *jus cogens*.
266. A norm may be classified as *jus cogens* only when no derogation from it is possible. The rights invoked in the cases in point – the right to a fair hearing and the right to respect for property – are, however, subject to limitations and exceptions.
267. The United Kingdom has brought a cross-appeal in this connection, seeking to have set aside the parts of the judgments under appeal dealing with *jus cogens*, *viz.*, paragraphs 226 to 231 of *Kadi* and 277 to 281 of *Yusuf and Al Barakaat*.
268. For their part, the French Republic and the Kingdom of the Netherlands suggest that

- the Court should undertake a replacement of grounds, claiming that Mr Kadi's and Al Barakaat's pleas in law relating to *jus cogens* should be dismissed by reason of the absolute lack of jurisdiction of the Community judicature to carry out any review of resolutions of the Security Council, even in the light of *jus cogens*.
269. The Commission maintains that two reasons may justify not giving effect to an obligation to implement resolutions of the Security Council such as those at issue, whose strict terms leave the Community authorities no discretion in their implementation; they are, first, the case in which the resolution concerned is contrary to *jus cogens* and, second, the case in which that resolution falls outside the ambit of or violates the purposes and principles of the United Nations and was therefore adopted *ultra vires*.
270. The Commission takes the view that, given that, according to Article 24(2) of the Charter of the United Nations, the Security Council is bound by the purposes and principles of the United Nations, including, according to Article 1(3) of the Charter, the development of human rights and their promotion, an act adopted by that body in breach of human rights, including the fundamental rights of the individuals at issue, might be regarded as having been adopted *ultra vires* and, therefore, as not binding on the Community.
271. In the Commission's view, however, the Court of First Instance was right to hold that the Community judicature cannot in principle review the validity of a resolution of the Security Council in the light of the purposes and principles of the United Nations.
272. If, nevertheless, the Court were to accept that it could carry out such a review, the Commission argues that the Court, as the judicature of an international organisation other than the United Nations, could express itself on this question only if the breach of human rights was particularly flagrant and glaring, referring here to *Racke*.
273. That is not, in the Commission's view, the case here, owing to the existence of the re-examination procedure before the Sanctions Committee and because it must be supposed that the Security Council had weighed the requirements of international security at issue against the fundamental rights concerned.
274. With regard to the guidance given in *Bosphorus*, the Commission maintains that, in contrast to the case giving rise to that judgment, the question of the lawfulness and possible nullity of the resolution in question could arise with regard to the contested regulation if the Court were to rule that the Community may not implement a binding resolution of the Security Council because the standards applied by that body in the sphere of human rights, especially in respect of the right to be heard, are insufficient.
275. In addition, the United Kingdom is of the view that Mr Kadi's arguments that the lawfulness of any legislation adopted by the Community institutions in order to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin, constitute a new ground of appeal because they were put forward for the first time in that appellant's reply. That Member State submits that in accordance with Articles 42(2) and 118 of the Rules of Procedure, those arguments must therefore be rejected.
276. In the alternative, the United Kingdom maintains that the special status of resolutions adopted under Chapter VII of the Charter of the United Nations, as a result of the interaction of Articles 25, 48 and 103 of that Charter, recognised by Article 297 EC, implies that action taken by a Member State to perform its obligations with a view to maintaining international peace and security is protected against any action founded on Community law. The primacy of those obligations clearly extends to principles of Community law of a constitutional nature.
277. That Member State maintains that, in *Bosphorus*, the Court did not declare that it had jurisdiction to determine the validity of a regulation intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, but did no more than interpret the regulation concerned for the purpose of determining whether a measure laid down by that regulation had to be applied by the authorities of a Member State in a given case. The French Republic essentially agrees with that interpretation of *Bosphorus*.

Findings of the Court

278. Before addressing the substance of the question, the Court finds it necessary to reject the objection of inadmissibility raised by the Unit-

ed Kingdom in respect of the line of argument put forward by Mr Kadi in his reply, to the effect that the lawfulness of any legislation adopted by the Community institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin.

279. In point of fact, as Mr Kadi has stated, that is an additional argument supplementing the ground of appeal set out earlier, at least implicitly, in the notice of appeal and closely connected to that ground, to the effect that the Community, when giving effect to a resolution of the Security Council, was bound to ensure, as a condition of the lawfulness of the legislation it intended thus to introduce, that that legislation should observe the minimum criteria in the field of human rights (see, to that effect, *inter alia*, the order in Case C430/00 P Dürbeck v Commission [2001] ECR I8547, paragraph 17).
280. The Court will now consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of *jus cogens*, and therefore to that extent enjoyed immunity from jurisdiction.
281. In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR I339, paragraph 23).
282. It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the

Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I6079, paragraphs 35 and 71, and Case C-459/03 *Commission v Ireland* [2006] ECR I4635, paragraph 123 and case-law cited).

283. In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, *inter alia*, Case C305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I5305, paragraph 29 and case-law cited).
284. It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C112/00 *Schmidberger* [2003] ECR I5659, paragraph 73 and case-law cited).
285. It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.
286. In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.
287. With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even

- if that review were to be limited to examination of the compatibility of that resolution with *ius cogens*.
288. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.
289. The Court has thus previously annulled a decision of the Council approving an international agreement after considering the internal lawfulness of the decision in the light of the agreement in question and finding a breach of a general principle of Community law, in that instance the general principle of non-discrimination (Case C122/95 *Germany v Council* [1998] ECR I973).
290. It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the Community legal order, any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is in principle excluded, notwithstanding the fact that, as is clear from the decisions referred to in paragraphs 281 to 284 above, such review is a constitutional guarantee forming part of the very foundations of the Community.
291. In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (*Poulsen and Diva Navigation*, paragraph 9, and *Racke*, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.
292. Moreover, the Court has held that the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organisations (Case C91/05 *Commission v Council* [2008] ECR I0000, paragraph 65 and case-law cited).
293. Observance of the undertakings given in the context of the United Nations is required just as
- much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
294. In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.
295. Next, it is to be noted that the powers provided for in Articles 60 EC and 301 EC may be exercised only in pursuance of the adoption of a common position or joint action by virtue of the provisions of the EC Treaty relating to the CFSP which provides for action by the Community.
296. Although, because of the adoption of such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.
297. Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (*Möllendorf and Möllendorf-Niehuus*, paragraph 54 and case-law cited).
298. It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are

to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299. It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300. What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.

301. Admittedly, the Court has previously recognised that Article 234 of the EC Treaty (now, after amendment, Article 307 EC) could, if the conditions for application have been satisfied, allow derogations even from primary law, for example from Article 113 of the EC Treaty on the common commercial policy (see, to that effect, *Centro-Com*, paragraphs 56 to 61).

302. It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.

303. Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.

304. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by

the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.

305. Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

306. Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States.

307. Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (see, to that effect, *Case C308/06 Intertanko and Others* [2008] ECR I0000, paragraph 42 and case-law cited).

308. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

309. That interpretation is supported by Article 300(6) EC, which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EC Treaty, unless the latter has previously been amended.

310. It has however been maintained before the Court, in particular at the hearing, that the Community judicature ought, like the European Court of Human Rights, which in several recent decisions has declined jurisdiction to review the compatibility of certain measures taken in the implementing of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, to refrain from reviewing the lawfulness of the contested regulation in the light of fundamental freedoms, because that regulation is also intended to give effect to such resolutions.

311. In this respect, it is to be found that, as the European Court of Human Rights itself has noted, there exists a fundamental difference between the nature of the measures concerned

- by those decisions, with regard to which that court declined jurisdiction to carry out a review of consistency with the ECHR, and the nature of other measures with regard to which its jurisdiction would seem to be unquestionable (see *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* of 2 May 2007, not yet published in the Reports of Judgments and Decisions, § 151).
312. While, in certain cases before it the European Court of Human Rights has declined jurisdiction *ratione personae*, those cases involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective, in particular actions of a subsidiary organ of the UN created under Chapter VII of the Charter of the United Nations or actions falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter, and not actions ascribable to the respondent States before that court, those actions not, moreover, having taken place in the territory of those States and not resulting from any decision of the authorities of those States.
313. By contrast, in paragraph 151 of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the European Court of Human Rights stated that in the case leading to its judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, concerning a seizure measure carried out by the authorities of the respondent State on its territory following a decision by one of its ministers, it had recognised its competence, notably *ratione personae*, *vis-à-vis* the respondent State, despite the fact that the source of the contested measure was a Community regulation taken, in its turn, pursuant to a resolution of the Security Council.
314. In the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.
315. In addition and in any event, the question of the Court's jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances.
316. As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.
317. The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.
318. It has in addition been maintained that, having regard to the deference required of the Community institutions *vis-à-vis* the institutions of the United Nations, the Court must forgo the exercise of any review of the lawfulness of the contested regulation in the light of fundamental rights, even if such review were possible, given that, under the system of sanctions set up by the United Nations, having particular regard to the re-examination procedure which has recently been significantly improved by various resolutions of the Security Council, fundamental rights are adequately protected.
319. According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.
320. In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.
321. In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.

322. Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.
323. In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.
324. The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.
325. Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.
326. It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
327. The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of Kadi and 263 to 282 of Yusuf and Al Barakaat, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens.
328. The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.
329. It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens and that it is, therefore, no longer necessary to examine the United Kingdom's cross-appeal on this point either.
330. Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter part of those judgments must also be set aside.

Concerning the actions before the Court of First Instance

331. As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.
332. In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.
333. It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.

334. In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.
335. According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C432/05 Unibet [2007] ECR I2271, paragraph 37).
336. In addition, having regard to the Court's case-law in other fields (see, *inter alia*, Case 222/86 Heylens and Others [1987] ECR 4097, paragraph 15, and Joined Cases C189/02 P, C202/02 P, C205/02 P to C208/02 P and C213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.
337. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature (see, to that effect, Heylens and Others, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.
338. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by the contested regulation, the Community authorities cannot be required to communicate those grounds before the name of a person or entity is entered in that list for the first time.
339. As the Court of First Instance stated in paragraph 308 of Yusuf and Al Barakaat, such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation.
340. In order to attain the objective pursued by that regulation, such measures must, by their very nature, take advantage of a surprise effect and, as the Court has previously stated, apply with immediate effect (Möllendorf and Möllendorf-Niehuus, paragraph 63).
341. Nor were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation, for reasons also connected to the objective pursued by the contested regulation and to the effectiveness of the measures provided by the latter.
342. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.
343. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.
344. In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that

effect, the judgment of the European Court of Human Rights in *Chahal v. United Kingdom* of 15 November 1996, Reports of Judgments and Decisions 1996-V, § 131).

345. In the circumstances, the inevitable conclusion is, first of all, that neither the contested regulation nor Common Position 2002/402 to which the former refers provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later.
346. It has next to be pointed out that the Council at no time informed the appellants of the evidence adduced against them that allegedly justified the inclusion of their names for the first time in Annex I to the contested regulation and, consequently, the imposition of the restrictive measures laid down by the latter.
347. It is not indeed denied that no information was supplied in that connection to the appellants, whether in Regulation No 467/2001 as amended by Regulations Nos 2062/2001 and 2199/2001, their names being mentioned for the first time in a list of persons, entities or bodies to whom and to which a measure freezing funds applies, in the contested regulation or at some later stage.
348. Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants' rights of defence, in particular the right to be heard, were not respected.
349. In addition, given the failure to inform them of the evidence adduced against them and having regard to the relationship, referred to in paragraphs 336 and 337 above, between the rights of the defence and the right to an effective legal remedy, the appellants were also unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.
350. Last, it must be stated that that infringement has not been remedied in the course of these actions. Indeed, given that, according to the fundamental position adopted by the Council, no evidence of that kind may be the subject of investigation by the Community judicature, the Council has adduced no evidence to that effect.
351. The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed.
352. It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.
353. It follows from all the foregoing considerations that the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded.
354. Second, the Court will now examine the plea raised by Mr Kadi with regard to breach of the right to respect for property entailed by the freezing measures imposed on him by virtue of the contested regulation.
355. According to settled case-law, the right to property is one of the general principles of Community law. It is not, however, absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed (see, in particular, *Regione autonoma Friuli-Venezia Giulia* and *ERSA*, paragraph 119 and case-law cited; see also, to that effect in the context of a system of restrictive measures, *Bosphorus*, paragraph 21).

356. In order to assess the extent of the fundamental right to respect for property, a general principle of Community law, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR, which enshrines that right.
357. Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.
358. That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property. It does, however, undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.
359. The question therefore arises whether that restriction of the exercise of Mr Kadi's right to property can be justified.
360. In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question [see, to that effect, in particular, European Court of Human Rights, judgment in *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom* of 30 August 2007, Reports of Judgments and Decisions 2007-0000, § 55 and 75].
361. As the Court has already held in connection with another Community system of restrictive measures of an economic nature also giving effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights (see, to that effect, *Bosphorus*, paragraphs 22 and 23).
362. In the case in point, the restrictive measures laid down by the contested regulation contribute to the implementation, at Community level, of the restrictive measures decided on by the Security Council against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.
363. With reference to an objective of general interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate (see, to that effect, *Bosphorus*, paragraph 26, and the judgment of the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, § 167).
364. On this point, it is also to be taken into consideration that the contested regulation, in the version amended by Regulation No 561/2003, adopted following Resolution 1452 (2002), provides, among other derogations and exemptions, that, on a request made by an interested person, and unless the Sanctions Committee expressly objects, the competent national authorities may declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges. In addition, funds necessary for any 'extraordinary expense' whatsoever may be unfrozen, on the express authorisation of the Sanctions Committee.
365. It is further to be noted that the resolutions of the Security Council to which the contested regulation is intended to give effect provide for a mechanism for the periodic re-examination of the general system of measures they enact and also for a procedure enabling the persons

concerned at any time to submit their case to the Sanctions Committee for re-examination, by means of a request that may now be made direct to the Committee at what is called the 'focal' point.

366. It must therefore be found that the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle, be justified.
367. In addition, it must be considered whether, when that regulation was applied to Mr Kadi, his right to property was respected in the circumstances of the case.
368. It is to be borne in mind in this respect that the applicable procedures must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities. In order to ascertain whether this condition, which constitutes a procedural requirement inherent in Article 1 of Protocol No 1 to the ECHR, has been satisfied, a comprehensive view must be taken of the applicable procedures (see, to that effect, the judgment of the European Court of Human Rights in *Jokela v. Finland* of 21 May 2002, Reports of Judgments and Decisions 2002-IV, § 45 and case-law cited, and § 55).
369. The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.
370. It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property.
371. The plea raised by Mr Kadi that his fundamental right to respect for property has been infringed is therefore well founded.
372. It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.
373. However, the annulment to that extent of the contested regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and

which the Community is required to implement, because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again.

374. Furthermore, in so far as it follows from this judgment that the contested regulation must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.
375. Having regard to those considerations, the effects of the contested regulation, in so far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC, be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms.
376. In those circumstances, Article 231 EC will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.

Costs

377. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first paragraph of Article 69(4) provides that the Member States which have intervened in the proceedings are to bear their own costs.
378. Because Mr Kadi and Al Barakaat's appeals must be upheld and because the contested regulation must be annulled in so far as it concerns the appellants, the Council and the Commission must each be ordered to pay, in addition to their own costs, half of those incurred by Mr

Kadi and Al Barakaat, both at first instance and in the present proceedings, in accordance with the forms of order sought to that effect by the appellants.

379. The United Kingdom of Great Britain and Northern Ireland is to bear its own costs both at first instance and in the appeals.

380. The Kingdom of Spain, the French Republic and the Kingdom of the Netherlands are to bear their own costs relating to the appeals.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in Case T315/01 Kadi v Council and Commission and Case T306/01 Yusuf and Al Barakaat International Foundation v Council and Commission;**
2. **Annuls Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, in so far as it concerns Mr Kadi and the Al Barakaat International Foundation;**
3. **Orders the effects of Regulation No 881/2002 to be maintained, so far as concerns Mr Kadi and the Al Barakaat International Foundation, for a period that may not exceed three months running from the date of delivery of this judgment;**
4. **Orders the Council of the European Union and the Commission of the European Communities each to pay, in addition to their own costs, half of those incurred by Mr Kadi and Al Barakaat International Foundation both at first instance and in these appeals;**
5. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs both at first instance and in these appeals;**
6. **Orders the Kingdom of Spain, the French Republic and the Kingdom of the Netherlands to bear their own costs.**

Signatures

COUNCIL FRAMEWORK DECISION 2001/220/JHA OF 15 MARCH 2001 ON THE STANDING OF VICTIMS IN CRIMINAL PROCEEDINGS, CONCEPT OF VICTIM

CASE C-467/05 CRIMINAL PROCEEDINGS AGAINST GIOVANNI DELL'ORTO

(Reference for a preliminary ruling from the judge in charge of preliminary investigations at the Tribunale di Milano)

(Police and judicial cooperation in criminal matters – Framework Decision 2001/220/JHA – Directive 2004/80/EC – Concept of 'victim' in criminal proceedings – Legal person – Return of property seized in the course of criminal proceedings)

Opinion of Advocate General Kokott delivered on 8 March 2007

Judgment of the Court (Third Chamber), 28 June 2007

KEYWORDS

1. *Preliminary rulings – Question on the interpretation of a Framework Decision adopted under Title VI of the EU Treaty (Art. 234 EC; Arts 35 EU and 46(b) EU)*
2. *Preliminary rulings – Jurisdiction of the Court – Police and judicial cooperation in criminal matters (Art. 234 EC; Arts 35 EU and 46(b) EU)*
3. *Acts of the institutions – Temporal application – Procedural rules*
4. *European Union – Police and judicial cooperation in criminal matters – Standing of victims in criminal proceedings – Framework Decision 2001/220 (Council Framework Decision 2001/220, Arts 1(a), 2(1) and 8(1))*

SUMMARY OF THE JUDGMENT

1. The fact that an order for reference concerning the interpretation of a Framework Decision adopted under Title VI of the EU Treaty does not mention Article 35 EU, but refers to Article 234 EC, cannot of itself make the reference for preliminary ruling inadmissible. That conclusion is reinforced by the fact that the EU Treaty

neither expressly nor by implication lays down the form in which the national court must present its reference for a preliminary ruling. (see para. 36)

2. In accordance with Article 46(b) EU, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down by that provision. Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU. (see paras 34, 39-40)

3. Procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.

The question as to the power of the national court to take a decision concerning the return to the victim of property which has been seized in criminal proceedings relates to procedural rules, with the result that there is no obstacle deriving from the temporal application of the law which precludes the taking into account, in proceedings on that question, of the relevant provisions of Framework Decision 2001/220 on the standing of victims in criminal proceedings, with a view to the interpretation of the applicable national law in conformity with those provisions. (see paras 48-49)

4. Framework Decision 2001/220 on the standing of victims in criminal proceedings must be interpreted as meaning that, in criminal

proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, the concept of 'victim' for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

To interpret the Framework Decision as also applying to 'legal' persons who maintain that they have suffered harm directly caused by a criminal act, would contradict the very letter of Article 1(a) of that Framework Decision, which applies only to natural persons who have suffered harm directly caused by conduct which infringes the criminal law of a Member State. In addition, there is no indication in any other provision of the Framework Decision that the European Union legislature intended to extend the concept of victim for the purposes of the application of the Framework Decision to legal persons. The converse is in fact the case, as several provisions of the Framework Decision, particularly Articles 2(1) and (2) and 8(1) confirm that the legislature's objective was to limit its scope exclusively to natural persons who are victims of harm resulting from a criminal act.

That interpretation cannot be invalidated by Directive 2004/80 relating to compensation to crime victims. Even supposing that the provisions of a directive adopted on the basis of the EC Treaty were capable of having any effect on the interpretation of the provisions of a Framework Decision based on the Treaty on European Union and that the concept of victim for the purposes of the directive could be interpreted to include legal persons, the directive and the Framework Decision are not on any analysis linked in a manner which would call for a uniform interpretation of the concept in question.

(see paras 53-55, 57-58, 60, operative part)

JUDGMENT OF THE COURT (THIRD CHAMBER)

28 June 2007¹⁵

(Police and judicial cooperation in criminal matters – Framework Decision 2001/220/JHA – Directive 2004/80/EC – Concept of 'victim' in criminal proceedings – Legal person – Return of property seized in the course of criminal proceedings)

¹⁵ Language of the case: Italian.

In Case C-467/05,

REFERENCE for a preliminary ruling under Article 234 EC from the judge in charge of preliminary investigations at the Tribunale di Milano (Italy), made by decision of 6 October 2005, received at the Court on 27 December 2005, in the criminal proceedings against

Giovanni Dell'Orto,

joined party: Saipem SpA,

THE COURT (Third Chamber), composed of A. Rosas, President of the Chamber, J. Klučka, J.N. Cunha Rodrigues (Rapporteur), A. Ó Caoimh and P. Lindh, Judges, Advocate General: J. Kokott, Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2007,

after considering the observations submitted on behalf of:

- Mr Dell'Orto, by M. Brusa, avvocato,
- the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo, avvocato dello Stato,
- Ireland, by D. O'Hagan, acting as Agent, and N. Travers BL,
- the Netherlands Government, by H.G. Sevenster, C. ten Dam and M. de Grave, acting as Agents,
- the Austrian Government, by H. Dossi, acting as Agent,
- the United Kingdom Government, by E. O'Neill, acting as Agent, and J. Turner, Barrister,
- the Commission of the European Communities, by M. Condou-Durande, E. Righini and L. Visaggio, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2007, gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; 'the Framework Decision') and of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ 2004 L 261, p. 15; 'the Directive').
2. The reference was presented in criminal enforcement proceedings following a judgment

which resulted in a final criminal conviction, brought before the judge in charge of preliminary investigations at the Tribunale di Milano (District Court, Milan), acting as the judge responsible for enforcement, and concerning the return of assets placed under sequestration.

Legal context

European Union law

The Framework Decision

3. Article 1 of the Framework Decision provides:

'For the purposes of this Framework Decision:

(a) "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State;

...

(c) "criminal proceedings" shall be understood in accordance with the national law applicable;

(d) "proceedings" shall be broadly construed to include, in addition to criminal proceedings, all contacts of victims as such with any authority, public service or victim support organisation in connection with their case, before, during, or after criminal process;

...'

4. Article 2 of the Framework Decision provides:

'1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

5. In accordance with Article 8(1) of the Framework Decision:

'Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the

competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.'

6. Under Article 9 of the Framework Decision:

'1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time-limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.

...

3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.'

7. In accordance with the third indent of Article 17 of the Framework Decision, each Member State shall bring into force the laws, regulations and administrative provisions necessary for the purposes of the implementation of the articles cited in paragraphs 3 to 6 of this judgment by 22 March 2002 at the latest.

The Directive

8. Under Article 1 of the Directive:

'Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.'

9. Article 2 of the Directive provides:

'Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.'

10. Article 12 of the Directive is worded as follows:

'1. The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories.

2. All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.'

11. Article 17 of the Directive provides:

'This Directive shall not prevent Member States, in so far as such provisions are compatible with this Directive, from:

(a) introducing or maintaining more favourable provisions for the benefit of victims of crime or any other persons affected by crime;

(b) introducing or retaining provisions for the purpose of compensating victims of crime committed outside their territory, or any other person affected by such a crime, subject to any conditions that Member States may specify for that purpose.'

12. Article 18(1) and (2) of the Directive provides:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2006 at the latest, with the exception of Article 12(2), in which case the date of compliance shall be 1 July 2005. They shall forthwith inform the Commission thereof.

2. Member States may provide that the measures necessary to comply with this Directive shall apply only to applicants whose injuries result from crimes committed after 30 June 2005.'

National legislation

13. In accordance with Article 263 of the Italian Code of Criminal Procedure, as amended by Law No 134 of 12 June 2003 ('CPP):

'1. The return of property placed under sequestration shall be ordered by the judge provided that there remains no doubt as to its ownership.

...

3. Where there is a dispute as to the ownership of property placed under sequestration, the judge shall refer the case, in so far as it concerns the return, to the civil court with territorial jurisdiction competent at first instance, while maintaining sequestration during this period.'

...

6. Once the judgment is no longer subject to appeal, the judge responsible for enforcement shall take steps to return the property.'

14. Article 444 CPP provides:

'1. The accused and the public prosecutor may request the court to apply an alternative sanction, of a kind and extent appropriate, or

a financial penalty, reduced to a maximum of one third of the quantum, or a sentence of imprisonment which, taking into account the circumstances and reduced to a maximum of one third of the quantum, does not exceed five years, alone or accompanied by a financial penalty.

2. If there is an agreement, even of the party who did not make the request, and provided there has been no acquittal ...', the court, on the basis of the documents before it, assuming that the characterisation of the facts and the application and comparison of the circumstances of the case made by the parties are correct and that the sanction indicated is adequate, shall by judgment impose that sanction, mentioning in the operative part that it was requested by the parties. In cases where a civil party joins the proceedings, the court shall not give judgment on that claim; ...

...'

15. Article 665(1) CPP provides:

'Unless provided otherwise by law, only the judge who took the decision in the case is competent to enforce that decision.'

The main action and the questions referred for a preliminary ruling

16. It is apparent from the order for reference that criminal proceedings were brought before the Tribunale di Milano against Mr Dell'Orto and other accused persons in respect of the offence of giving false information about companies (false accounting), with the further intention of committing the offences of aggravated embezzlement and of unlawful financing of political parties. Several companies belonging to the Italian group ENI were among the persons affected by those crimes, including Saipem SpA ('Saipem'), which joined those criminal proceedings as a civil party.
17. According to the order for reference, Mr Dell'Orto and the other accused persons embezzled large sums of money belonging to those companies by obtaining remuneration for fictional consultancy activities provided to offshore companies with which one of the accomplices was institutionally linked, appropriating part of those sums for themselves. In particular, Mr Dell'Orto appropriated for himself a sum of EUR 1 064 069.78 which belonged to Saipem, a sum which was placed under sequestration by the Italian courts in the course of the criminal proceedings. Such a protective

measure had, in particular, the main and specific goal of guaranteeing that the civil obligations arising from the crime would be met.

18. The criminal proceedings resulted in the issue of a judgment by the judge in charge of the preliminary investigations at the Tribunale di Milano on 4 May 1999, which became *res judicata* on 5 June 1999, applying a penalty on the basis of Article 444 CPP, that is by a means known as 'by settlement'. Mr Dell'Orto was sentenced by this judgment to a term of imprisonment and a fine, the sentence being suspended. No decision was taken as to the fate of the sum placed under sequestration.
19. Saipem obtained the return of the above sum following an order of that judge made on 3 December 1999. That order was set aside by a judgment of the Corte suprema di cassazione (Supreme Court of Cassation) of 8 November 2001. That judgment pointed out in particular that, as the judgment of 4 May 1999 made no decision on the sum placed under sequestration, the criminal court lacked the power to order its return to Saipem.
20. Following the judgment of 8 November 2001, Mr Dell'Orto requested the judge in charge of preliminary investigations to order Saipem in turn to return the sum in question, given that it might again be placed under sequestration in anticipation of a decision on its possible return. According to Mr Dell'Orto, it is for the civil court to take that decision pursuant to Article 263(3) CPP, on the ground that there is a dispute as to the ownership of that sum.
21. By order of 18 July 2003, the judge in charge of preliminary investigations at the Tribunale di Milano ordered the transfer of the case-file to the civil court, rejecting Mr Dell'Orto's request as to the remainder.
22. That order was annulled by a judgment of 21 April 2005 of the Corte suprema di cassazione, which sent the case back to the same judge. According to that judgment, if, pursuant to Article 263(3) CPP, the dispute as to the ownership of the seized property is decided by the civil court judge in interim proceedings, that does not thereby deprive the criminal court judge of the power to take measures regarding the safe keeping of the property pending resolution of the dispute as to its ownership, with the result that it is for the judge in charge of preliminary investigations at the Tribunale di Milano to adopt the appropriate measures for the purposes of actually placing under sequestration the sum which has in the meantime been returned to Saipem'.
23. The proceedings before the court making the reference were therefore reopened in order to ensure the enforcement of the second judgment of the Corte suprema di cassazione.
24. According to the court making the reference, there cannot in the main action be any remaining 'dispute as to ownership' of the sums placed under sequestration, of such a kind as to justify the opening of interim proceedings before the civil court judge. The assets placed under sequestration are not owed to a third party and should be returned to Saipem pursuant to Article 2037 of the Italian Civil Code, and it follows from the examination of the documents in the case-file that Mr Dell'Orto has never questioned that the sums in question are the property of that company.
25. The court making the reference considers that, in reality, a purely procedural obstacle precludes it from itself ordering the return of the sums in question to Saipem, the question being one as to the power of the judge responsible for enforcement to take a decision on the return of the sums placed under sequestration following a judgment on application of the penalty imposed under Article 444 CPP. According to the case-law of the Corte suprema di cassazione, in particular the above-mentioned judgment of 8 November 2001, the judge with responsibility for enforcement does not have the power to take a decision concerning return to the victim of the property seized following a judgment issued under Article 444, which makes no provision in that regard.
26. In that context, the court making the reference raises the question of the applicability of the principles set out in Articles 2 and 9 of the Framework Decision.
27. It asks, in particular, whether those articles of the Framework Decision are applicable from the point of view of their personal scope, as the victim is not a natural person but a legal person.
28. Article 1(a) of the Framework Decision provides that it applies to a 'natural person' who has suffered harm. The court making the reference nevertheless asks whether it is possible to interpret the Framework Decision, when read in the light of Articles 12 and 17 of the Directive, to mean that it also applies to any other person who is the victim of a crime, and, in particular,

to legal persons. If this is the case, the principle referred to in Article 9(3) of the Framework Decision, according to which property seized in the course of criminal proceedings which belongs to victims shall be returned to them without delay, is applicable in the main action. In accordance with the case-law of the Court (Case C-105/03 Pupino [2005] ECR I-5285), the national judge is obliged, in so far as possible, to interpret the provisions of the CPP concerning the extent of the decision-making powers of the judge responsible for enforcement, with regard to the return of property seized in the course of criminal proceedings, in conformity with Article 9(3) of the Framework Decision, which sanctions a simplified procedure in order to obtain the objectives established by the legislation relating to the compensation of victims.

29. The court making the reference comments moreover that the Court has held with regard to certain forms of procedure which bar further prosecution and are analogous to that resulting from a judgment reached by 'settlement' for the purposes of Article 444 CPP, that they are to be considered as equivalent to a judgment which finally disposes of a case and closes the criminal proceedings (Joined Cases C-187/01 and C-385/01 Gözütok and Brüggge [2003] ECR I-1345).
30. Since, in the main action, the dispute as to the return of sums placed under sequestration arises following the closure of criminal proceedings by the judgment of 4 May 1999, the national court making the reference also raises the question of the applicability of the principles referred to in Articles 2 and 9 of the Framework Decision in the specific context of criminal enforcement proceedings which follow the closure of the criminal proceedings proper.
31. In those circumstances, the judge in charge of preliminary investigations at the Tribunale di Milano decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can the rules referred to in Articles 2 and 9 of the Framework Decision ... apply in criminal proceedings, in general, to any party affected by a crime, by virtue of Article 1 et seq. of the Directive ... or of other provisions of Community law?

(2) Can the rules referred to in Articles 2 and 9 of the Framework Decision ... apply in criminal proceedings for enforcement following

a judgment which resulted in a final criminal conviction (and thus also following a judgment applying a penalty as provided for in Article 444 of the Code of Criminal Procedure) to any party affected by a crime, by virtue of Article 1 et seq. of the Directive ... or of other provisions of Community law?'

The questions referred for a preliminary ruling

Admissibility

32. Several governments which have submitted observations in the course of these proceedings have cast doubt upon the admissibility of the reference for a preliminary ruling.
33. The United Kingdom Government submits that the reference for a preliminary ruling is inadmissible because it is based on Article 234 EC whereas the interpretation sought concerns the Framework Decision, that is an act adopted under Title VI of the Treaty on European Union. In such a case, the reference should be based exclusively on Article 35(1) EU, whereas Article 234 EC is not applicable. Ireland maintains that, since the conditions for application of Article 35 EU are met in this case, the mistaken reliance on Article 234 EC as the basis for the reference should not preclude the Court from giving a reply to the questions referred by the court making the reference.
34. First of all, it should be noted that, in accordance with Article 46(b) EU, the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. Contrary to what is argued by the United Kingdom Government, it therefore follows that the system under Article 234 EC is capable of being applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision (see, to that effect, Pupino, paragraphs 19 and 28).
35. It is established that the Italian Republic indicated, by a declaration which took effect on 1 May 1999, the date on which the Treaty of Amsterdam came into force, that it accepts the jurisdiction of the Court to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the rules laid down in paragraph 3(b) of that article. It

is also undisputed that the Framework Decision, based on Articles 31 EU and 34 EU, is one of the acts referred to in Article 35(1) EU on which the Court may rule in a reference for a preliminary ruling (Pupino, paragraphs 20 and 22) and it is accepted that the judge in charge of preliminary investigations at the Tribunale di Milano, acting in proceedings such as those in the main action, must be considered as a court or tribunal of a Member State for the purposes of Article 35 EU.

36. In those circumstances, and regardless of the fact that the questions referred for a preliminary ruling also concern the interpretation of a directive adopted under the EC Treaty, the fact that the order for reference does not mention Article 35 EU, but refers to Article 234 EC, cannot of itself make the reference for a preliminary ruling inadmissible. This conclusion is reinforced by the fact that the Treaty on European Union neither expressly nor by implication lays down the form in which the national court must present its reference for a preliminary ruling (see, by analogy, with regard to Article 234 EC, Case 13/61 *De Geus* [1962] ECR 45, 50).
37. The Netherlands Government questions the admissibility of the reference for a preliminary ruling on the ground that the factual and legislative context is not defined sufficiently in the order for reference. According to that government, the relevance of the questions asked does not emerge from it sufficiently clearly, since, in the absence of further clarification of the applicable national law, it is impossible to confirm whether, as submitted by the court making the reference, a question is raised concerning the interpretation of that law in conformity with the Framework Decision, which in any event lacks direct effect.
38. The Austrian Government submits that Italian law prevents the court making the reference from taking a decision in the main action on questions of a civil law nature, with the consequence that the questions referred for a preliminary ruling are hypothetical.
39. The Court observes that, like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC

is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU (Pupino, paragraph 29).

40. It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU (Pupino, paragraph 30).
41. Furthermore, the need to provide an interpretation of Community law which will be of use to the national court presupposes that the latter sets out the factual and legislative context of the questions it is asking or, at the very least, explains the factual circumstances on which those questions are based. In that regard, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the provisions of Union law which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (see, *inter alia*, with regard to Article 234 EC, Case C-295/05 *Asemfo* [2007] ECR I-0000, paragraphs 32 and 33).
42. The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice (see, *inter alia*, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-0000, paragraph 20).
43. As is evident from paragraphs 16 to 30 of this judgment, the order for reference sets out the underlying facts of the main action and the provisions of applicable national law which are directly relevant and it explains the reasons why the court making the reference is seeking an interpretation of the Framework Decision, and also the link between the latter and the national legislation applicable in the matter.
44. Contrary to the argument submitted by the

- Austrian Government, it is not obvious that an interpretation of national law in conformity with the Framework Decision in the main action is impossible, this being a matter for the national court to determine (see, to that effect, Pupino, paragraph 48).
45. In those circumstances, it is not obvious that the interpretation which is sought of the provisions of the Framework Decision referred to in the questions raised bears no relation to the actual facts of the main action or to its purpose or that the problem is hypothetical or that the Court lacks the factual or legal material necessary to give a useful answer to those questions.
 46. Finally, the information contained in the order for reference is also sufficient to ensure that the parties to the main action, the Member States, the Council of the European Union and the Commission of the European Communities are able to submit their observations pursuant to Article 23 of the Statute of the Court of Justice, as is, moreover, indicated by the observations lodged by the parties who have intervened in these proceedings.
 47. During the written procedure before the Court, the question was raised whether the Framework Decision can be considered as applicable from a temporal perspective to a set of facts which, as in the main action, occurred well before adoption of the Framework Decision on 15 March 2001, let alone the period prescribed for its implementation, which expired on 22 March 2002 with regard *inter alia* to Article 9 of the Framework Decision.
 48. In that regard, it must be recalled that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, *inter alia*, Case C-293/04 *Beemsterboer Coldstore Services* [2006] ECR I-2263, paragraph 21 and case-law cited).
 49. The question which is at the centre of the main proceedings, that is the power of the national court to take a decision concerning the return to the victim of property which has been seized in criminal proceedings, relates to procedural rules, with the result that there is no obstacle deriving from the temporal application of the law which precludes the taking into account, in those proceedings, of the relevant provisions of the Framework Decision with a view to the interpretation of the applicable national law in conformity with those provisions.
 50. The reference for a preliminary ruling is therefore admissible.
- The questions referred for a preliminary ruling
51. By its two questions, which it is appropriate to examine together, the court making the reference asks essentially whether the Framework Decision must be interpreted as meaning that, in criminal proceedings, and, more specifically, in enforcement proceedings following a judgment resulting in a final criminal conviction, such as that at issue in the main proceedings, the concept of 'victim' for the purposes of the Framework Decision includes legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.
 52. Article 1(a) of the Framework Decision defines 'victim', for the purposes of the Framework Decision, as a 'natural' person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.
 53. It follows from the wording of this provision that the Framework Decision applies only to natural persons who have suffered harm directly caused by conduct which infringes the criminal law of a Member State.
 54. To interpret the Framework Decision to mean that it would also apply to 'legal' persons who, like the civil party to the main action, maintain that they have suffered harm directly caused by a criminal act, would contradict the very letter of Article 1(a) of the Framework Decision.
 55. In addition, there is no indication in any other provision of the Framework Decision that the European Union legislature intended to extend the concept of victim for the purposes of the application of the Framework Decision to legal persons. The converse is in fact the case, as several provisions of the Framework Decision confirm that the legislature's objective was to limit its scope exclusively to natural persons who are victims of harm resulting from a criminal act.
 56. In that regard, apart from Article 1(a) of the Framework Decision, which refers, so far as the principal categories of harm are concerned, to physical or mental injury and to emotional suffering, reference should also be made to Article 2(1) of the Framework Decision, which obliges

each Member State to make every effort to ensure that victims are treated with due respect for the dignity of the individual, Article 2(2), which refers to the specific treatment from which victims who are particularly vulnerable can benefit, and also Article 8(1) of the Framework Decision, which obliges the Member States to ensure a suitable level of protection to the family of the victim or to persons in a similar position.

57. The Directive is not of such a kind as to invalidate this interpretation. The Framework Decision and the Directive govern different matters. The Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations. It seeks to ensure that where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually resident, the victim shall receive compensation from the former Member State. The Framework Decision, on the other hand, aims to approximate the legislation of the Member States concerning the protection of the interests of the victim in criminal proceedings. It seeks to ensure that the offender makes reparation for the harm suffered by the victim.
58. Even supposing that the provisions of a directive adopted on the basis of the EC Treaty were capable of having any effect on the interpretation of the provisions of a framework decision based on the Treaty on European Union and that the concept of victim for the purposes of the directive could be interpreted to include legal persons, the directive and the framework decision are not on any analysis linked in a manner which would call for a uniform interpretation of the concept in question.
59. Moreover, a situation such as that in the main action does not fall within the scope of the Directive. As is evident from paragraph 57 of this judgment, the Directive provides for compensation only where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually resident, whereas the main action relates to offences of false accounting, aggravated embezzlement and unlawful financing of political parties committed substantially on the territory of the Member State in which the victim resides.
60. The answer to the questions referred is therefore that the Framework Decision must be interpreted as meaning that, in criminal proceedings and, in particular, in enforcement pro-

ceedings following a judgment which resulted in a final criminal conviction, such as those in the main action, the concept of 'victim' for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

Costs

61. Since these proceedings are, for the parties to the main action, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that, in criminal proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, such as those in the main action, the concept of 'victim' for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

[Signatures]

PROTECTION OF CHILDREN AND THE FREE MOVEMENT OF GOODS, GENERAL INTERNATIONAL LAW AND COMMUNITY LAW

CASE C-244/06 DYNAMIC MEDIEN VERTRIEBS GMBH v AVIDES MEDIA AG

(Reference for a preliminary ruling from the Landgericht Koblenz)

(Free movement of goods – Article 28 EC – Measures having equivalent effect – Directive 2000/31/EC – National rules prohibiting the sale by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting children and which do not bear a label from that authority indicating the age from which they may be viewed – Image storage media imported from another Member State which have been examined and classified by the competent authority of that State and bear an age-limit label – Justification – Child protection – Principle of proportionality)

SUMMARY OF THE JUDGMENT

Free movement of goods – Quantitative restrictions – Measures having equivalent effect (Art. 28 EC)

National rules which prohibit the sale and transfer by mail order of image storage media which have not been examined and classified by a competent national authority or by a national voluntary self-regulatory body for the purposes of protecting young persons and which do not bear a label from that authority or body indicating the age from which they may be viewed, does not constitute a selling arrangement which is capable of hindering, directly or indirectly, actually or potentially intra-Community trade, but a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC and is, in principle, incompatible with the obligations arising from that provision.

However, those rules may be compatible with that provision provided that they do not go beyond what is necessary to attain the objective of protecting children pursued by the Member State concerned, as will be the case where the rules do not preclude all forms of marketing of unchecked

image storage media and where it is permissible to import and sell such image storage media to adults, while ensuring that children do not have access to them. It could be otherwise only if it appears that the procedure for examining, classifying and labelling image storage media established by those rules is not easily accessible or cannot be completed within a reasonable period or that the decision of refusal cannot be open to challenge before the courts. (see paras 29, 32, 35, 42, 47-48, operative part)

JUDGMENT OF THE COURT (THIRD CHAMBER)

14 February 2008¹⁶

(Free movement of goods – Article 28 EC – Measures having equivalent effect – Directive 2000/31/EC – National rules prohibiting the sale by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting children and which do not bear a label from that authority indicating the age from which they may be viewed – Image storage media imported from another Member State which have been examined and classified by the competent authority of that State and bear an age-limit label – Justification – Child protection – Principle of proportionality)

In Case C244/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Koblenz (Germany), made by decision of 25 April 2006, received at the Court on 31 May 2006, in the proceedings

Dynamic Medien Vertriebs GmbH

v

Avides Media AG,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, U. Löhmus, J. Klučka, A. Ó Caoimh and P. Lindh, Judges, Advocate General: P. Mengozzi, Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2007, after considering the observations submitted on behalf of:

- Dynamic Medien Vertriebs GmbH, by W. Konrad and F. Weber, Rechtsanwälte,
- Avides Media AG, by C. Grau, Rechtsanwalt,

¹⁶ Language of the case: German.

- the German Government, by M. Lumma, C. Blaschke and C. Schulze-Bahr, acting as Agents,
- Ireland, by D. O'Hagan, acting as Agent, and P. McGarry, BL,
- the United Kingdom Government, by V. Jackson, acting as Agent, and M. Hoskins, Barrister,
- the Commission of the European Communities, by B. Schima, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2007, gives the following Judgment

1. This reference for a preliminary ruling concerns the interpretation of Articles 28 EC and 30 EC and of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('the Directive on electronic commerce') (OJ 2000 L 178, p. 1).
2. The reference has been made in the course of proceedings between two companies incorporated under German law, Dynamic Medien Vertriebs GmbH ('Dynamic Medien') and Avides Media AG ('Avides Media'), with respect to mail order sales by Avides Media in Germany, via the internet, of image storage media from the United Kingdom which have not been examined and classified by a higher regional authority or a national voluntary self-regulation body for the purpose of protecting young persons and which do not bear any label from such an authority or body as to the age from which such image storage media may be viewed.

Legal framework

Community law

3. According to Article 1(1) thereof, Directive 2000/31 seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.
4. Article 2(h) of Directive 2000/31 defines the concept of 'coordinated field' as 'requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.'
5. Article 2(h)(ii) states that the coordinated field

does not cover requirements such as those applicable to goods as such or requirements applicable to the delivery of goods. As regards the requirements relating to goods, recital (21) in the preamble to Directive 2000/31 mentions safety standards, labelling obligations, and liability for goods.

6. Article 3(2) of Directive 2000/31 provides that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. Article 3(4), however, states that under certain conditions Member States may, in respect of a given information society service, take measures necessary for reasons such as public policy, in particular the protection of young persons and the protection of public health and consumers.
7. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) seeks, according to Article 1 thereof, to harmonise the provisions applicable in the Member States concerning distance contracts between consumers and suppliers.

National law

8. Paragraph 1(4) of the Law on the protection of young persons (Jugendschutzgesetz) of 23 July 2002 (BGBl. 2002 I, p. 2730) defines sale by mail order as 'any transaction for consideration carried out by means of the ordering and dispatch of a product by postal or electronic means without personal contact between the supplier and the purchaser or without technical or other safeguards to ensure that the product is not dispatched to children or adolescents'.
9. Paragraph 12(1) of the Law on the protection of young persons provides that pre-recorded video cassettes and other image storage media programmed with films or games to be reproduced or played on a screen (picture carriers) may be made publicly accessible to a child or adolescent only if the programmes have been authorised for that person's age range and labelled by the highest authority of the Land or by a voluntary self-regulation body under the procedure described in Paragraph 14(6) of that Law, or if they are information, educational or training programmes labelled by the supplier as 'information programmes' or 'educational programmes'.

10. Paragraph 12(3) of the Law provides that 'image storage media which have not been labelled or have been labelled "Not suitable for young persons" under Paragraph 14(2) by the highest authority of the Land or by a voluntary self-regulation body under the procedure described in Paragraph 14(6), or which have not been labelled by the supplier in accordance with Paragraph 14(7), may not:

1. be offered, transferred or otherwise made accessible to a child or adolescent;
2. be offered or transferred in retail trade outside of commercial premises, in kiosks or in other sales outlets which customers do not usually enter, or by mail order.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11. Avides Media sells video and audio media by mail order via its internet site and an electronic trading platform.
12. The dispute in the main proceedings concerns the importation by that company of Japanese cartoons called 'Animes' in DVD or video cassette format from the United Kingdom to Germany. The cartoons were examined before importation by the British Board of Film Classification ('the BBFC'). The latter checked the audience targeted by the image storage media by applying the provisions relating to the protection of young persons in force in the United Kingdom and classified them in the category 'suitable only for 15 years and over'. The image storage media bear a BBFC label stating that they may be viewed only by adolescents aged 15 years or older.
13. Dynamic Medien, a competitor of Avides Media, brought proceedings for interim relief before the Landgericht (Regional Court) Koblenz (Germany) with a view to prohibiting Avides Media from selling such image storage media by mail order. Dynamic Medien submits that the Law on the protection of young persons prohibits the sale by mail order of image storage media which have not been examined in Germany in accordance with that Law, and which do not bear an age-limit label corresponding to a classification decision from a higher regional authority or a national self-regulation body ('competent authority').
14. By decision of 8 June 2004, the Landgericht Koblenz held that mail order sales of image

storage media bearing only an age-limit label from the BBFC is contrary to the provisions of the Law on the protection of young persons and constitutes anti-competitive conduct. On 21 December 2004, the Oberlandesgericht (Higher Regional Court) Koblenz, ruling in an application for interim relief, confirmed that decision.

15. The Landgericht Koblenz, called to rule on the merits of the dispute and unsure whether the prohibition provided for by the Law on the protection of young persons complied with the provisions of Article 28 EC and Directive 2000/31, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

[1] Does the principle of the free movement of goods within the meaning of Article 28 EC preclude a provision of German law prohibiting the sale by mail order of image storage media (DVDs, videos) that are not labelled as having been examined in Germany as to their suitability for young persons?

[2] In particular: Does the prohibition of mail order sales of such image storage media constitute a measure having equivalent effect within the meaning of Article 28 EC?

[3] If so: Is such a prohibition justified under Article 30 EC, having regard to Directive [2000/31] even if the image storage medium has been examined as to its suitability for young persons by another Member State ... and is labelled accordingly, or does such a check by another Member State ... constitute a less severe means for the purposes of that provision?

The questions referred for a preliminary ruling

Preliminary observations

16. By its questions, which it is appropriate to examine together, the referring court asks whether the principle of free movement of goods within the meaning of Articles 28 EC to 30 EC, the latter being read, where appropriate, in conjunction with the provisions of Directive 2000/31, precludes national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media which have not been examined or classified by the competent authority for the purpose of protecting young persons and which does not bear a label from

that authority indicating the age from which they may be viewed.

17. As far as concerns the national legal context giving rise to the request for a preliminary ruling, the German Government submits that the prohibition of mail order sales of unexamined image storage media is not absolute. In fact, that type of sale is in accordance with national law when it is ensured that the order was made by an adult and that delivery of the goods concerned to children or adolescents is prevented by effective means.
18. In that context, the question arises as to the definition in national law of the concept of mail order sales. It is clear from the case-file that that concept is defined by Paragraph 1(4) of the Law on the protection of young persons as 'any transaction for consideration carried out by means of the ordering and dispatch of a product by postal or electronic means without personal contact between the supplier and the purchaser or without technical or other safeguards to ensure that the product is not dispatched to children or adolescents'.
19. However, it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct (see, to that effect, Case C58/98 Corsten [2000] ECR I-7919, paragraph 24). The Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see Case C475/99 Ambulanz Glöckner [2001] ECR I8089, paragraph 10; Case C136/03 Dörr and Ünal [2005] ECR I4759, paragraph 46; and Case C419/04 Conseil général de la Vienne [2006] ECR I-5645, paragraph 24).
20. In such circumstances, it is appropriate to reply to the request for a preliminary ruling by starting from the premiss, which is that of the referring court, that the rules at issue in the main proceedings prohibit any sale by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed.
21. Furthermore, it is apparent, in the light of the evidence in the case-file, that the rules at issue

in the main proceedings apply not only to suppliers established on the territory of the Federal Republic of Germany but also to suppliers whose registered offices are in other Member States.

22. As regards the provisions of Community law applicable in circumstances such as those in the main proceedings, certain aspects relating to the sale of image storage media by mail order may come within the scope of Directive 2000/31. However, as is clear from Article 2(h) (ii) thereof, that directive does not govern the requirements applicable to goods as such. The same is true of Directive 97/7.
23. Since the national rules relating to the protection of young persons at the time of the sale of goods by mail order have not been harmonised at Community level, the rules at issue in the main proceedings must be assessed by reference to Articles 28 EC and 30 EC.

The existence of a restriction on the free movement of goods

24. Avides Media, the United Kingdom Government and the Commission of the European Communities take the view that the rules at issue in the main proceedings constitute a measure having equivalent effect to a quantitative restriction prohibited, in principle, by Article 28 EC. According to the United Kingdom Government and the Commission that regime is, however, justified on grounds relating to the protection of young persons.
25. Dynamic Medien, the German Government and Ireland submit that the rules at issue in the main proceedings concern selling arrangements within the meaning of the judgment in Joined Cases C-267/91 and C268/91 Keck and Mithouard [1993] ECR I-6097. Since they are applicable to both national and imported products alike, and affect the marketing of those two types of products in the same way in law and in fact, they do not fall within the prohibition laid down in Article 28 EC.
26. According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 28 EC (see, inter alia, Case 8/74 Dassonville [1974] ECR 837, paragraph 5, Case C-420/01 Commission v Italy [2003] ECR I-6445, paragraph 25, and Case

C143/06 Ludwigs-Apotheke [2007] ECR I-0000, paragraph 26).

27. Even if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential, on intra-Community trade. By virtue of that factor, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect (such as those relating to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply to all products alike, unless their application can be justified by a public-interest objective taking precedence over the requirements of the free movement of goods (see, to that effect, Case 120/78 Rewe-Zentral ('Cassis de Dijon') [1979] ECR 649, paragraphs 6, 14 and 15; Case C-368/95 Familiapress [1997] ECR I3689, paragraph 8; and Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, paragraph 67).
28. In its case-law, the Court has also treated as measures having equivalent effect, prohibited by Article 28 EC, national provisions making a product lawfully manufactured and marketed in another Member State subject to additional controls, save in the case of exceptions provided for or allowed by Community law (see, inter alia, Case C390/99 Canal Satélite Digital [2002] ECR I-607, paragraphs 36 and 37, and Case C14/02 ATRAL [2003] ECR I-4431, paragraph 65).
29. By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the line of case-law beginning with Dassonville, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see, inter alia, Keck and Mithouard, paragraph 16; Case C292/92 Hünernmund and Others [1993] ECR I6787, paragraph 21; and Case C434/04 Ahokainen and Leppik [2006] ECR I9171, paragraph 19). Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see Keck and Mithouard, paragraph 17).
30. Subsequently, the Court treated as provisions governing sales arrangements within the meaning of the judgment in Keck and Mithouard provisions concerning, in particular, a number of marketing methods (see, inter alia, Hünernmund and Others, paragraphs 21 and 22; Case C-254/98 TK-Heimdienst [2000] ECR I-151, paragraph 24; and Case C-441/04 A-Punkt Schmuckhandel [2006] ECR I-2093, paragraph 16).
31. It is clear from paragraph 15 of the judgment in Case C391/92 Commission v Greece [1995] ECR I-1621 that rules which restrict the marketing of products to certain points of sale, and which have the effect of limiting the commercial freedom of economic operators, without affecting the actual characteristics of the products referred to, constitute a selling arrangement for the purposes of the case-law cited in paragraph 29 of this judgment. Therefore, the need to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the above-mentioned requirements from being treated as selling arrangements (see Canal Satélite Digital, paragraph 30). That is the case, inter alia, with regard to the need to alter the labelling of imported products (see, inter alia, Case C33/97 Colim [1999] ECR I3175, paragraph 37, and Case C416/00 Morellato [2003] ECR I9343, paragraphs 29 and 30).
32. In the present case, the rules at issue in the main proceedings do not constitute a selling arrangement within the meaning of the case-law resulting from Keck and Mithouard.
33. Those rules do not prohibit sale by mail order of image storage media. They provide that, in order to be marketed in that way, image storage media must be subject to a national examination and classification procedure for the purpose of protecting young persons, regardless of whether a similar procedure has already been followed in the Member State from which those image storage media were exported. Furthermore, those rules lay down a condition with which image storage media must comply, namely that with regard to their labelling.

34. Such rules are liable to make the importation of image storage media from a Member State other than the Federal Republic of Germany more difficult and more expensive, with the result that they may dissuade some interested parties from marketing such image storage media in the latter Member State.
35. It follows that the rules at issue in the main proceedings constitute a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC, which in principle is incompatible with the obligations arising from that article unless it can be objectively justified.

Possible justification for the rules at issue in the main proceedings

36. The United Kingdom Government and the Commission take the view that the rules at issue in the main proceedings are justified in so far as they are designed to protect young people. That objective is linked in particular to public morality and public policy, which are grounds of justification recognised in Article 30 EC. Furthermore, Directives 97/7 and 2000/31 expressly authorise the imposition of restrictions on grounds of public interest.
37. Dynamic Medien, the German Government and Ireland concur with that position if it is established that those rules do not fall outside the prohibition laid down by Article 28 EC. The German Government submits that they pursue public-policy objectives and ensure that young people are able to develop their sense of personal responsibility and their sociability. Furthermore, the protection of young people is an objective which is closely related to ensuring respect for human dignity. Ireland also invokes the imperative requirement of consumer protection recognised by the judgment in *Cassis de Dijon*.
38. Avides Media takes the view that the rules at issue in the main proceedings are disproportionate in so far as they have the effect of systematically prohibiting the sale by mail order of image storage media not bearing the labelling which they require, regardless of whether or not the image storage media concerned were examined in another Member State for the purpose of protecting young people. In addition, it is argued, German law fails to provide for a simplified procedure in cases where such an examination has in fact been made.
39. In that connection, it must be recalled that the protection of the rights of the child is recognised by various international instruments which the Member States have cooperated on or acceded to, such as the International Covenant on Civil and Political Rights, which was adopted by the General Assembly of the United Nations on 19 December 1966 and entered into force on 23 March 1976, and the Convention on the Rights of the Child, which was adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990. The Court has already had occasion to point out that those international instruments are among those concerning the protection of human rights of which it takes account in applying the general principles of Community law (see, *inter alia*, Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 37).
40. In this context, it must be observed that, under Article 17 of the Convention on the Rights of the Child, the States Parties recognise the important function performed by the mass media and are required to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. Article 17(e) provides that those States are to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.
41. The protection of the child is also enshrined in instruments drawn up within the framework of the European Union, such as the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), Article 24(1) of which provides that children have the right to such protection and care as is necessary for their well-being (see, to that effect, *Parliament v Council*, paragraph 58). Furthermore, the Member States' right to take the measures necessary for reasons relating to the protection of young persons is recognised by a number of Community-law instruments, such as Directive 2000/31.
42. Although the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty, such as the free movement of goods (see, by analogy, Case C112/00 *Schmidberger* [2003] ECR I5659, paragraph 74), the fact remains that such restrictions may be justified only if they are suitable for securing

the attainment of the objective pursued and do not go beyond what is necessary in order to attain it (see, to that effect, Case C36/02 Omega [2004] ECR I-9609, paragraph 36, and Case C438/05 International Transport Workers' Federation and Finnish Seamen's Union [2007] ECR I-0000, paragraph 75).

43. It is clear from the decision making the reference that the national rules at issue in the main proceedings are designed to protect children against information and materials injurious to their well-being.
44. In that connection, it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, referred to in paragraphs 39 to 42 of this judgment, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, Omega, paragraph 37). As that conception may vary from one Member State to another on the basis of, *inter alia*, moral or cultural views, Member States must be recognised as having a definite margin of discretion.
45. While it is true that it is for the Member States, in the absence of Community harmonisation, to determine the level at which they intend to protect the interest concerned, the fact remains that that discretion must be exercised in conformity with the obligations arising under Community law.
46. Although the rules at issue in the main proceedings correspond to the level of child protection that the German legislature has sought to ensure on the territory of the Federal Republic of Germany, it is also necessary that the measures implemented by those rules be suitable for securing that objective and do not go beyond what is necessary in order to attain it.
47. There is no doubt that prohibiting the sale and transfer by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed constitutes a measure suitable for protecting children against information and materials injurious to their well-being.
48. As far as concerns the substantive scope of the prohibition concerned, the Law on the protection of young persons does not preclude all

forms of marketing of unchecked image storage media. It is clear from the decision making the reference that it is permissible to import and sell such image storage media to adults by way of distribution channels involving personal contact between the supplier and the purchaser, which thus ensures that children do not have access to the image storage media concerned. In the light of those factors, it appears that the rules at issue in the main proceedings do not go beyond what is necessary to attain the objective pursued by the Member State concerned.

49. As regards the examination procedure established by the national legislature in order to protect children against information and materials injurious to their well-being, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the national provisions enacted to that end. Those provisions must be assessed solely by reference to the objective pursued and the level of protection which the Member State in question intends to provide (see, by analogy, Case C-124/97 *Lääraänd Others* [1999] ECR I-6067, paragraph 36, and Omega, paragraph 38).
50. However, such an examination procedure must be one which is readily accessible, can be completed within a reasonable period, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts (see, to that effect, Case C-344/90 *Commission v France* [1992] ECR I4719, paragraph 9, and Case C-95/01 *Greenham and Abel* [2004] ECR I-1333, paragraph 35).
51. In the present case, it appears from the observations submitted by the German Government before the Court that the procedure for examining, classifying, and labelling image storage media, established by the rules at issue in the main proceedings, fulfils the conditions set out in the preceding paragraph. However, it is for the national court, before which the main action has been brought and which must assume responsibility for the subsequent judicial decision, to ascertain whether that is the case.
52. Having regard to all the foregoing considerations, the answer to the questions referred must be that Article 28 EC does not preclude national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media

which have not been examined and classified by the competent authority for the purposes of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed, unless it appears that the procedure for examination, classification and labelling of image storage media established by those rules is not readily accessible or cannot be completed within a reasonable period, or that a decision of refusal is not open to challenge before the courts.

Costs

53. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 28 EC does not preclude national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media which have not been examined and classified by a higher regional authority or a national voluntary self-regulation body for the purposes of protecting young persons and which do not bear a label from that authority or that body indicating the age from which they may be viewed, unless it appears that the procedure for examination, classification and labelling of image storage media established by those rules is not readily accessible or cannot be completed within a reasonable period, or that a decision of refusal is not open to challenge before the courts.

[Signatures]

PERSONAL DATA IN TERMS OF PRIVATE LIFE, SCOPE OF PERSONAL DATA, CONFIDENTIALITY AND STORAGE OF TRAFFIC DATA, THE POSSIBILITY TO RESTRICT THE OBLIGATION TO ENSURE CONFIDENTIALITY OF TRAFFIC DATA, UNAUTHORISED USE OF THE ELECTRONIC COMMUNICATIONS SYSTEM, BALANCE BETWEEN VARIOUS FUNDAMENTAL RIGHTS

CASE C-275/06 PRODUCTORES DE MÚSICA DE ESPAÑA (PROMUSICAE) v ELEFÓNICA DE ESPAÑA SAU

(Reference for a preliminary ruling from the Juzgado de lo Mercantil nº 5 de Madrid)

(Information society – Obligations of providers of services – Retention and disclosure of certain traffic data – Obligation of disclosure – Limits – Protection of the confidentiality of electronic communications – Compatibility with the protection of copyright and related rights – Right to effective protection of intellectual property)

SUMMARY OF THE JUDGMENT

Approximation of laws – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29 – Electronic commerce – Directive 2000/31 – Processing of personal data and the protection of privacy in the electronic communications sector – Directive 2002/58 – Enforcement of intellectual property rights – Directive 2004/48 – Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (TRIPs Agreement, Arts 41, 42 and 47; European Parliament and Council Directives 2000/31, 2001/29, 2002/58 and 2004/48)

Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce), Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2004/48 on the enforcement of intellectual property rights, and Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector

(Directive on privacy and electronic communications) do not require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings, in a situation in which a non-profit-making organisation of producers and publishers of musical and audiovisual recordings has brought proceedings seeking an order that a provider of internet access services disclose to the organisation the identities and physical addresses of certain subscribers, so as to enable civil proceedings to be brought for infringement of copyright.

Similarly, as to Articles 41, 42 and 47 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), in the light of which Community law must as far as possible be interpreted where it regulates a field to which that agreement applies, while they require the effective protection of intellectual property rights and the institution of judicial remedies for their enforcement, they do not contain provisions which require those directives to be interpreted as compelling the Member States to lay down an obligation to communicate personal data in the context of civil proceedings.

However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality. (see paras 60, 70, operative part)

JUDGMENT OF THE COURT (GRAND CHAMBER)

29 January 2008¹⁷

(Information society – Obligations of providers of services – Retention and disclosure of certain traffic data – Obligation of disclosure – Limits – Protection of the confidentiality of electronic communications – Compatibility with the protection of copyright and related rights – Right to effective protection of

¹⁷ Language of the case: Spanish.

intellectual property)

In Case C275/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Juzgado de lo Mercantil No 5 de Madrid (Spain), made by decision of 13 June 2006, received at the Court on 26 June 2006, in the proceedings

Productores de Música de España (Promusicae)

v

Telefónica de España SAU,

THE COURT (Grand Chamber), composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Löhmus, Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský (Rapporteur), J. Klučka, E. Levits, A. Arabadjiev and C. Toader, Judges, Advocate General: J. Kokott, Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 June 2007, after considering the observations submitted on behalf of:

- Productores de Música de España (Promusicae), by R. Bercovitz Rodríguez Cano, A. González Gozalo and J. de Torres Fueyo, abogados,
- Telefónica de España SAU, by M. Cornejo Barranco, procuradora, R. García Boto and P. Cerdán López, abogados,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,
- the Slovenian Government, by M. Remic and U. Steblovnik, acting as Agents,
- the Finnish Government, by J. Heliskoski and A. Guimaraes-Purokoski, acting as Agents,
- the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and S. Malynicz, Barrister,
- the Commission of the European Communities, by R. Vidal Puig and C. Docksey, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2007, gives the following Judgment

1. This reference for a preliminary ruling concerns the interpretation of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive

on electronic commerce') (OJ 2000 L 178, p. 1), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum, OJ 2004 L 195, p. 16), and Articles 17(2) and 47 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter').

2. The reference was made in the course of proceedings between Productores de Música de España (Promusicae) ('Promusicae'), a non-profit-making organisation, and Telefónica de España SAU ('Telefónica') concerning Telefónica's refusal to disclose to Promusicae, acting on behalf of its members who are holders of intellectual property rights, personal data relating to use of the internet by means of connections provided by Telefónica.

Legal context

International law

3. Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), which constitutes Annex 1C to the Agreement establishing the World Trade Organisation ('the WTO'), signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), is headed 'Enforcement of intellectual property rights'. That part includes Article 41(1) and (2), according to which:

'1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.'

4. In Section 2 of Part III, 'Civil and administrative procedures and remedies', Article 42, headed 'Fair and Equitable Procedures', provides:

'Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement ...'

5. Article 47 of the TRIPs Agreement, headed 'Right of Information', provides:

'Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.'

Community law

Provisions relating to the information society and the protection of intellectual property, especially copyright

- Directive 2000/31

6. Article 1 of Directive 2000/31 states:

'1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

...

5. This Directive shall not apply to:

...

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

...'

7. According to Article 15 of Directive 2000/31:

'1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

8. Article 18 of Directive 2000/31 provides:

'1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

...'

– Directive 2001/29

9. According to Article 1(1) of Directive 2001/29, the directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

10. Under Article 8 of Directive 2001/29:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity

carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

11. Article 9 of Directive 2001/29 reads:

'This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.'

- Directive 2004/48

12. Article 1 of Directive 2004/48 states:

'This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights ...'

13. According to Article 2(3) of Directive 2004/48:

'3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.'

14. Article 3 of Directive 2004/48 provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

15. Article 8 of Directive 2004/48 provides:

'1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities;

or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

or

(d) afford an opportunity for refusing to provide information which would force the per-

son referred to in paragraph 1 to admit to his/her own participation or that of his/her close relatives in an infringement of an intellectual property right;

or

(e) govern the protection of confidentiality of information sources or the processing of personal data.'

Provisions on the protection of personal data

– Directive 95/46/EC

16. Article 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) states:

'For the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...'

17. According to Article 3 of Directive 95/46:

'1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

...'

18. Article 7 of Directive 95/46 reads as follows:

'Member States shall provide that personal data may be processed only if:

...

(f) processing is necessary for the purposes of the legitimate interests pursued by the

controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).'

19. Article 8 of Directive 95/46 provides:

'1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

...

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent ...

...'

20. According to Article 13 of Directive 95/46:

'1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

...'

– Directive 2002/58/EC

21. Article 1 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the elec-

tronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) states:

'1. This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

2. The provisions of this Directive particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1 ...

3. This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.'

22. Under Article 2 of Directive 2002/58:

'Save as otherwise provided, the definitions in Directive 95/46/EC and in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ... shall apply.

The following definitions shall also apply:

...

(b) "traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

...

(d) "communication" means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

...'

23. Article 3 of Directive 2002/58 provides:

'1. This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community.

...'

24. Article 5 of Directive 2002/58 provides:

'1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

...'

25. Article 6 of Directive 2002/58 provides:

'1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his/her consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

...

5. Processing of traffic data, in accordance with

paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.'

26. Under Article 15 of Directive 2002/58:

'1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

...'

27. Article 19 of Directive 2002/58 provides:

'Directive 97/66/EC is hereby repealed with effect from the date referred to in Article 17(1).

References made to the repealed Directive shall be construed as being made to this Directive.'

National law

28. Under Article 12 of Law 34/2002 on information society services and electronic commerce (Ley 34/2002 de servicios de la sociedad de la información y de comercio electrónico) of 11 July 2002 (BOE No 166 of 12 July 2002, p. 25388, 'the LSSI'), headed 'Duty to retain traffic data relating to electronic communications':

'1. Operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services must retain for a maximum of 12 months the connection and traffic data generated by the communications established during the supply of an information society service, under the conditions established in this article and the regulations implementing it.

2. ... The operators of electronic communications networks and services and the service providers to which this article refers may not use the data retained for purposes other than those indicated in the paragraph below or other purposes permitted by the Law and must adopt appropriate security measures to avoid the loss or alteration of the data and unauthorised access to the data.

3. The data shall be retained for use in the context of a criminal investigation or to safeguard public security and national defence, and shall be made available to the courts or the public prosecutor at their request. Communication of the data to the forces of order shall be effected in accordance with the provisions of the rules on personal data protection.

...'

The main proceedings and the order for reference

29. Promusicae is a non-profit-making organisation of producers and publishers of musical and audiovisual recordings. By letter of 28 November 2005 it made an application to the Juzgado de lo Mercantil No 5 de Madrid (Commercial Court No 5, Madrid) for preliminary measures against Telefónica, a commercial company whose activities include the provision of internet access services.

30. Promusicae asked for Telefónica to be ordered to disclose the identities and physical addresses of certain persons whom it provided with internet access services, whose IP address and date and time of connection were known. According to Promusicae, those persons used the KaZaA file exchange program (peer-to-peer or P2P) and provided access in shared files of personal computers to phonograms in which the members of Promusicae held the exploitation rights.

31. Promusicae claimed before the national court that the users of KaZaA were engaging in unfair competition and infringing intellectual

property rights. It therefore sought disclosure of the above information in order to be able to bring civil proceedings against the persons concerned.

32. By order of 21 December 2005 the Juzgado de lo Mercantil No 5 de Madrid ordered the preliminary measures requested by Promusicae.
33. Telefónica appealed against that order, contending that under the LSSI the communication of the data sought by Promusicae is authorised only in a criminal investigation or for the purpose of safeguarding public security and national defence, not in civil proceedings or as a preliminary measure relating to civil proceedings. Promusicae submitted for its part that Article 12 of the LSSI must be interpreted in accordance with various provisions of Directives 2000/31, 2001/29 and 2004/48 and with Articles 17(2) and 47 of the Charter, provisions which do not allow Member States to limit solely to the purposes expressly mentioned in that law the obligation to communicate the data in question.
34. In those circumstances the Juzgado de lo Mercantil No 5 de Madrid decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does Community law, specifically Articles 15(2) and 18 of Directive [2000/31], Article 8(1) and (2) of Directive [2001/29], Article 8 of Directive [2004/48] and Articles 17(2) and 47 of the Charter ... permit Member States to limit to the context of a criminal investigation or to safeguard public security and national defence, thus excluding civil proceedings, the duty of operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services to retain and make available connection and traffic data generated by the communications established during the supply of an information society service?'

Admissibility of the question referred

35. In its written observations the Italian Government submits that the statements in point 11 of the order for reference indicate that the question referred would be justified only in the event that the national legislation at issue in the main proceedings were interpreted as limiting the duty to disclose personal data to the field of criminal investigations or the protection of public safety and national defence.

Since the national court does not exclude the possibility of that legislation being interpreted as not containing such a limitation, the question thus appears, according to the Italian Government, to be hypothetical, so that it is inadmissible.

36. In this respect, it should be recalled that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C217/05 Confederación Española de Empresarios de Estaciones de Servicio [2006] ECR I11987, paragraph 16 and the case-law cited).
37. Where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is thus bound, in principle, to give a ruling unless it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Confederación Española de Empresarios de Estaciones de Servicio, paragraph 17).
38. Moreover, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is admittedly a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules of law with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of national rules with Community law (see, to that effect, Case C506/04 Wilson [2006] ECR I8613, paragraphs 34 and 35, and Joined Cases C338/04, C359/04 and C360/04 Placanica and Others [2007] ECR I1891, paragraph 36).

39. However, in the case of the present reference for a preliminary ruling, it is perfectly clear from the grounds of the order for reference as a whole that the national court considers that the interpretation of Article 12 of the LSSI depends on the compatibility of that provision with the relevant provisions of Community law, and hence on the interpretation of those provisions which it asks the Court to provide. Since the outcome of the main proceedings is thus linked to that interpretation, the question referred clearly does not appear hypothetical, so that the ground of inadmissibility put forward by the Italian Government cannot be accepted.
40. The reference for a preliminary ruling is therefore admissible.

The question referred for a preliminary ruling

41. By its question the national court asks essentially whether Community law, in particular Directives 2000/31, 2001/29 and 2004/48, read also in the light of Articles 17 and 47 of the Charter, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

Preliminary observations

42. Even if, formally, the national court has limited its question to the interpretation of Directives 2000/31, 2001/29 and 2004/48 and the Charter, that circumstance does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of use for deciding the case before it, whether or not that court has referred to them in the wording of its question (see Case C392/05 *Alevizos* [2007] ECR I3505, paragraph 64 and the case-law cited).
43. It should be observed to begin with that the intention of the provisions of Community law thus referred to in the question is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright, which Promusicae claims in the main proceedings. The national court proceeds, however, from the premiss that the Community law obligations required by that protection may be blocked, in national law, by the provisions of Article 12 of the LSSI.

44. While that law, in 2002, transposed the provisions of Directive 2000/31 into domestic law, it is common ground that Article 12 of the law is intended to implement the rules for the protection of private life, which is also required by Community law under Directives 95/46 and 2002/58, the latter of which concerns the processing of personal data and the protection of privacy in the electronic communications sector, which is the sector at issue in the main proceedings.

45. It is not disputed that the communication sought by Promusicae of the names and addresses of certain users of KaZaA involves the making available of personal data, that is, information relating to identified or identifiable natural persons, in accordance with the definition in Article 2(a) of Directive 95/46 (see, to that effect, Case C101/01 *Lindqvist* [2003] ECR I12971, paragraph 24). That communication of information which, as Promusicae submits and Telefónica does not contest, is stored by Telefónica constitutes the processing of personal data within the meaning of the first paragraph of Article 2 of Directive 2002/58, read in conjunction with Article 2(b) of Directive 95/46. It must therefore be accepted that that communication falls within the scope of Directive 2002/58, although the compliance of the data storage itself with the requirements of that directive is not at issue in the main proceedings.

46. In those circumstances, it should first be ascertained whether Directive 2002/58 precludes the Member States from laying down, with a view to ensuring effective protection of copyright, an obligation to communicate personal data which will enable the copyright holder to bring civil proceedings based on the existence of that right. If that is not the case, it will then have to be ascertained whether it follows directly from the three directives expressly mentioned by the national court that the Member States are required to lay down such an obligation. Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter, whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

Directive 2002/58

47. Article 5(1) of Directive 2002/58 provides that Member States must ensure the confidentiality

- of communications by means of a public communications network and publicly available electronic communications services, and of the related traffic data, and must *inter alia* prohibit, in principle, the storage of that data by persons other than users, without the consent of the users concerned. The only exceptions relate to persons lawfully authorised in accordance with Article 15(1) of that directive and the technical storage necessary for conveyance of a communication. In addition, as regards traffic data, Article 6(1) of Directive 2002/58 provides that stored traffic data must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of that article and Article 15(1) of the directive.
48. With respect, first, to paragraphs 2, 3 and 5 of Article 6, which relate to the processing of traffic data in accordance with the requirements of billing and marketing services and the provision of value added services, those provisions do not concern the communication of that data to persons other than those acting under the authority of the providers of public communications networks and publicly available electronic communications services. As to the provisions of Article 6(6) of Directive 2002/58, they do not relate to disputes other than those between suppliers and users concerning the grounds for storing data in connection with the activities referred to in the other provisions of that article. Since Article 6(6) thus clearly does not concern a situation such as that of Promusicae in the main proceedings, it cannot be taken into account in assessing that situation.
49. With respect, second, to Article 15(1) of Directive 2002/58, it should be recalled that under that provision the Member States may adopt legislative measures to restrict the scope *inter alia* of the obligation to ensure the confidentiality of traffic data, where such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, as referred to in Article 13(1) of Directive 95/46.
50. Article 15(1) of Directive 2002/58 thus gives Member States the possibility of providing for exceptions to the obligation of principle, imposed on them by Article 5 of that directive, to ensure the confidentiality of personal data.
51. However, none of these exceptions appears to relate to situations that call for the bringing of civil proceedings. They concern, first, national security, defence and public security, which constitute activities of the State or of State authorities unrelated to the fields of activity of individuals (see, to that effect, Lindqvist, paragraph 43), and, second, the prosecution of criminal offences.
52. As regards the exception relating to unauthorised use of the electronic communications system, this appears to concern use which calls into question the actual integrity or security of the system, such as the cases referred to in Article 5(1) of Directive 2002/58 of the interception or surveillance of communications without the consent of the users concerned. Such use, which, under that article, makes it necessary for the Member States to intervene, also does not relate to situations that may give rise to civil proceedings.
53. It is clear, however, that Article 15(1) of Directive 2002/58 ends the list of the above exceptions with an express reference to Article 13(1) of Directive 95/46. That provision also authorises the Member States to adopt legislative measures to restrict the obligation of confidentiality of personal data where that restriction is necessary *inter alia* for the protection of the rights and freedoms of others. As they do not specify the rights and freedoms concerned, those provisions of Article 15(1) of Directive 2002/58 must be interpreted as expressing the Community legislature's intention not to exclude from their scope the protection of the right to property or situations in which authors seek to obtain that protection in civil proceedings.
54. The conclusion must therefore be that Directive 2002/58 does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings.
55. However, the wording of Article 15(1) of that directive cannot be interpreted as compelling the Member States, in the situations it sets out, to lay down such an obligation.
56. It must therefore be ascertained whether the three directives mentioned by the national court require those States to lay down that obligation in order to ensure the effective protec-

tion of copyright.

The three directives mentioned by the national court

57. It should first be noted that, as pointed out in paragraph 43 above, the purpose of the directives mentioned by the national court is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright. However, it follows from Article 1(5)(b) of Directive 2000/31, Article 9 of Directive 2001/29 and Article 8(3)(e) of Directive 2004/48 that such protection cannot affect the requirements of the protection of personal data.
58. Article 8(1) of Directive 2004/48 admittedly requires Member States to ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided. However, it does not follow from those provisions, which must be read in conjunction with those of paragraph 3(e) of that article, that they require the Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.
59. Nor does the wording of Articles 15(2) and 18 of Directive 2000/31 or that of Article 8(1) and (2) of Directive 2001/29 require the Member States to lay down such an obligation.
60. As to Articles 41, 42 and 47 of the TRIPs Agreement, relied on by Promusicae, in the light of which Community law must as far as possible be interpreted where – as in the case of the provisions relied on in the context of the present reference for a preliminary ruling – it regulates a field to which that agreement applies (see, to that effect, Joined Cases C300/98 and C392/98 *Dior and Others* [2000] ECR I11307, paragraph 47, and Case C431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I0000, paragraph 35), while they require the effective protection of intellectual property rights and the institution of judicial remedies for their enforcement, they do not contain provisions which require those directives to be interpreted as compelling the Member States to lay down an obligation to communicate per-

sonal data in the context of civil proceedings.

Fundamental rights

61. The national court refers in its order for reference to Articles 17 and 47 of the Charter, the first of which concerns the protection of the right to property, including intellectual property, and the second of which concerns the right to an effective remedy. By so doing, that court must be regarded as seeking to know whether an interpretation of those directives to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection.
62. It should be recalled that the fundamental right to property, which includes intellectual property rights such as copyright (see, to that effect, Case C479/04 *Laserdisken* [2006] ECR I8089, paragraph 65), and the fundamental right to effective judicial protection constitute general principles of Community law (see respectively, to that effect, Joined Cases C154/04 and C155/04 *Alliance for Natural Health and Others* [2005] ECR I6451, paragraph 126 and the case-law cited, and Case C432/05 *Unibet* [2007] ECR I2271, paragraph 37 and the case-law cited).
63. However, the situation in respect of which the national court puts that question involves, in addition to those two rights, a further fundamental right, namely the right that guarantees protection of personal data and hence of private life.
64. According to recital 2 in the preamble to Directive 2002/58, the directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter. In particular, the directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter. Article 7 substantially reproduces Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, which guarantees the right to respect for private life, and Article 8 of the Charter expressly proclaims the right to protection of personal data.
65. The present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of dif-

ferent fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.

66. The mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 2002/58 itself, in that it provides for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for, and in the three directives mentioned by the national court, which reserve the cases in which the measures adopted to protect the rights they regulate affect the protection of personal data. Second, they result from the adoption by the Member States of national provisions transposing those directives and their application by the national authorities (see, to that effect, with reference to Directive 95/46, Lindqvist, paragraph 82).
67. As to those directives, their provisions are relatively general, since they have to be applied to a large number of different situations which may arise in any of the Member States. They therefore logically include rules which leave the Member States with the necessary discretion to define transposition measures which may be adapted to the various situations possible (see, to that effect, Lindqvist, paragraph 84).
68. That being so, the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, Lindqvist, paragraph 87, and Case C305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I0000, paragraph 28).
69. Moreover, it should be recalled here that the Community legislature expressly required, in accordance with Article 15(1) of Directive 2002/58, that the measures referred to in that paragraph be adopted by the Member States in compliance with the general principles of

Community law, including those mentioned in Article 6(1) and (2) EU.

70. In the light of all the foregoing, the answer to the national court's question must be that Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

Costs

71. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Direc-

tive on privacy and electronic communications) do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

[Signatures]

ENISA , DATA RETENTION, USE OF RETAINED DATA BY THE POLICE OR JUDICIAL AUTHORITIES OF THE MEMBER STATES, DATA-PROCESSING FOR PUBLIC SECURITY PURPOSES

CASE C-301/06 IRELAND v EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION

(Action for annulment – Directive 2006/24/EC – Retention of data generated or processed in connection with the provision of electronic communications services – Choice of legal basis)

SUMMARY OF THE JUDGMENT

Acts of the institutions – Choice of legal basis (Art. 95 EC; European Parliament and Council Directive 2006/24)

Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks had to be adopted on the basis of Article 95 EC.

The Community legislature may have recourse to Article 95 EC in particular where disparities exist between national rules which are such as to obstruct the fundamental freedoms or to create distortions of competition and thus have a direct effect on the functioning of the internal market.

It is apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time. Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.

Furthermore, Directive 2006/24 regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that relating to the use and exchange of those data between those author-

ities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of that directive. It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty. In light of that substantive content, it must be held that that directive relates predominantly to the functioning of the internal market. (see paras 63, 71-72, 83-85, 93)

JUDGMENT OF THE COURT (GRAND CHAMBER)

10 February 2009¹⁸

(Action for annulment – Directive 2006/24/EC – Retention of data generated or processed in connection with the provision of electronic communications services – Choice of legal basis)

In Case C301/06,

ACTION for annulment under Article 230 EC, brought on 6 July 2006, Ireland, represented by D. O'Hagan, acting as Agent, E. Fitzsimons, D. Barniville and A. Collins, SC, with an address for service in Luxembourg, applicant, supported by: Slovak Republic, represented by J. Čorba, acting as Agent, intervener,

v

European Parliament, represented initially by H. Duintjer Tebbens, M. Dean and A. Auersperger Matic, and subsequently by the latter two and K. Bradley, acting as Agents, with an address for service in Luxembourg, Council of the European Union, represented by J.-C. Piris, J. Schutte and S. Kyriakopoulou, acting as Agents, defendants, supported by: Kingdom of Spain, represented by M.A. Sampol Pucurull and J. Rodríguez Cárcamo, acting as Agents, with an address for service in Luxembourg, Kingdom of the Netherlands, represented by C. ten Dam and C. Wissels, acting as Agents, Commission of the European Communities, represented by C. Docksey, R. Troosters and C. O'Reilly, acting as Agents, with an address for service in Luxembourg, European Data Protection Supervisor, represented by H. Hijmans, acting as Agent, interveners,

THE COURT (Grand Chamber), composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, J. N. Cunha Rodrigues (Rapporteur), R. Silva

¹⁸ Language of the case: English.

de Lapuerta, K. Schiemann, J. Klučka, A. Arabadjiev, C. Toader and J.J. Kasel, Judges, Advocate General: Y. Bot, Registrar: C. Strömholm, Administrator, having regard to the written procedure and further to the hearing on 1 July 2008, after hearing the Opinion of the Advocate General at the sitting on 14 October 2008,

gives the following Judgment

1. By its action, Ireland requests the Court to annul Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), on the ground that it was not adopted on an appropriate legal basis.

Legal framework

Directive 95/46/EC

2. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) lays down rules relating to the processing of personal data in order to protect the rights of individuals in that respect, while ensuring the free movement of those data in the European Community.
3. Article 3(2) of Directive 95/46 provides:

'This Directive shall not apply to the processing of personal data:

 - in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,
 - by a natural person in the course of a purely personal or household activity.'

Directive 2002/58/EC

4. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and

the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) was adopted with a view to supplementing Directive 95/46 by provisions specific to the telecommunications sector.

5. Under Article 6(1) of Directive 2002/58:

'Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).'

6. Article 15(1) of Directive 2002/58 states:

'Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.'

Directive 2006/24

7. Recitals 5 to 11 in the preamble to Directive 2006/24 provide as follows:

'(5) Several Member States have adopted legislation providing for the retention of data by service providers for the prevention, investigation, detection and prosecution of criminal offences. Those national provisions vary considerably.

(6) The legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences present obstacles to the internal market for electronic communications,

since service providers are faced with different requirements regarding the types of traffic and location data to be retained and the conditions and periods of retention.

(7) The Conclusions of the Justice and Home Affairs Council of 19 December 2002 underline that, because of the significant growth in the possibilities afforded by electronic communications, data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention, investigation, detection and prosecution of criminal offences, in particular organised crime.

(8) The Declaration on Combating Terrorism adopted by the European Council on 25 March 2004 instructed the Council to examine measures for establishing rules on the retention of communications traffic data by service providers.

(9) Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everyone has the right to respect for his private life and his correspondence. Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, inter alia, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. Because retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the ECHR is therefore a necessary measure.

(10) On 13 July 2005, the Council reaffirmed in its declaration condemning the terrorist attacks on London the need to adopt common measures on the retention of telecommunications data as soon as possible.

(11) Given the importance of traffic and location data for the investigation, detection and prosecution of criminal offences, as demonstrated by research and the practical experience of several Member States, there is a need to ensure at European level that data that are generated or processed, in the course of the supply of communications services, by providers of publicly available electronic commu-

nications services or of a public communications network are retained for a certain period, subject to the conditions provided for in this Directive.'

8. Recital 21 in the preamble to Directive 2006/24 states:

'Since the objectives of this Directive, namely to harmonise the obligations on providers to retain certain data and to ensure that those data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the [EC] Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

9. Recital 25 in the preamble to Directive 2006/24 is worded as follows:

'This Directive is without prejudice to the power of Member States to adopt legislative measures concerning the right of access to, and use of, data by national authorities, as designated by them. Issues of access to data retained pursuant to this Directive by national authorities for such activities as are referred to in the first indent of Article 3(2) of Directive 95/46/EC fall outside the scope of Community law. However, they may be subject to national law or action pursuant to Title VI of the Treaty on European Union. Such laws or action must fully respect fundamental rights as they result from the common constitutional traditions of the Member States and as guaranteed by the ECHR. ...'

10. Article 1(1) of Directive 2006/24 provides:

'This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.'

11. Article 3(1) of that directive provides:

'By way of derogation from Articles 5, 6 and 9

of Directive 2002/58/EC, Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.'

12. Article 4 of Directive 2006/24 states:

'Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.'

13. Article 5 of Directive 2006/24 states:

'Member States shall ensure that the following categories of data are retained under this Directive:

(a) data necessary to trace and identify the source of a communication:

...

(b) data necessary to identify the destination of a communication:

...

(c) data necessary to identify the date, time and duration of a communication:

...

(d) data necessary to identify the type of communication:

...

(e) data necessary to identify users' communication equipment or what purports to be their equipment:

...

(f) data necessary to identify the location of mobile communication equipment:

...

2. No data revealing the content of the com-

munication may be retained pursuant to this Directive.'

14. Article 6 of Directive 2006/24 provides:

'Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.'

15. Article 7 of Directive 2006/24 states:

'Without prejudice to the provisions adopted pursuant to Directive 95/46/EC and Directive 2002/58/EC, each Member State shall ensure that providers of publicly available electronic communications services or of a public communications network respect, as a minimum, the following data security principles with respect to data retained in accordance with this Directive:

...'

16. Under Article 8 of Directive 2006/24:

'Member States shall ensure that the data specified in Article 5 are retained in accordance with this Directive in such a way that the data retained and any other necessary information relating to such data can be transmitted upon request to the competent authorities without undue delay.'

17. Article 11 of Directive 2006/24 is worded as follows:

'The following paragraph shall be inserted in Article 15 of Directive 2002/58/EC:

"1a. Paragraph 1 shall not apply to data specifically required by Directive [2006/24] to be retained for the purposes referred to in Article 1(1) of that Directive".'

Background to the dispute

18. On 28 April 2004, the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland submitted to the Council of the European Union a proposal for a framework decision to be adopted on the basis of Articles 31(1)(c) EU and 34(2)(b) EU. The subject of that proposal was the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data in public communication networks for the purposes of the prevention, investigation, detection and prosecution of criminal offences, including terrorism (Council Document

8958/04).

19. The Commission of the European Communities stated that it favoured the legal basis used in that proposed framework decision with respect to a part of it. In particular, it pointed out that Article 47 EU did not allow an instrument based on the EU Treaty to affect the *acquis communautaire*, in this case Directives 95/46 and 2002/58. Taking the view that the determination of the categories of data to be retained and of the relevant retention period fell within the competence of the Community legislature, the Commission reserved the right to submit a proposal for a directive.
20. On 21 September 2005, the Commission adopted a proposal, based on Article 95 EC, for a directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication[s] services and amending Directive 2002/58 [COM(2005) 438 final].
21. During its session on 1 and 2 December 2005, the Council decided to seek the adoption of a directive based on the EC Treaty, rather than pursuing the adoption of a framework decision.
22. On 14 December 2005, the European Parliament delivered its opinion in accordance with the co-decision procedure under Article 251 EC.
23. The Council adopted Directive 2006/24 by qualified majority at its session on 21 February 2006. Ireland and the Slovak Republic voted against the adoption of that directive.

Forms of order sought by the parties

24. Ireland claims that the Court should:
 - annul Directive 2006/24 on the ground that it was not adopted on an appropriate legal basis, and
 - order the Council and the Parliament to pay the costs.
25. The Parliament contends that the Court should:
 - primarily, dismiss the action as unfounded, and
 - order Ireland to pay all the costs of the present proceedings,
 - or, in the alternative, should the Court annul Directive 2006/24, declare that the ef-

fects of that directive are to remain in force until a new measure enters into force.

26. The Council contends that the Court should:
 - dismiss the action brought by Ireland, and
 - order Ireland to pay the costs.
27. By orders of 1 February 2007, the President of the Court granted leave to the Slovak Republic to intervene in support of the form of order sought by Ireland and to the Kingdom of Spain, the Kingdom of the Netherlands, the Commission and the European Data Protection Supervisor to intervene in support of the forms of order sought by the Parliament and the Council.

The action

Arguments of the parties

28. Ireland submits that the choice of Article 95 EC as the legal basis for Directive 2006/24 is a fundamental error. Neither Article 95 EC nor any other provision of the EC Treaty is, in its view, capable of providing an appropriate legal basis for that directive. Ireland argues principally that the sole objective or, at least, the main or predominant objective of that directive is to facilitate the investigation, detection and prosecution of crime, including terrorism. Therefore, the only legal basis on which the measures contained in Directive 2006/24 may be validly based is Title VI of the EU Treaty, in particular Articles 30 EU, 31(1)(c) EU and 34(2)(b) EU.
29. Ireland argues that an examination of, in particular, recitals 7 to 11 and 21 in the preamble to Directive 2006/24 and of the fundamental provisions laid down therein, in particular Article 1(1) thereof, shows that reliance on Article 95 EC as the legal basis for that directive is inappropriate and unjustifiable. That directive, it contends, is clearly directed towards the fight against crime.
30. Ireland submits that measures based on Article 95 EC must have as their 'centre of gravity' the harmonisation of national laws in order to improve the functioning of the internal market (see, *inter alia*, Joined Cases C317/04 and C-318/04 Parliament v Council and Commission [2006] ECR I4721). The provisions of Directive 2006/24 concern the fight against crime and are not intended to address defects in the internal market.
31. If, contrary to its main argument, the Court

- were to hold that Directive 2006/24 is indeed intended, *inter alia*, to prevent distortions or obstacles to the internal market, Ireland submits in the alternative that that objective must be regarded as being purely incidental to the main or predominant objective of combating crime.
32. Ireland adds that Directive 2002/58 could be amended by another directive, but the Community legislature is not competent to use an amending directive adopted on the basis of Article 95 EC in order to incorporate into Directive 2002/58 provisions falling outside the competence conferred on the Community under the first pillar. The obligations designed to ensure that data are available for the investigation, detection and prosecution of criminal offences fall within an area which may only be the subject of a measure based on Title VI of the EU Treaty. The adoption of such an instrument would not affect the provisions of Directive 2002/58 within the meaning of Article 47 EU. If the verb 'affect', which is used in that article, were to be properly construed, it would be necessary to interpret it as not precluding a random or incidental overlap of unimportant and secondary subject matter between instruments of the Community and those of the Union.
33. The Slovak Republic supports Ireland's position. It takes the view that Article 95 EC cannot serve as the legal basis for Directive 2006/24, since the latter's main objective is not to eliminate barriers and distortions in the internal market. The directive's purpose, it submits, is to harmonise the retention of personal data in a manner which goes beyond commercial objectives in order to facilitate action by the Member States in the area of criminal law and, for that reason, it cannot be adopted under Community competence.
34. According to the Slovak Republic, the retention of personal data to the extent required by Directive 2006/24 amounts to an extensive interference in the right of individuals to privacy as provided for by Article 8 of the ECHR. It is questionable whether such far-reaching interference may be justified on economic grounds, in this case the enhanced functioning of the internal market. The adoption of an act outside the scope of Community competence, the primary and undisguised purpose of which is the fight against crime and terrorism, would be a more appropriate solution, providing a more proportionate justification for interference with the right of individuals to protection of their privacy.
35. The Parliament submits that Ireland is being selective in its interpretation of the provisions of Directive 2006/24. Recitals 5 and 6 in the preamble thereto, it argues, make it clear that the main or predominant purpose of that directive is to eliminate obstacles to the internal market for electronic communications services, while recital 25 confirms that the access to and use of the retained data for law-enforcement purposes fall outside the scope of Community competence.
36. The Parliament submits that, following the terrorist attacks of 11 September 2001 in New York (United States), 11 March 2004 in Madrid (Spain) and 7 July 2005 in London (United Kingdom), a number of Member States adopted divergent rules on the retention of data. Such differences were liable to impede the provision of electronic communications services. The Parliament takes the view that the retention of data constitutes a significant cost element for the providers of publicly available electronic communications services or of public communications networks ('service providers') and the existence of different requirements in that field may distort competition within the internal market. It adds that the main purpose of Directive 2006/24 is to harmonise the obligations imposed by the Member States on service providers in regard to data retention. It follows that Article 95 EC is the correct legal basis for that directive.
37. The Parliament also argues that reliance on Article 95 EC as the legal basis is not invalidated by the importance attributed to combating crime. While crime prevention has clearly influenced the choices made in Directive 2006/24, that concern does not invalidate the choice of Article 95 EC as the legal basis for that directive.
38. Furthermore, Article 4 of Directive 2006/24 provides, in a manner consistent with the view expressed in recital 25 in the preamble thereto, that the conditions for access to and processing of retained data must be defined by the Member States subject to the legal provisions of the Union and international law, in particular the ECHR. That approach differs from that adopted for the measures which were the subject of the judgment in *Parliament v Council and Commission*, a case in which airline companies were obliged to grant access to passenger data to a law-enforcement authority

- in a non-member country. Directive 2006/24 thus respects the separation of areas of competence between the first and third pillars.
39. According to the Parliament, although the retention of an individual's personal data may in principle constitute interference within the meaning of Article 8 of the ECHR, that interference may be justified, in terms of that article, by reference to public safety and crime prevention. The issue of justification for such interference must be distinguished from that of the correct choice of the legal basis within the legal system of the Union, that being an unrelated matter.
40. The Council submits that, in the years following the adoption of Directive 2002/58, national law-enforcement authorities were becoming increasingly concerned about the exploitation of developments in the area of electronic communications for the purpose of committing criminal acts. Those new concerns led the Member States to adopt measures to prevent data relating to those communications from being erased and to ensure that they were available to law-enforcement authorities. Those measures, the Council continues, were divergent and began to affect the proper functioning of the internal market. Recitals 5 and 6 in the preamble to Directive 2006/24 are explicit in that regard.
41. That situation obliged the Community legislature to ensure that uniform rules were imposed on service providers with regard to the conditions under which they carried out their activities.
42. For those reasons, during 2006 the Community legislature considered it necessary to put an end to the obligation to erase data imposed by Articles 5, 6 and 9 of Directive 2002/58 and to provide that, in future, the data referred to in Article 5 of Directive 2006/24 would have to be retained for a certain period. That amendment obliges the Member States to ensure that such data are retained for a minimum period of six months and a maximum of two years from the date of the communication. The purpose of that amendment was to establish precise and harmonised conditions with which service providers must comply in respect of the erasure or non-erasure of the personal data referred to in Article 5 of Directive 2006/24 by thus introducing common rules in the Community with a view to ensuring the unity of the internal market.
43. The Council takes the view that, while the need to combat crime, including terrorism, was a determining factor in the decision to amend the scope of the rights and obligations laid down in Articles 5, 6 and 9 of Directive 2002/58, that circumstance did not prevent Directive 2006/24 from having to be adopted on the basis of Article 95 EC.
44. Neither Articles 30 EU, 31 EU and 34 EU nor any other article in the EU Treaty can serve as the basis for a measure which, in substance, has the objective of amending the conditions under which service providers carry out their activities or of making the system established by Directive 2002/58 inapplicable to them.
45. Rules relating to the categories of data to be retained by service providers and the retention period for those data which amend the obligations imposed on the latter by Directive 2002/58 cannot be the subject of an instrument based on Title VI of the EU Treaty. The adoption of such an instrument would affect the provisions of that directive, in breach of Article 47 EU.
46. According to the Council, the rights protected by Article 8 of the ECHR are not absolute and may be subject to restrictions under the conditions laid down in Article 8(2) thereof. As provided in Directive 2006/24, the retention of data serves a legitimate public interest, recognised in Article 8(2) of the ECHR, and constitutes an appropriate means by which to protect that interest.
47. The Kingdom of Spain and the Kingdom of the Netherlands submit that, as is apparent from recitals 1, 2, 5 and 6 in the preamble to Directive 2006/24, the main purpose of that directive is to eliminate obstacles to the internal market generated by existing legal and technical differences between the national provisions of the Member States. That directive, in their view, regulates the retention of data with the aim of eliminating that type of obstacles, first, by harmonising the obligation to retain data and, second, by specifying the criteria relevant to that obligation, such as the categories of data to be retained and the retention period.
48. The fact that, under Article 1, Directive 2006/24 effects such harmonisation 'in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law' is a separate matter. Directive 2006/24 does not regulate the pro-

cessing of data by the public or law-enforcement authorities of the Member States. On the contrary, that harmonisation relates only to the aspects of data retention which directly affect the commercial activities of service providers.

49. In so far as Directive 2006/24 amends Directive 2002/58 and has a connection with Directive 95/46, the amendments which it contains may be properly implemented only by means of a Community instrument and not by an instrument based on the EU Treaty.
50. The Commission recalls that, prior to the adoption of Directive 2006/24, several Member States had adopted national measures on data retention pursuant to Article 15(1) of Directive 2002/58. It highlights the significant divergences which existed between those measures. For example, the retention periods varied from three months in the Netherlands to four years in Ireland. The obligations relating to data retention have significant economic implications for service providers. Divergences between those obligations could lead to distortions in the internal market. In that context, it was legitimate to adopt Directive 2006/24 on the basis of Article 95 EC.
51. Furthermore, Directive 2006/24 limits, in a manner harmonised at Community level, the obligations laid down by Directive 2002/58. Since the latter was based on Article 95 EC, the legal basis of Directive 2006/24 cannot be different.
52. The reference to the investigation, detection and prosecution of serious crime in Article 1(1) of Directive 2006/24 falls under Community law because it serves to indicate the legitimate objective of the restrictions imposed by that directive on the rights of individuals with regard to data protection. Such an indication is necessary in order to comply both with the requirements of Directives 95/46 and 2002/58 and with those of Article 8 of the ECHR.
53. The European Data Protection Supervisor submits that the subject-matter of Directive 2006/24 is covered by Article 95 EC because, first, that directive has a direct impact on the economic activities of service providers and may therefore contribute to the establishment and functioning of the internal market and, second, had the Community legislature not intervened, a distortion of competition in the internal market might have occurred. The aim of combating crime is not the sole, or even the predominant, objective of that directive.

On the contrary, it was intended in the first place to contribute to the establishment and functioning of the internal market and to the elimination of distortions of competition. The directive harmonises the national provisions on the retention by private undertakings of certain data in the course of their normal economic activities.

54. Furthermore, Directive 2006/24 amends Directive 2002/58, which was adopted on the basis of Article 95 EC, and ought for that reason to be adopted on the same legal basis. Under Article 47 EU, the Community legislature alone is competent to amend obligations arising from a directive based on the EC Treaty.
55. According to the European Data Protection Supervisor, if the EC Treaty could not serve as the basis for Directive 2006/24, the provisions of Community law relating to data protection would not protect citizens in cases where the processing of their personal data would facilitate crime prevention. In such a situation, the general system of data protection under Community law would apply to data-processing for commercial purposes but not to the processing of those data for purposes of crime prevention. That would give rise to difficult distinctions for service providers and to a reduction in the level of protection for data subjects. Such a situation should be avoided. The need for consistency justifies the adoption of Directive 2006/24 under the EC Treaty.

Findings of the Court

56. It must be noted at the outset that the question of the areas of competence of the European Union presents itself differently depending on whether the competence in issue has already been accorded to the European Union in the broad sense or has not yet been accorded to it. In the first hypothesis, it is a question of ruling on the division of areas of competence within the Union and, more particularly, on whether it is appropriate to proceed by way of a directive based on the EC Treaty or by way of a framework decision based on the EU Treaty. By contrast, in the second hypothesis, it is a question of ruling on the division of areas of competence between the Union and the Member States and, more particularly, on whether the Union has encroached on the latter's areas of competence. The present case comes under the first of those two hypotheses.
57. It must also be stated that the action brought

- by Ireland relates solely to the choice of legal basis and not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy contained in Directive 2006/24.
58. Ireland, supported by the Slovak Republic, contends that Directive 2006/24 cannot be based on Article 95 EC since its 'centre of gravity' does not concern the functioning of the internal market. The sole objective of the directive, or at least its principal objective, is, it is contended, the investigation, detection and prosecution of crime.
 59. That argument cannot be accepted.
 60. According to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see Case C-440/05 *Commission v Council* [2007] ECR I9097, paragraph 61 and the case-law cited).
 61. Directive 2006/24 was adopted on the basis of the EC Treaty and, in particular, Article 95 EC.
 62. Article 95(1) EC provides that the Council is to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
 63. The Community legislature may have recourse to Article 95 EC in particular where disparities exist between national rules which are such as to obstruct the fundamental freedoms or to create distortions of competition and thus have a direct effect on the functioning of the internal market (see, to that effect, Case C380/03 *Germany v Parliament and Council* [2006] ECR I-11573, paragraph 37 and the case-law cited).
 64. Furthermore, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from the divergent development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (*Germany v Parliament and Council*, paragraph 38 and the case-law cited).
 65. It is necessary to ascertain whether the situation which led to the adoption of Directive 2006/24 satisfies the conditions set out in the preceding two paragraphs.
 66. As is apparent from recitals 5 and 6 in the preamble to that directive, the Community legislature started from the premiss that there were legislative and technical disparities between the national provisions governing the retention of data by service providers.
 67. In that connection, the evidence submitted to the Court confirms that, following the terrorist attacks mentioned in paragraph 36 of this judgment, several Member States, realising that data relating to electronic communications constitute an effective means for the detection and prevention of crimes, including terrorism, adopted measures pursuant to Article 15(1) of Directive 2002/58 with a view to imposing obligations on service providers concerning the retention of such data.
 68. It is also clear from the file that the obligations relating to data retention have significant economic implications for service providers in so far as they may involve substantial investment and operating costs.
 69. The evidence submitted to the Court shows, moreover, that the national measures adopted up to 2005 pursuant to Article 15(1) of Directive 2002/58 differed substantially, particularly in respect of the nature of the data retained and the periods of data retention.
 70. Finally, it was entirely foreseeable that the Member States which did not yet have rules on data retention would introduce rules in that area which were likely to accentuate even further the differences between the various existing national measures.
 71. In the light of that evidence, it is apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time.
 72. Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.
 73. Furthermore, it must also be noted that, by laying down a harmonised level of retention of data relating to electronic communications, Directive 2006/24 amended the provisions of Directive 2002/58.
 74. Directive 2002/58 is based on Article 95 EC.

75. Under Article 47 EU, none of the provisions of the EC Treaty may be affected by a provision of the EU Treaty. That requirement appears in the first paragraph of Article 29 EU, which introduces Title VI of the EU Treaty, entitled 'Provisions on police and judicial cooperation in criminal matters' (Case C-440/05 *Commission v Council*, paragraph 52).
76. In providing that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them, Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire* (Case C-91/05 *Commission v Council* [2008] ECR I-0000, paragraph 59).
77. It is the task of the Court to ensure that acts which, according to one party, fall within the scope of Title VI of the Treaty on European Union and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community (Case C-91/05 *Commission v Council*, paragraph 33 and the case-law cited).
78. In so far as the amendment of Directive 2002/58 effected by Directive 2006/24 comes within the scope of Community powers, Directive 2006/24 could not be based on a provision of the EU Treaty without infringing Article 47 thereof.
79. In order to determine whether the legislature has chosen a suitable legal basis for the adoption of Directive 2006/24, it is also appropriate, as follows from paragraph 60 of this judgment, to examine the substantive content of its provisions.
80. In that connection, the provisions of Directive 2006/24 are essentially limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States.
81. More specifically, the provisions of Directive 2006/24 are designed to harmonise national laws on the obligation to retain data (Article 3), the categories of data to be retained (Article 5), the periods of retention of data (Article 6), data protection and data security (Article 7) and the conditions for data storage (Article 8).
82. By contrast, the measures provided for by Directive 2006/24 do not, in themselves, involve intervention by the police or law-enforcement authorities of the Member States. Thus, as is clear in particular from Article 3 of the directive, it is provided that service providers are to retain only data that are generated or processed in the course of the provision of the relevant communication services. Those data are solely those which are closely linked to the exercise of the commercial activity of the service providers.
83. Directive 2006/24 thus regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that relating to the use and exchange of those data between those authorities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of that directive, as is stated, in particular, in recital 25 in the preamble to, and Article 4 of, Directive 2006/24.
84. It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty.
85. In light of that substantive content, Directive 2006/24 relates predominantly to the functioning of the internal market.
86. Against such a finding, Ireland argues that, by the judgment in *Parliament v Council and Commission*, the Court annulled Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ 2004 L 183, p. 83, and – corrigendum – OJ 2005 L 255, p. 168).
87. In paragraph 68 of the judgment in *Parliament v Council and Commission*, the Court held that that agreement related to the same transfer of data as did Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection (OJ 2004 L 235, p. 11).
88. The latter decision concerned the transfer of passenger data from the reservation systems of air carriers situated in the territory of the Mem-

ber States to the United States Department of Homeland Security, Bureau of Customs and Border Protection. The Court held that that the subject-matter of that decision was data-processing which was not necessary for a supply of services by the air carriers, but which was regarded as necessary for safeguarding public security and for law-enforcement purposes. In paragraphs 57 to 59 of the judgment in *Parliament v Council and Commission*, the Court held that such data-processing was covered by Article 3(2) of Directive 95/46, according to which that directive does not apply, in particular, to the processing of personal data relating to public security and the activities of the State in areas of criminal law. The Court accordingly concluded that Decision 2004/535 did not fall within the scope of Directive 95/46.

89. Since the agreement which was the subject of Directive 2004/496 related, in the same way as Decision 2004/535, to data-processing which was excluded from the scope of Directive 95/46, the Court held that Decision 2004/496 could not have been validly adopted on the basis of Article 95 EC (*Parliament v Council and Commission*, paragraphs 68 and 69).
90. Such a line of argument cannot be transposed to Directive 2006/24.
91. Unlike Decision 2004/496, which concerned a transfer of personal data within a framework instituted by the public authorities in order to ensure public security, Directive 2006/24 covers the activities of service providers in the internal market and does not contain any rules governing the activities of public authorities for law-enforcement purposes.
92. It follows that the arguments which Ireland draws from the annulment of Decision 2004/496 by the judgment in *Parliament v Council and Commission* cannot be accepted.
93. Having regard to all of the foregoing considerations, Directive 2006/24 had to be adopted on the basis of Article 95 EC.
94. The present action must accordingly be dismissed.

Costs

95. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful parties' pleadings. Since the Parliament and the Council have applied for Ireland

to be ordered to pay the costs and Ireland has been unsuccessful, Ireland must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in this case are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**
2. **Orders Ireland to pay the costs;**
3. **Orders the Kingdom of Spain, the Kingdom of the Netherlands, the Slovak Republic, the Commission of the European Communities and the European Data Protection Supervisor to bear their own respective costs.**

[Signatures]

COMMON FOREIGN AND SECURITY POLICY, OBLIGATION TO REVIEW ALL COMMUNITY ACTS IN THE LIGHT OF THE FUNDAMENTAL RIGHTS

JOINED CASES C 399/06 P AND C-403/06 P FARAJ HASSAN v COUNCIL OF THE EUROPEAN UNION AND EUROPEAN COMMISSION (C-399/06 P) AND CHAFIQ AYADI v COUNCIL OF THE EUROPEAN UNION (C-403/06 P)

3 December 2009

(Common foreign and security policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Regulation (EC) No 881/2002 – Freezing of the funds and economic resources of a person following his inclusion in a list drawn up by a body of the United Nations – Sanctions Committee – Subsequent inclusion in Annex I to Regulation (EC) No 881/2002 – Action for annulment – Fundamental rights – Right to respect for property, right to be heard and right to effective judicial review)

In Cases C399/06 P and C-403/06 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, brought on 20 and 22 September 2006, respectively, Faraj Hassan, residing in Leicester (United Kingdom), represented by E. Grieves, Barrister, instructed by H. Miller, Solicitor, and subsequently by J. Jones, Barrister, instructed by M. Arani, Solicitor, appellant,

the other parties to the proceedings being:

Council of the European Union, represented by S. Marquardt, M. Bishop and E. Finnegan, acting as Agents, European Commission, represented by P. Hetsch and P. Aalto, acting as Agents, with an address for service in Luxembourg, defendants at first instance, supported by: French Republic, United Kingdom of Great Britain and Northern Ireland,

interveners on appeal (C399/06 P), Chafiq Ayadi, residing in Dublin (Ireland), represented by S. Cox, Barrister, instructed by H. Miller, Solicitor, appellant, the other parties to the proceedings being:

Council of the European Union, represented by M. Bishop and E. Finnegan, acting as Agents, defendant at first instance, supported by: French Republic, intervener on appeal, United Kingdom of Great Britain and Northern Ireland, European Commission, represented by P. Hetsch and P. Aalto, acting as Agents, with an address for service in Luxembourg, interveners at first instance (C-403/06 P),

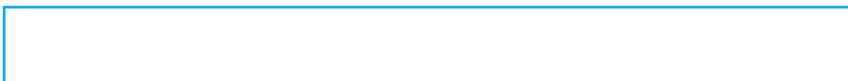
THE COURT (Second Chamber), composed of J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans (Rapporteur), K. Schiemann and P. Küris, Judges, Advocate General: M. Poiares Maduro,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 24 September 2009, in Case C399/06 P,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following Judgment

1. By their appeals, Mr Hassan (Case C399/06 P) and Mr Ayadi (Case C403/06 P) seek to have set aside the judgments of the Court of First Instance of the European Communities of 12 July 2006 in Case T49/04 Hassan v Council and Commission [2006] ECR II52 ('Hassan') and in Case T253/02 Ayadi v Council [2006] ECR II2139 ('Ayadi') (together, the judgments under appeal).
2. By the judgments under appeal the Court of First Instance dismissed the actions brought by Mr Hassan and Mr Ayadi for annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9, 'the contested regulation'), in so far as that act concerned them. Mr Hassan's action was particularly directed against the contested regulation as amended by Commission Regulation (EC) No



2049/2003 (OJ 2003 L 303, p. 20). By its judgment in Hassan the Court of First Instance also dismissed Mr Hassan's claim for compensation.

History of the cases

3. The history of the cases was set out in Hassan, paragraphs 6 to 34, and in Ayadi, paragraphs 11 to 49.
4. For the purpose of this judgment, those histories may be briefly summarised as follows.
5. On 19 October 2001, the committee established by Resolution 1267 (1999) of the Security Council of the United Nations ('the Sanctions Committee') published an addendum to its consolidated list of 8 March 2001 of entities and individuals to be subject to the freezing of funds under Resolutions 1267 (1999) and 1333 (2000) of the Security Council of the United Nations (see press release SC/7180), including inter alia the name of Mr Ayadi, who was identified as being a person associated with Usama bin Laden.
6. On the same day, the Commission of the European Communities adopted Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25). By Regulation No 2062/2001 Mr Ayadi's name was added, with others, to the list forming Annex I to Council Regulation No 467/2001 of 6 March 2001 (OJ 2001 L 67, p. 1).
7. On 16 January 2002 the Security Council of the United Nations ('the Security Council') adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Paragraphs 1 and 2 of that resolution provide, in essence, that the measures, in particular the freezing of funds, imposed by paragraph 4(b) of Resolution 1267 (1999) and by paragraph 8(c) of Resolution 1333 (2000) are to be maintained.
8. Considering that action by the European Community was necessary in order to implement Resolution 1390 (2002), on 27 May 2002 the Council of the European Union adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of Common Position 2002/402 prescribes, inter alia, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).
9. On 27 May 2002 the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.
10. According to the fourth recital in the preamble to that regulation, the measures laid down, inter alia, by Resolution 1390 (2002) fall [within] the scope of the [EC] Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.'
11. Article 1 of the contested regulation defines the concepts of 'funds' and 'freezing of funds' in terms substantially identical to those in Article 1 of Regulation 467/2001. In addition, it defines what is meant by 'economic resources'.
12. Article 2 of the contested regulation states:
 - '1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.
 2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.
 3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'
13. Annex I to Regulation No 881/2002 contains the list of persons, entities and groups affected by the freezing of funds imposed by Article 2 of that regulation. That list includes, inter alia, Mr Ayadi's name.
14. While Mr Ayadi's name remains to this day included in that list, the wording of the entry

referring to him has on several occasions been replaced by Commission regulations adopted on the basis of Article 7(1) of the contested regulation and conferring on the Commission the power to amend or add to Annex I to that regulation, most recently by Regulation (EC) No 76/2006 of 17 January 2006 (OJ 2006 L 12, p. 7).

15. On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counterterrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999) and 1390 (2002), which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.
16. On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures were again to be improved after 12 months or earlier if necessary.
17. Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), the Council adopted Common Position 2003/140/CFSP of 27 February 2003 concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62). Article 1 of Common Position 2003/140 provides that, when implementing the measures set out in Article 3 of Common Position 2002/402, the European Community is to provide for the exceptions permitted by that resolution.
18. On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of Resolution 1452 (2002), to adjust the measures imposed by the Community.
19. On 12 November 2003 the Sanctions Committee adopted an addendum to its consolidated list of entities and individuals to be subject to the freezing of funds under Resolutions 1267

(1999), 1333 (2000) and 1390 (2002). That addendum includes, inter alia, the name of Mr Hassan, identified as being a person associated with the Al-Qaeda organisation.

20. On 20 November 2003 the Commission adopted Regulation No 2049/2003 amending for the 25th time Regulation No 881/2002. By Regulation No 2049/2003 Mr Hassan's name was added, with others, to the list forming the Annex to the contested regulation.
21. On 30 January 2004 the Security Council adopted Resolution 1526 (2004), designed, first, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002), and, secondly, to strengthen the mandate of the Sanctions Committee. In accordance with Paragraph 3 of Resolution 1526 (2004), those measures were to be further improved in 18 months, or sooner if necessary.
22. On 29 July 2005 the Security Council adopted Resolution 1617 (2005). This provides, inter alia, for the continuation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 21 of Resolution 1617 (2005), those measures were to be reviewed within 17 months with a view to their possible further strengthening or sooner if necessary.
23. Mr Ayadi remains included in the list forming Annex I to the contested regulation. The entry concerning him has been replaced by Commission Regulation No 1210/2006 of 9 August 2006 (EC) amending for the 67th time Regulation (EC) No 881/2002 (OJ L 219, p. 14).
24. Similarly, while Mr Hassan's name too still appears in that list, the entry concerning him has been replaced by Commission Regulation (EC) No 46/2008 of 18 January 2008 amending for the 90th time Regulation (EC) No 881/2002 (OJ L 16, p. 11).

The actions before the Court of First Instance and the judgments under appeal

25. By application lodged at the Registry of the Court of First Instance on 12 February 2004, Mr Hassan brought an action against the Council and the Commission for annulment of the con-

tested regulation and claimed that the Court of First Instance should:

- principally, annul in whole or in part the contested regulation as amended by Regulation No 2049/2003, or the latter regulation only;
 - or, alternatively, declare the contested regulation and Regulation No 2049/2003 inapplicable to him;
 - take such further action as it might deem appropriate;
 - order the Council to pay the costs and
 - order the Council to pay him damages.
26. At the hearing before the Court of First Instance, Mr Hassan stated that his action challenged the contested regulation and Regulation No 2049/2003 only in so far as they were of direct and individual concern to him.
27. By application lodged at the Registry of the Court of First Instance on 26 August 2002, Mr Ayadi brought an action against the Council for annulment of the contested regulation, claiming that the Court of First Instance should:
- annul Article 2 of the contested regulation and, in so far as it refers to Article 2, Article 4 thereof;
 - or, alternatively, annul the entry mentioning him in the list forming Annex I to the contested regulation, and
 - order the Council to pay the costs.
28. At the hearing before the Court of First Instance, Mr Ayadi stated that his action challenged the contested regulation only in so far as it was of direct and individual concern to him.
29. In the case concerning Mr Ayadi, the United Kingdom of Great Britain and Northern Ireland and the Commission were granted leave to intervene before the Court of First Instance in support of the forms of order sought by the Council.
30. In support of his claims, Mr Hassan raised a single plea in law alleging breach of certain of his fundamental rights and of the general principle of proportionality. His complaints related more particularly to the alleged breach of the right to respect for property and of the right to respect for private and family life, on the one hand, and to the alleged breach of the right to be heard and of the right to a fair hearing, on

the other.

31. Mr Ayadi, for his part, based his claims on three pleas in law, the first alleging that the Council was not competent to adopt Articles 2 and 4 of the contested regulation and a misuse of powers, the second alleging breach of the fundamental principles of subsidiarity, proportionality and respect for his fundamental rights and the third alleging infringement of an essential procedural requirement.
32. Because, without prejudice to the claim for compensation in Mr Hassan's appeal, these appeals are confined to the parts of the judgments under appeal relating to the pleas in law alleging breach of the appellants' fundamental rights, only those parts of those judgments will be summarised below.
33. With regard to those pleas in law, the Court of First Instance held in Hassan, paragraph 91, and Ayadi, paragraph 115, that, subject only to a single point of law specific to each of those cases, all the points of law raised by the applicants had already been settled in its judgments of 21 September 2005 in Case T306/01 Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II3533 ('Yusuf at first instance'), paragraphs 226 to 346, and Case T315/01 Kadi v Council and Commission [2005] ECR II3649 ('Kadi at first instance'), paragraphs 176 to 291 (together, 'Yusuf and Kadi at first instance').
34. In paragraph 92 of Hassan, as in paragraph 116 of Ayadi, similarly worded, it was noted that, in Yusuf and Kadi at first instance, the Court of First Instance had in particular ruled as follows:
- '...
from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international Treaty law including, for those of them that are members of the Council of Europe, their obligations under the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'),] and, for those that are also members of the Community, their obligations under the EC Treaty (Yusuf at first instance, paragraph 231, and Kadi at first instance, paragraph 181);
- that primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter

of the United Nations (Yusuf at first instance, paragraph 234, and Kadi at first instance, paragraph 184);

– although not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it (Yusuf at first instance, paragraph 243, and Kadi at first instance, paragraph 193);

– first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations (Yusuf at first instance, paragraph 254, and Kadi at first instance, paragraph 204);

– as a result, the arguments challenging the contested regulations and based, on the one hand, on the autonomy of the Community legal order vis-à-vis the legal order under the United Nations and, on the other, on the necessity of transposing Security Council resolutions into the domestic law of the Member States, in accordance with the constitutional provisions and fundamental principles of that law, must be rejected (Yusuf at first instance, paragraph 258, and Kadi at first instance, paragraph 208);

– [the contested] regulation ... adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations (Yusuf at first instance, paragraph 264, and Kadi at first instance, paragraph 213);

– in that situation, the Community institutions acted under circumscribed powers, with the result that they had no autonomous discretion (Yusuf at first instance, paragraph 265, and Kadi at first instance, paragraph 214);

– in light of the considerations set out above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council or of the

Sanctions Committee according to the standard of protection of fundamental rights as recognised by the Community legal order cannot be justified either on the basis of international law or on the basis of Community law (Yusuf at first instance, paragraph 272, and Kadi at first instance, paragraph 221);

– the resolutions of the Security Council at issue therefore fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law; on the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations (Yusuf at first instance, paragraph 276, and Kadi at first instance, paragraph 225);

– none the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible (Yusuf at first instance, paragraph 277, and Kadi at first instance, paragraph 226);

– the freeing of funds provided for by [the contested] regulation ... infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens* (Yusuf at first instance, paragraphs 288 and 289, and Kadi at first instance, paragraphs 237 and 238);

– since the Security Council resolutions concerned do not provide a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in the list in question and since it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case, the arguments alleging breach of such a right must be rejected (Yusuf at first instance, paragraphs 306, 307 and 321, and Kadi at first instance, paragraphs 261 and 268);

– in these circumstances in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council

or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (Yusuf at first instance, paragraph 320, and Kadi at first instance, paragraph 274);

– nor were the Community institutions obliged to hear the persons concerned before [the contested regulation ... was adopted (Yusuf at first instance, paragraph 329) or in the context of the adoption and implementation of that act (Kadi at first instance, paragraph 259);

– in dealing with an action for annulment such as the present action, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions; the Court also reviews the lawfulness of the contested regulations having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether those regulations are proportionate to the resolutions; the Court reviews the lawfulness of the contested regulations and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person (Yusuf at first instance, paragraphs 334, 335 and 337, and Kadi at first instance, paragraphs 279, 280 and 282);

– on the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order; nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 337 above, to check indirectly the appropriateness and proportionality of those measures (Yusuf at first instance, paragraphs 338 and 339, and Kadi at first instance, paragraphs 283 and 284);

– to that extent, there is no judicial remedy available to the persons concerned, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions

taken by the Sanctions Committee (Yusuf at first instance, paragraph 340, and Kadi at first instance, paragraph 285);

– the lacuna thus found to exist in the previous indent in the judicial protection available to the persons involved is not in itself contrary to *jus cogens*, for (a) the right of access to the courts is not absolute; (b) the limitation of the right of the persons concerned to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, is inherent in that right; (c) such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII and by the legitimate objective pursued, and (d) in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving the governments concerned, constitute another reasonable method of affording adequate protection of the fundamental rights of the persons concerned as recognised by *jus cogens* (Yusuf [at first instance], paragraphs 341 to 345, and Kadi [at first instance], paragraphs 286 to 290);

– the arguments relied on to challenge the contested regulations alleging breach of the right to an effective judicial remedy must consequently be rejected (Yusuf [at first instance], paragraph 346, and Kadi [at first instance], paragraph 291).'

35. In paragraphs 95 to 124 of Hassan, the Court of First Instance added a number of points in response to the arguments more specifically propounded by Mr Hassan at the hearing concerning, on the one hand, the allegedly excessive strictness of the measure freezing all his funds and economic resources and, on the other, the alleged invalidity, in the circumstances, of the conclusions reached by the Court of First Instance in Yusuf and Kadi at first instance concerning the compatibility with *jus cogens* of the lacuna found in those judgments to exist in the judicial protection of the persons concerned.
36. Similarly, in paragraphs 117 to 154 of Ayadi, the Court of First Instance added a number of points to those set out in paragraph 34 above in response to the arguments more specifi-

cally propounded by Mr Ayadi concerning, on the one hand, the alleged ineffectiveness of the exemptions to and derogations from the freezing of funds provided for by Regulation No 561/2003, especially as regards carrying on a trade or business and, on the other, the alleged invalidity, in the circumstances, of the conclusions reached by the Court in Yusuf and Kadi at first instance concerning the compatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons concerned.

37. The Court of First Instance examined those arguments, concluding that they could not call in question the assessment it had made of the points of law raised in Yusuf and Kadi at first instance.
38. In paragraphs 126 to 128 of Hassan, the Court of First Instance went on to examine Mr Hassan's complaints relating to a breach of his right to respect for private and family life and an attack on his reputation, and rejected them for the essential reason that, according to the standard of *jus cogens*, it must be held that that applicant had not suffered any arbitrary interference with the exercise of those rights.
39. Similarly, in paragraph 156 of Ayadi, the Court of First Instance rejected the argument, not yet examined in Yusuf and Kadi at first instance, that the Member States of the United Nations are not bound to apply as they stand the measures that the Security Council 'calls upon' them to adopt.
40. The Court of First Instance therefore dismissed the appellants' claims for annulment as unfounded.
41. Lastly, the Court of First Instance declared inadmissible Mr Hassan's claim for compensation because it lacked all detail, adding that with regard to the other evidence he had produced the claim was on any view unfounded.
42. In consequence, the Court of First Instance dismissed the two actions in their entirety.

Procedure before the Court

43. By order of the President of the Court of 5 November 2008, the French Republic and the United Kingdom were given leave to intervene in support of the form of order sought by the Council and the Commission in Case C399/06 P. By order of the President of the Court of 30 March 2009, the French Republic was given

leave to intervene in support of the form of order sought by the Council in Case C403/06 P.

44. By application lodged at the Court Registry on 7 January 2009, Mr Ayadi applied for the legal aid provided for by Article 76 of the Court's Rules of Procedure.
45. By order of 2 September 2008 the Court granted his application.
46. The parties and the Advocate General having been heard on this point, these cases must, on account of the connection between them, be joined for the purposes of the judgment, in accordance with Article 43 of the Court's Rules of Procedure.

Forms of order sought by the parties to the appeals

47. By his appeal, Mr Hassan claims that the Court should:
 - set aside the judgment in Hassan;
 - annul the contested regulation and/or Regulation No 2049/2003 in their entirety or in respect of the measures directed against him;
 - or, alternatively, declare those regulations inapplicable to him;
 - take such further action as the Court may deem appropriate;
 - order the Council to pay the costs and
 - order the Council to pay him damages.
48. By his appeal, Mr Ayadi claims that the Court should:
 - set aside the judgment in Ayadi in its entirety;
 - declare null and void Articles 2 and 4 of and Annex I to the contested regulation in so far as they are of direct and individual concern to him and
 - order the Council to pay the costs of the proceedings before the Court and the Court of First Instance.
49. In the two cases the Council and the Commission contend that the Court should dismiss the appeals, with the exception of the grounds similar to those held to be well founded by the Court in its judgment of 3 September 2008 in Joined Cases C402/05 P and C415/05 P Kadi

and *Al Barakaat v Council and Commission* [2008] ECR I6351 ('Kadi on appeal') and order the appellants to pay so much of the costs as the Court may deem appropriate.

The grounds put forward in support of the appeals

50. In his first ground of appeal Mr Hassan argues that the Court of First Instance erred in law in its examination of the pleas he raised before it with regard to the breach of certain of his fundamental rights, in that it did not determine directly whether the Security Council offered protection equivalent to that offered by the ECHR, more particularly by Articles 6, 8 and 13 thereof and by Article 1 of Protocol 1 of the ECHR, but rather examined indirectly the actions of the Security Council by virtue of the principle of *jus cogens*.
51. In his second ground of appeal Mr Hassan maintains that the Court of First Instance erred in law in considering that restriction of the use of property was not relevant with regard to the actual substance of the right to property.
52. It is clear from Mr Ayadi's reply that, in the light of *Kadi on appeal*, he now means to submit only two grounds of appeal, the first of which is that the Court of First Instance erred in law in finding that the Community judicature may evaluate the lawfulness of a Community measure giving effect to a resolution of the Security Council only with regard to *jus cogens* and in not holding that it could annul such a measure in order to guarantee the protection of the fundamental rights recognised by the legal order of the United Nations, and the second of which is that the Court of First Instance erred in law in not holding that the parts of the contested regulation which are under challenge constitute a breach of Mr Ayadi's fundamental rights.

Concerning the appeals

The effect of Regulation (EC) No 954/2009 on whether it is necessary to adjudicate

53. By Regulation (EC) No 954/2009 of 13 October 2009 amending for the 114th time Regulation No 881/2002 (OJ L 269, p. 20), the decisions to include Mr Hassan and Mr Ayadi in the list forming Annex I to the contested regulation were replaced by fresh decisions confirming and amending their inclusion.

54. According to the preamble to Regulation No 954/2009, the Commission adopted that regulation, having regard to the case-law of the Court of Justice, in particular to *Kadi on appeal*, after apprising Mr Hassan and Mr Ayadi of the grounds for their inclusion in the list, as provided by the Sanctions Committee and after examining the comments made by the appellants concerning those grounds.
55. In that preamble it is also stated that, after careful examination of those comments, the Commission considered, given the preventive nature of freezing of funds and economic resources, that the inclusion of the two appellants in the list in question was justified by reason of their association with the Al-Qaeda network.
56. In accordance with Article 2 of Regulation No 954/2009, the latter entered into force on the day following its publication in the Official Journal of the European Union, that is to say, 15 October 2009, and has applied as from 30 May 2002 as regards Mr Ayadi and from 21 November 2003 as regards Mr Hassan.
57. The question therefore arises whether, in the light of the withdrawal of the contested regulation and its retroactive replacement by Regulation No 954/2009 with effect from those dates with regard to the appellants, it is still necessary to adjudicate on these cases.
58. It is to be borne in mind that the Court may, of its own motion, raise the objection that a party has no interest in bringing or in maintaining an appeal because an event occurring after the judgment of the Court of First Instance removes the prejudicial effect thereof as regards the appellant, and declare the appeal inadmissible or devoid of purpose for that reason (see, in particular, Case C535/06 P *Moser Baer India v Council* [2009] ECR I0000, paragraph 24, and the case-law cited).

59. In the present case, Article 2 of Regulation No 954/2009 provides that the latter is to apply from the original inclusion of Mr Ayadi and Mr Hassan in the list forming Annex I to the contested regulation, that is to say, since 30 May 2002 and 21 November 2003 respectively.
60. Mr Ayadi and Mr Hassan have been included in that list for a period of seven and six years respectively and have, therefore, been subject to the restrictive measures provided by the contested regulation which the Court has held to have a considerable impact on the rights

and freedoms of the persons concerned (see Kadi on appeal, paragraph 375), while they have maintained, first before the Court of First Instance and then before the Court of Justice in proceedings covering nearly the whole of those periods, that the inclusion of their names in that list was unlawful, for it failed, in particular, to have regard to their fundamental rights, which is not now denied by either the Council or the Commission, in the light of Kadi on appeal.

61. Regulation No 954/2009 has kept the names of Mr Ayadi and Mr Hassan in that list with retroactive force, so that the resulting restrictive measures continued to apply to them for the period for which the contested regulation, as referred to in their actions, was applicable, although the purpose of their actions is to have their names removed from that list.
62. The adoption of Regulation No 954/2009 cannot, therefore, be considered to constitute a fact occurring after the judgments under appeal and capable of rendering the appeals devoid of purpose.
63. Furthermore, Regulation No 954/2009 is not yet definitive, inasmuch as it may be the object of an action for annulment. It is therefore not inconceivable that, supposing that that measure were annulled as a result of such proceedings, the contested regulation might come back into force so far as the appellants are concerned.
64. Those matters supply confirmation that the adoption of Regulation No 954/2009 cannot be regarded as equivalent to annulment pure and simple of the contested regulation in so far as it concerns the appellants by which they have obtained the only result that their actions could have secured for them and that there is accordingly no longer any need for the Court to adjudicate. In that regard the contested regulation differs from the measure at issue in the order of 8 March 1993 in Case C123/92 Lezzi Pietro v Commission [1993] ECR I809.
65. In these particular circumstances, the appeals have not become devoid of purpose and it is necessary for the Court to adjudicate on them in that regard.

Substance

66. A preliminary point to be noted is, in the first place, that at the hearing before the Court of Justice Mr Hassan expressly withdrew his

ground of appeal relating to the claim for compensation. There is, therefore, no longer any need to consider that ground in this appeal.

67. In the second place, as regards the subject-matter of the grounds of appeal, it must be observed that that must be understood to concern, in so far as it relates to each of the appellants respectively, the contested regulation as amended, in connection with Mr Ayadi's case, by Regulation No 1210/2006 and, in Mr Hassan's, by Regulation No 46/2008.

The appellants' grounds of appeal relating to the contested regulation's failure to observe their fundamental rights

68. It is necessary to consider the grounds advanced by the appellants in support of their appeals, in which they object that the Court of First Instance dismissed their pleas in law alleging that the contested regulation failed to observe their fundamental rights.
69. In the judgments under appeal, and relying on its judgments in Yusuf and Kadi, the Court of First Instance essentially held that it follows from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, because it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, may not be the subject of judicial review of its internal lawfulness save with regard to its compatibility with the norms of jus cogens and therefore enjoys, subject to that reservation, immunity from jurisdiction (Hassan, paragraph 92, and Ayadi, paragraph 116).
70. Again relying on its judgments in Yusuf and Kadi, the Court of First Instance held, therefore, that it is with regard to jus cogens, understood as a public international order binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible, that the lawfulness of the contested regulation may be examined, in relation also to the appellants' pleas alleging breach of their fundamental rights (Hassan, paragraph 92, and Ayadi, paragraph 116).
71. It is apparent from paragraphs 326 and 327 of Kadi on appeal that that reasoning amounts to an error of law. The Community judicature must, in accordance with the powers conferred

on it by the Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

72. The Court concluded, in paragraph 328 of Kadi on appeal, that the grounds of appeal put forward by the persons concerned being well founded on that point, it was necessary to set aside Yusuf and Kadi at first instance in that respect.
73. In addition, the Court held, in paragraph 330 of Kadi on appeal, that because in the latter parts of Yusuf and Kadi at first instance, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance had confined itself to examining the lawfulness of the contested regulation in the light of the rules of *jus cogens* alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter parts of those judgments also had to be set aside.
74. It follows that, given that the legal grounds of the judgments under appeal are, as pointed out in paragraphs 69 and 70 above, the same as those relied on in Yusuf and Kadi at first instance, the judgments under appeal are marred by the same error in law and must, therefore, for the same reasons, be set aside in so far as they contain the Court of First Instance's response to the appellants' arguments alleging breach of certain of their fundamental rights.
75. That conclusion is not called in question by the addition, in paragraphs 95 to 125 of Hassan and in paragraphs 117 to 155 of Ayadi, of a number of points in response to the arguments more specifically propounded by the appellants, given that the Court of First Instance concluded that those points demonstrate the correctness of the legal grounds of Yusuf and Kadi at first instance and, in consequence, of the judgments under appeal.
76. Lastly, it is to be noted that at the hearing before the Court Mr Hassan acknowledged that the head of claim raised before the Court of First Instance and dismissed by the latter, relat-

ing to the alleged breach of his right to respect for private and family life, guaranteed by Article 8 of the ECHR, had not been included in his appeal. In the circumstances, there is no need to examine it.

77. The grounds of appeal put forward by the appellants are therefore well founded with the result that the judgments under appeal must be set aside.

Concerning the actions before the Court of First Instance

78. As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits
79. In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.
80. It is appropriate to examine, in the first place, the claims made by the appellants with regard to the breach of the rights of defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.
81. In this regard it has to be found that it is not disputed that the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation are identical to those in which the names of the parties concerned in the cases giving rise to Kadi on appeal had been entered in that list.
82. In the light of those circumstances, the Court held in paragraph 334 of Kadi on appeal that the rights of defence, in particular the right to be heard, and the right to effective judicial review of observance of those rights, had patently not been respected.
83. In paragraph 348 of that judgment the Court likewise held that, because the Council had neither communicated to the persons concerned the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after

those measures were enacted, those persons had not had the opportunity to make their point of view in that respect known to advantage. The Court concluded in that paragraph that their rights of defence, in particular the right to be heard, had not been respected.

84. That conclusion must be reached in the instant cases, and for the same reasons, so that it must be found that the appellants' rights of defence have not been respected.
85. Moreover, the Court ruled in paragraph 349 of *Kadi on appeal* that, given the failure to inform them of the evidence adduced against them and having regard to the relationship, referred to in paragraphs 336 and 337 of that judgment, between the rights of defence and the right to an effective legal remedy, the parties concerned had also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judiciary, with the result that it must be held that their right to an effective legal remedy had also been infringed.
86. The same conclusion must be reached in the instant cases with regard to the appellants' right to an effective legal remedy, so that it must be found that, in the circumstances, that fundamental right of Mr Hassan and Mr Ayadi has not been respected.
87. It must, furthermore, be stated that that infringement has not been remedied in the course of these actions. Indeed, given that, according to the fundamental position adopted by the Council, no evidence of that kind may be the subject of investigation by the Community judiciary, the Council has adduced no evidence to that effect (see, by analogy, *Kadi on appeal*, paragraph 350). What is more, although the Council took formal note in these appeals of the guidance given in *Kadi on appeal*, it must be found that it has produced no information concerning the evidence adduced against the appellants.
88. The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed (see, by analogy, *Kadi on appeal*, paragraph 351).
89. It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the evidence adduced against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed (see, by analogy, *Kadi on appeal*, paragraph 352).
90. It follows from all the foregoing considerations that the pleas in law raised by Mr Hassan and Mr Ayadi in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded (see, by analogy, *Kadi on appeal*, paragraph 353).
91. In the second place, so far as the heads of claim relating to a breach of the right to respect for property caused by the fund-freezing measures imposed by the contested regulation are concerned, the Court held, in paragraph 366 of *Kadi on appeal*, that the restrictive measures imposed by that regulation constituted restrictions of the right to property which might, in principle, be justified.
92. It is, however, established that the contested regulation, in so far as it concerns Mr Hassan and Mr Ayadi, was adopted without furnishing any guarantee enabling them to put their case to the competent authorities, in a situation in which the restriction of their property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting them (see, by analogy, *Kadi on appeal*, paragraph 369).
93. It must therefore be held that, in the circumstances of these cases, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Hassan and Mr Ayadi, by including them in the list contained in Annex I to that regulation, constitutes an unjustified restriction of their right to property (see, by analogy, *Kadi on appeal*, paragraph 370).
94. The appellants' claims that their fundamental right to respect for property has been infringed are therefore well founded.
95. In the circumstances, it is no longer necessary

to examine Mr Hassan's heads of claim concerning the alleged breach of his right to respect for his private and family life, guaranteed by Article 8 of the ECHR.

96. It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled, account being taken of the clarification in paragraph 67 above as to the version of that regulation concerned by the appellants' respective appeals.

Costs

97. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first paragraph of Article 69(4) provides that the Member States which have intervened in the proceedings are to bear their own costs.
98. Because Mr Hassan and Mr Ayadi's appeals must be upheld and because the contested regulation must be annulled in so far as it concerns the appellants and within the limits described in paragraph 67 above, the Council must be ordered to pay, in addition to its own costs, those incurred by Mr Hassan and Mr Ayadi, both at first instance and on appeal in accordance with the forms of order sought by the appellants.
99. The United Kingdom is to bear its own costs both at first instance and in the appeals.
100. The French Republic is to bear its own costs relating to the appeals.
101. The Commission is to bear its own costs at first instance and in the appeal in the case concerning Mr Hassan. In the case concerning Mr Ayadi, the Commission is to bear its own costs, in respect both of its intervention before the Court of First Instance and of the proceedings before the Court.

On those grounds, the Court (Second Chamber) hereby:

1. **Sets aside the judgments of the Court of First Instance of the European Communities of 12 July 2006 in Case T49/04 Hassan v Council**

and Commission and in Case T253/02 Ayadi v Council;

2. **Annuls Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, as amended by Commission Regulation (EC) No 46/2008 of 18 January 2008, in so far as it concerns Mr Hassan;**
3. **Annuls Regulation No 881/2002, as amended by Commission Regulation (EC) No 1210/2006 of 9 August 2006, in so far as it concerns Mr Ayadi;**
4. **Orders the Council of the European Union to pay, in addition to its own costs, the costs incurred by Mr Hassan and Mr Ayadi both at first instance and in these appeals;**
5. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs, both at first instance in the case concerning Mr Ayadi and in these appeals;**
6. **Orders the French Republic to bear its own costs;**
7. **Orders the European Commission to bear its own costs both at first instance and in the appeal in the case concerning Mr Hassan. Orders the European Commission, in the case concerning Mr Ayadi, to bear its own costs, in respect both of its intervention before the Court of First Instance of the European Communities and of the proceedings before the Court of Justice of the European Union.**

[Signatures]

PROTECTION OF CONFIDENTIAL INFORMATION AS SUBSTANTIVE RIGHT, REFERENCE TO ARTICLE 8 OF THE ECHR, WITHHOLDING INFORMATION TO PRESERVE THE FUNDAMENTAL RIGHTS OF THIRD PARTIES, PRIVATE LIFE, PROTECTION OF BUSINESS SECRETS

VAREC SA v BELGIAN STATE

14 February 2008¹⁹

(Public procurement – Review – Directive 89/665/EEC – Effective review – Meaning – Balance between the adversarial principle and the right to observance of business secrets – Protection, by the body responsible for the review, of the confidentiality of information provided by economic operators)

In Case C450/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (Council of State) (Belgium), made by decision of 24 October 2006, received at the Court on 6 November 2006, in the proceedings Varec SA

v

État belge, interveners: Diehl Remscheid GmbH & Co.,

THE COURT (Third Chamber), composed of A. Rosas, President of Chamber, J.N. Cunha Rodrigues (Rapporteur), J. Klučka, P. Lindh and A. Arabadjiev, Judges, Advocate General: E. Sharpston, Registrar: R. Grass,

having regard to the written procedure, after considering the observations submitted on behalf of:

- Varec SA, by J. Bourtembourg and C. Molitor, avocats,
- the Belgian Government, by A. Hubert, acting as Agent, assisted by N. Cahen, avocat,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Commission of the European Communities, by B. Stromsky and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007, gives the following Judgment

¹⁹ Language of the case: French.

1. The reference for a preliminary ruling concerns the interpretation of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; Directive 89/665).
2. The reference was made in proceedings between Varec SA ('Varec') and the Belgian State, represented by the Minister for Defence, concerning the award of a public contract for the supply of track links for 'Leopard' tanks.

Legal context

Community legislation

3. Article 1(1) of Directive 89/665 provides:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC ..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4. Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) repeals Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), and provides that the references to that repealed directive are to be construed as references to Directive 93/36. Similarly, Article 36 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) repeals Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), and provides that references to Directive 71/305 are to be construed as references to Directive 93/37.
5. Article 2(8) of Directive 89/665 provides:

'Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234 EC] and independent of both the contracting authority and the review body.'

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

6. According to Article 7(1) of Directive 93/36, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1; 'Directive 93/36'):

'The contracting authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.'

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, shall be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.'

7. Article 9(3) of Directive 93/36 provides:

'Contracting authorities who have awarded a contract shall make known the result by means of a notice. However, certain information on the contract award may, in certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial

interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.'

8. Article 15(2) of Directive 93/36 provides:

'The contracting authorities shall respect fully the confidential nature of any information furnished by the suppliers.'

9. The provisions of Articles 7(1), 9(3) and 15(2) of Directive 93/36 have been substantially reproduced in Article 6, the fifth subparagraph of Article 35(4), and Article 41(3) respectively of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

National legislation

10. Article 87 of the Decree of the Regent of 23 August 1948 establishing the procedure before the Administrative Section of the Conseil d'État (Moniteur belge of 23 to 24 August 1948, p. 6821), provides:

'Parties, their advisers and the government commissioner may inspect the case-file at the registry.'

11. According to the third and fourth subparagraphs of Article 21 of the Coordinated Laws on the Conseil d'État of 12 January 1973 (Moniteur belge of 21 March 1973, p. 3461):

'Where the defendant fails to lodge the administrative file within the prescribed period, without prejudice to Article 21a, the facts alleged by the applicant shall be deemed to have been proven, unless they are manifestly inaccurate.'

Where the administrative file is not in the possession of the defendant, he shall inform the Chamber seized of the action accordingly. The Chamber may order that the administrative file be lodged, on penalty of a fine in accordance with Article 36.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12. On 14 December 2001, the Belgian State initiated a contract award procedure in respect of the supply of track links for 'Leopard' tanks. Two tenderers submitted bids, namely Varec and Diehl Remscheid GmbH & Co. ('Diehl').

13. When examining those tenders, the Belgian State considered that the tender submitted by Varec did not satisfy the technical selection criteria and that that tender was unlawful. By contrast, it took the view that the tender submitted by Diehl satisfied all the selection criteria, that it was lawful and that its prices were normal. Consequently, the Belgian State awarded the contract to Diehl by decision of the Minister for Defence of 28 May 2002 ('the award decision').
14. On 29 July 2002, Varec brought an action for annulment of the award decision before the Conseil d'État. Diehl was granted leave to intervene.
15. The file delivered to the Conseil d'État by the Belgian State did not include Diehl's tender.
16. Varec requested that that tender be added to the file. The same request was made by the Auditeur of the Conseil d'État who was responsible for drawing up a report ('the Auditeur').
17. On 17 December 2002, the Belgian State added Diehl's tender to the file, explaining that neither the plans of the whole of the proposed track link nor those of its constituent parts were included. It stated that these had been returned to Diehl in accordance with the specification and at Diehl's request. It further stated that that was why it could not place those documents on the file and that, if it was essential that they be included, it would be necessary to ask Diehl to provide them. The Belgian State also observed that Varec and Diehl are in dispute about the intellectual property rights to the plans in question.
18. By letter of the same date, Diehl informed the Auditeur that the version of its tender that was placed on the file by the Belgian State contained confidential data and information, and that it was objecting on the ground that third parties, including Varec, would be able to peruse those confidential data and information relating to business secrets included in the tender. According to Diehl, certain passages in Annexes 4, 12 and 13 to its tender contain specific data concerning the detailed revisions of the relevant manufacturing plans and also the industrial process.
19. In his report of 23 February 2006, the Auditeur concluded that the award decision should be annulled on the ground that in the absence of the defendant's cooperation in the sound administration of justice and fair proceedings, the only possible sanction is the annulment of

the administrative measure whose lawfulness is not established where documents are excluded from *inter partes* proceedings'.

20. The Belgian State challenged that conclusion and requested the Conseil d'État to rule on the issue of respecting the confidentiality of Diehl's tender documents containing information relating to business secrets which had been placed on the file in the proceedings before that court.
21. In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 1(1) of [Directive 89/665], read with Article 15(2) of [Directive 93/36] and Article 6 of [Directive 2004/18], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?'

Admissibility

22. Varec submits that in order to resolve the dispute before the Conseil d'État it is not necessary for the Court to answer the question referred for a preliminary ruling.
23. In that regard, it must be observed that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C326/00 IKA [2003] ECR I1703, paragraph 27; Case C145/03 Keller [2005] ECR I2529, paragraph 33; and Case C419/04 Conseil général de la Vienne [2006] ECR I5645, paragraph 19).

24. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 Foglia [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Case C379/98 PreussenElektra [2001] ECR I2099, paragraph 39; Case C390/99 Canal Satélite Digital [2002] ECR I607, paragraph 19; and Conseil général de la Vienne, paragraph 20).
25. It must be pointed out that that is not the case here. If the Conseil d'État follows the form of order proposed by the Auditeur, it will have to annul the award decision which is before it, without examining the substance of the dispute. On the other hand, if the provisions of Community law which the Conseil d'État seeks to have interpreted justify the confidential treatment of the documents of the file at issue in the main proceedings, it will be in a position to examine the substance of the dispute. For those reasons it may be concluded that the interpretation of those provisions is necessary for the resolution of the dispute in the main proceedings.
29. The right crystallised when Diehl submitted its tender in the award procedure at issue in the main proceedings. Since that date was not specified in the order for reference, it is appropriate to conclude that it falls between 14 December 2001, the date of the call for tenders, and 14 January 2002, the date of the opening of bids.
30. Directive 2004/18 had not yet been adopted at that time. It follows that the provisions of Directive 93/36 must be taken into consideration for the purposes of the dispute in the main proceedings.
31. There is no provision in Directive 89/665 which expressly governs the protection of confidential information. It is necessary, in that respect, to refer to that directive's general provisions, and in particular to Article 1(1).
32. Article 1(1) provides that the Member States are to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of, *inter alia*, Directive 93/36, decisions taken by the contracting authorities may be reviewed effectively on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
33. Since the objective of Directive 89/665 is to ensure compliance with Community law in the field of public procurement, Article 1(1) of that directive must be interpreted in the light of the provisions of Directive 93/36 as well as of other provisions of Community law in the field of public procurement.
34. The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraph 44).
35. In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.

formation. As the Advocate General noted in point 31 of her Opinion, such a right is in essence a substantive right, even if its application can have procedural consequences.

Merits

26. In the question referred to the Court, the Conseil d'État refers both to Directive 93/36 and to Directive 2004/18. Since Directive 2004/18 has replaced Directive 93/36, it is necessary to establish which of the two directives is relevant to the examination of the question referred.
27. It must be borne in mind that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (see Case C-201/04 Molenbergnatie [2006] ECR I2049, paragraph 31 and the case-law cited).
28. The dispute in the main proceedings concerns the right to the protection of confidential in-
- formation. As the Advocate General noted in point 31 of her Opinion, such a right is in essence a substantive right, even if its application can have procedural consequences.
29. The right crystallised when Diehl submitted its tender in the award procedure at issue in the main proceedings. Since that date was not specified in the order for reference, it is appropriate to conclude that it falls between 14 December 2001, the date of the call for tenders, and 14 January 2002, the date of the opening of bids.
30. Directive 2004/18 had not yet been adopted at that time. It follows that the provisions of Directive 93/36 must be taken into consideration for the purposes of the dispute in the main proceedings.
31. There is no provision in Directive 89/665 which expressly governs the protection of confidential information. It is necessary, in that respect, to refer to that directive's general provisions, and in particular to Article 1(1).
32. Article 1(1) provides that the Member States are to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of, *inter alia*, Directive 93/36, decisions taken by the contracting authorities may be reviewed effectively on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
33. Since the objective of Directive 89/665 is to ensure compliance with Community law in the field of public procurement, Article 1(1) of that directive must be interpreted in the light of the provisions of Directive 93/36 as well as of other provisions of Community law in the field of public procurement.
34. The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C26/03 Stadt Halle and RPL Lochau [2005] ECR I1, paragraph 44).
35. In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.
36. Furthermore, both by their nature and according to the scheme of Community legislation

in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.

37. Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.
38. In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.
39. Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.
40. In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.
41. In such an appeal, the respondent would be the contracting authority and the economic operator whose interests are at risk of being damaged would not necessarily be a party to the dispute or joined to the case to defend those interests. Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.
42. In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority's respect for the confidentiality of information. The 'effective review' requirement provided for in Article 1(1) of Directive 89/665, read in conjunction with Articles 7(1), 9(3) and 15(2) of Directive 93/36, therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions, and thereby to ensure that fair competition is maintained and that the legitimate interests of the economic operators concerned are protected.
43. It follows that, in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers, if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by Community law.
44. The question arises whether that interpretation is consistent with the concept of a fair hearing in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR').
45. As the order for reference shows, Varec claimed before the Conseil d'État that the right to a fair hearing means that both parties must be heard in any judicial procedure, that the adversarial principle is a general principle of law, that it has a foundation in Article 6 of the ECHR, and that that principle means that the parties are entitled to a process of inspecting and commenting on all documents or observations submitted to the court with a view to influencing its decision.
46. The Court notes that Article 6(1) of the ECHR provides *inter alia* that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ...'. The European Court of Human Rights has consistently held that the adversarial nature of proceedings is one of the factors which enables their fairness to be assessed, but it may be balanced against other rights and interests.
47. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However,

- in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (see *Rowe and Davis v The United Kingdom* [GC] no 28901/95, § 61, ECHR 2000II, and *V v Finland* no 40412/98, § 75, ECHR 2007...).
48. One of the fundamental rights capable of being protected in this way is the right to respect for private life, enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States and which is restated in Article 7 of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) (see, in particular, *Case C62/90 Commission v Germany* [1992] ECR I2575, paragraph 23, and *Case C404/92 P X v Commission* [1994] ECR I4737, paragraph 17). It follows from the case-law of the European Court of Human Rights that the notion of 'private life' cannot be taken to mean that the professional or commercial activities of either natural or legal persons are excluded (see *Niemietz v Germany*, judgment of 16 December 1992, Series A no 251B, § 29; *Société Colas Est and Others v France*, no 37971/97, § 41, ECHR 2002III; and also *Peck v The United Kingdom* no 44647/98, § 57, ECHR 2003I). Those activities can include participation in a contract award procedure.
 49. The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle (see *Case 53/85 AKZO Chemie and AKZO Chemie UK v Commission* [1986] ECR 1965, paragraph 28, and *Case C36/92 P SEP v Commission* [1994] ECR I1911, paragraph 37).
 50. Finally, the maintenance of fair competition in the context of contract award procedures is an important public interest, the protection of which is acknowledged in the case-law cited in paragraph 47 of this judgment.
 51. It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.
 52. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, *Case C-438/04 Mobistar* [2006] ECR I6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.
 53. To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets (see, by analogy, *Mobistar*, paragraph 40).
 54. Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, that body must, before communicating that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret (see, by analogy, *AKZO Chemie and AKZO Chemie UK v Commission*, paragraph 29).
 55. Accordingly, the answer to the question referred must be that Article 1(1) of Directive 89/665, read in conjunction with Article 15(2) of Directive 93/36, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.
- Costs**
56. Since these proceedings are, for the parties

to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Article 15(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.

[Signatures]

FUNDAMENTAL RIGHTS AND FREEDOMS THAT CONCERN PERSONAL DATA, LAWFUL PROCESSING OF DATA, PROTECTION OF PERSONAL DATA, CONCEPT OF NECESSITY, DATA QUALITY, DISCRIMINATION DATA RETENTION

CASE C-524/06 HEINZ HUBER v BUNDESREPUBLIK DEUTSCHLAND

(Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen)

(Protection of personal data – European citizenship – Principle of nondiscrimination on grounds of nationality – Directive 95/46/EC – Concept of necessity – General processing of personal data relating to citizens of the Union who are nationals of another Member State – Central register of foreign nationals)

KEYWORDS

1. *Approximation of laws – Protection of individuals with regard to the processing of personal data – Directive 95/46 – Scope (European Parliament and Council Directive 95/46, Art. 3(2))*
2. *Approximation of laws – Protection of individuals with regard to the processing of personal data – Directive 95/46 (Art. 12(1) EC; European Parliament and Council Directive 95/46, Art. 7(e))*
3. *Community law – Principles – Equal treatment – Discrimination on grounds of nationality – System for processing personal data (Art. 12 EC)*

SUMMARY OF THE JUDGMENT

1. Article 3(2) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data expressly excludes from its scope of application, inter alia, the processing of personal data concerning public security, defence, State security and the activities of the State in areas of criminal law. It follows that, while the processing of personal data for the purposes of the application of the legislation relating to the

right of residence and for statistical purposes falls within the scope of application of Directive 95/46, the position is otherwise where the objective of processing those data is connected with the fight against crime.

(see paras 44-45)

2. A system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, putting in place a central register of foreign nationals and having as its object the provision of support to the national authorities responsible for the application of the law relating to the right of residence does not satisfy the requirement of necessity laid down by Article 7(e) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:
 - it contains only the data which are necessary for the application by those authorities of that legislation, and
 - its centralised nature enables that legislation to be more effectively applied as regards the right of residence of Union citizens who are not nationals of that Member State.

- it contains only the data which are necessary for the application by those authorities of that legislation, and
- its centralised nature enables that legislation to be more effectively applied as regards the right of residence of Union citizens who are not nationals of that Member State.

It is for the national court to ascertain whether those conditions are satisfied.

Having regard to the objective of Directive 95/46 of ensuring an equivalent level of protection in all Member States, the concept of necessity laid down by Article 7(e) of the directive cannot have a meaning which varies between the Member States. It follows that what is at issue is a concept which has its own independent meaning in Community law.

As regards the use of a central register of foreign nationals for the purpose of the application of the legislation relating to the right of residence, it is necessary for a Member State, within the meaning of Article 7(e), to have the relevant particulars and documents available to it in order to ascertain, within the framework laid down under the applicable Community legislation, whether a right of residence in its territory exists in relation to a national of another Member State and to establish that there are no grounds which would justify a restriction on that right. It follows that the use of a register for the purpose of providing support to the au-

thorities responsible for the application of the legislation relating to the right of residence is, in principle, legitimate and, having regard to its nature, compatible with the prohibition of discrimination on grounds of nationality laid down by Article 12(1) EC. However, such a register must not contain any information other than what is necessary for that purpose. In that regard, as Community law presently stands, the processing of personal data contained in the documents referred to in Articles 8(3) and 27(1) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 must be considered to be necessary, within the meaning of Article 7(e) of Directive 95/46, for the application of the legislation relating to the right of residence.

With respect to the necessity that a centralised register be available in order to meet the requirements of the authorities responsible for the application of the legislation relating to the right of residence, even if it were to be assumed that decentralised registers such as district population registers contain all the data which are relevant for the purposes of allowing the authorities to undertake their duties, the centralisation of those data could be necessary, within the meaning of Article 7(e) of Directive 95/46, if it contributes to the more effective application of that legislation as regards the right of residence of Union citizens who wish to reside in a Member State of which they are not nationals.

The storage and processing of personal data containing individualised personal information in such a register for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46. While Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory, the exercise of that power does not, of itself, mean that the collection and storage of individualised personal information is necessary. It is only anonymous information that requires to be processed in order for such an objective to be attained. (see paras 52, 58-59, 62-63, 65-68, operative part 1)

3. Article 12(1) EC must be interpreted as mean-

ing that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

The principle of non-discrimination, which has its basis in Articles 12 EC and 43 EC, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.

While it is true that the objective of fighting crime is a legitimate one, it cannot be relied on in order to justify the systematic processing of personal data when that processing is restricted to the data of Union citizens who are not nationals of the Member State concerned. The fight against crime necessarily involves the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators. It follows that, as regards a Member State, the situation of its nationals cannot, as regards the objective of fighting crime, be different from that of Union citizens who are not nationals of that Member State and who are resident in its territory. Therefore, a difference in treatment between those nationals and those Union citizens which arises by virtue of the systematic processing of personal data relating only to Union citizens who are not nationals of the Member State concerned for the purposes of fighting crime constitutes discrimination which is prohibited by Article 12(1) EC. (see paras 75, 77-81, operative part 2)

JUDGMENT OF THE COURT (GRAND CHAMBER)

16 December 2008²⁰

(Protection of personal data – European citizenship – Principle of non-discrimination on grounds of nationality – Directive 95/46/EC – Concept of necessity – General processing of personal data relating to citizens of the Union who are nationals of another Member State – Central register of foreign nationals)

In Case C524/06,

REFERENCE for a preliminary ruling under Article

²⁰ Language of the case: German.

234 EC from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany), made by decision of 15 December 2006, received at the Court on 28 December 2006, in the proceedings

Heinz Huber

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber), composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and K. Lenaerts, Presidents of Chambers, P. Küris, G. Aręstis, U. Löhmus, E. Levits (Rapporteur) and L. Bay Larsen, Judges, Advocate General: M. Poiares Maduro, Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 January 2008, after considering the observations submitted on behalf of:

- Mr Huber, by A. Widmann, Rechtsanwalt,
- the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents, and by Professor K. Hailbronner,
- the Belgian Government, by L. Van den Broeck, acting as Agent,
- the Danish Government, by B. Weis Fogh, acting as Agent,
- the Greek Government, by E.-M. Mamouna and K. Boskovits, acting as Agents,
- the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,
- the Netherlands Government, by H.G. Sevenster, C.M. Wissels and C. ten Dam, acting as Agents,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the United Kingdom Government, by E. O'Neill, acting as Agent, and J. Stratford, Barrister,
- the Commission of the European Communities, by C. Docksey and C. Ladenburger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2008, gives the following Judgment

1. This reference for a preliminary ruling concerns Article 12(1) EC, read in conjunction with Articles 17 EC and 18 EC, the first paragraph of Article 43 EC, as well as Article 7(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protec-

tion of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2. The reference was made in proceedings between Mr Huber, an Austrian national who is resident in Germany, and the Bundesrepublik Deutschland, represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ('the Bundesamt'), regarding Mr Huber's request for the deletion of the data relating to him in the Central Register of Foreign Nationals (Ausländerzentralregister) ('the AZR').

Legal context

Community legislation

3. The eighth recital in the preamble to Directive 95/46 states:

'Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; ...'

4. The tenth recital in the preamble to that directive adds:

'... the approximation of [the national laws on the processing of personal data] must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.'

5. Article 1 of Directive 95/46 is entitled 'Object of the Directive' and Article 1(1) provides:

'In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.'

6. Article 2 of that directive includes the following definitions:

'...

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of op-

erations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...’.

7. The scope of application of Directive 95/46 is laid down by Article 3, in the following terms:

‘1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household activity.’

8. Article 7(e) of Directive 95/46 states:

‘Member States shall provide that personal data may be processed only if:

...

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

...’.

9. Article 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) provides:

‘1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. As proof of the right of residence, a document entitled “Residence Permit for a National of a Member State of the EEC” shall be issued.
...

3. For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents:

– by the worker:

(a) the document with which he entered their territory;

(b) a confirmation of engagement from the employer or a certificate of employment;

– by the members of the worker’s family:

(c) the document with which they entered the territory;

(d) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship;

(e) in the cases referred to in Article 10(1) and (2) of [Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475)], a document issued by the competent authority of the State of origin or the State whence they came, testifying that they are dependent on the worker or that they live under his roof in such country.

...’

10. Article 10 of Directive 68/360 provides:

‘Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health.’

11. Article 4(1) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14) states:

‘Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled “Residence Permit for a National of a Member State of the European Communities” shall be issued. This document shall be valid for not less than five years from the date of is-

sue and shall be automatically renewable.

...'

12. Article 6 of Directive 73/148 states:

'An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'

13. Article 8 of that directive sets out the derogation provided for in Article 10 of Directive 68/360.

14. On 29 April 2004, the European Parliament and the Council of the European Union adopted Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, with Corrigendum, OJ 2004 L 229, p. 35), which required to be transposed by 30 April 2006. Article 5 of that directive provides:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

...

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'

15. Article 7(1) of that directive governs the right of residence for a period of more than three months of Union citizens in a Member State of which they are not nationals in the following terms:

'All Union citizens shall have the right of residence on the territory of another Member

State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

...':

16. Article 8 of Directive 2004/38 provides:

'1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that:

– Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

– Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or

passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). ...'

17. Article 27 of that directive, entitled 'General principles', states:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. ...'

18. Lastly, Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (OJ 2007 L 199, p. 23) lays down the framework in which the Member States are to supply statistics to the Commission of the European Communities relating to migratory flows in their

territories.

National legislation

19. In accordance with Paragraph 1(1) of the Law on the central register of foreign nationals (Gesetz über das Ausländerzentralregister) of 2 September 1994 (BGBl. 1994 I, p. 2265), as amended by the Law of 21 June 2005 (BGBl. 1994 I, p. 1818) ('the AZRG'), the Bundesamt, which is attached to the Federal Ministry of the Interior, is responsible for the management of the AZR, a centralised register which contains certain personal data relating to foreign nationals who, *inter alia*, are resident in Germany on a basis which is not purely temporary. The foreign nationals concerned are those who reside in that territory for a period of more than three months, as is shown by the general administrative circular of the Federal Ministry of the Interior relating to the AZRG and to the regulation implementing that Law (Allgemeine Verwaltungsvorschrift des Bundesministeriums des Innern zum Gesetz über das AZR und zur AZRG-Durchführungsverordnung) of 4 June 1996. That information is collected in two databases which are managed separately. One contains personal data relating to foreign nationals who live or have lived in Germany and the other to those who have applied for a visa.
20. In accordance with Paragraph 3 of the AZRG, the first database contains, in particular, the following information:
- the name of the authority which provided the data;
 - the reference number allocated by the Bundesamt;
 - the grounds of registration;
 - surname, surname at birth, given names, date and place of birth, sex and nationality;
 - previous and other patronymics, marital status, particulars of identity documents, the last place of residence in the country of origin, and information supplied on a voluntary basis as to religion and the nationality of the spouse or partner;
 - particulars of entries into and exits from the territory, residence status, decisions of the Federal Employment Agency relating to a work permit, refugee status granted by another State, date of death;
 - decisions relating, *inter alia*, to any applica-

tion for asylum, any previous application for a residence permit, and particulars of, inter alia, any expulsion proceedings, arrest warrants, suspected contraventions of the laws on drugs or immigration, and suspected participation in terrorist activities, or convictions in respect of such activities; and

- search warrants.
21. As the authority entrusted with the management of the AZR, the Bundesamt is responsible for the accuracy of the data registered in it.
 22. According to Paragraph 1(2) of the AZRG, by registering and supplying personal data relating to foreign nationals, the Bundesamt assists the public authorities responsible for the application of the law on foreign nationals and the law on asylum, together with other public bodies.
 23. Paragraph 10(1) of the AZRG provides that every application made by a public authority to consult the AZR or for the making available of personal data contained in it must satisfy certain conditions, compliance with which must be determined by the Bundesamt on a case-by-case basis. The Bundesamt must, in particular, examine whether the data requested by an authority are necessary for the performance of its tasks and must also examine the precise use to which those data are intended to be put. The Bundesamt may reject an application if it does not satisfy the prescribed conditions.
 24. Paragraphs 14 to 21 and 25 to 27 of the Law specify the personal data which may be made available depending on the body which made the application in respect of them.
 25. Thus, Paragraph 14(1) of the AZRG authorises the communication to all German public authorities of data relating to identity and domicile, as well as the date of death and particulars of the authority responsible for the file and of any decision not to make data available.
 26. Paragraph 12 of the AZRG provides that applications, termed 'group applications', that is to say, which relate to a group of persons having one or more common characteristics, are to be subject to certain substantive and formal conditions. Such applications may be made only by a limited number of public bodies. In addition, every communication of personal data pursuant to such an application must be notified to the Federal and regional regulators responsible for the protection of personal data.

27. In addition, Paragraph 22 of the AZRG permits public bodies authorised for that purpose to consult the AZR directly through an automated procedure. However, the right to do so arises only in strictly defined circumstances and after a weighing up by the Bundesamt of the interests of the data subject and the public interest. Moreover, such consultation is allowed only in the case of so-called group applications. The public bodies having rights under Paragraph 22 of the AZRG are, by virtue of Paragraph 7 of that Law, also authorised to enter data and information directly in the AZR.
28. Lastly, Paragraphs 25 to 27 of the AZRG specify the public bodies which may obtain certain data contained in the AZR.
29. The national court adds that, in Germany, every inhabitant, whether a German national or not, must have his particulars entered in the register kept by the authorities of the district in which he resides (Einwohnermelderegister). The Commission has stated in that regard that that type of register contains only some of the data comprised in the AZR, with those relating, in particular, to a person's status as regards his right of residence not appearing there. There are currently some 7 700 district registers.

The facts and the questions referred

30. Mr Huber, an Austrian national, moved to Germany in 1996 in order to carry on business there as a self-employed insurance agent.
31. The following data relating to him are stored in the AZR:
 - his name, given name, date and place of birth, nationality, marital status, sex;
 - a record of his entries into and exits from Germany, and his residence status;
 - particulars of passports issued to him;
 - a record of his previous statements as to domicile; and
 - reference numbers issued by the Bundesamt, particulars of the authorities which supplied the data and the reference numbers used by those authorities.
32. Since he took the view that he was discriminated against by reason of the processing of the data concerning him contained in the AZR, in particular because such a database does not exist in respect of German nationals, Mr Huber

- requested the deletion of those data on 22 July 2000. That request was rejected on 29 September 2000 by the administrative authority which was responsible for maintaining the AZR at the time.
33. The challenge to that decision also having been unsuccessful, Mr Huber brought an action before the Verwaltungsgericht Köln (Administrative Court, Cologne) which upheld the action by judgment of 19 December 2002. The Verwaltungsgericht Köln held that the general processing, through the AZR, of data regarding a Union citizen who is not a German national constitutes a restriction of Articles 49 EC and 50 EC which cannot be justified by the objective of the swift treatment of cases relating to the right of residence of foreign nationals. In addition, that court took the view that the storage and processing of the data at issue were contrary to Articles 12 EC and 18 EC, as well as Articles 6(1)(b) and 7(e) of Directive 95/46.
 34. The Bundesrepublik Deutschland, acting through the Bundesamt, brought an appeal against that judgment before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land North-Rhine Westphalia), which considers that certain of the questions of law raised before it require an interpretation of Community law by the Court.
 35. First, the national court notes that, according to the Court's case-law, a citizen of the European Union lawfully resident in the territory of a Member State of which he is not a national can rely on Article 12 EC in all situations which fall within the scope of Community law. It refers in that regard to Case C85/96 Martínez Sala [1998] ECR I2691, paragraph 63; Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 32; and Case C-209/03 Bidar [2005] ECR I-2119, paragraph 32. Accordingly, having exercised the right to the freedom of movement conferred on him by Article 18(1) EC, Mr Huber was entitled to rely on the prohibition of discrimination laid down by Article 12 EC.
 36. The national court states that the general processing of personal data relating to Mr Huber in the AZR differs from the processing of data relating to a German national in two respects: first, some of the data relating to Mr Huber are stored not only in the register of the district in which he resides but also in the AZR, and, secondly, the AZR contains additional data.
 37. The national court doubts whether such a difference in treatment can be justified by the need to monitor the residence of foreign nationals in Germany. It also raises the question whether the general processing of personal data relating to Union citizens who are not German nationals and who reside or have resided in Germany is proportionate to the objective of protecting public security, inasmuch as the AZR covers all of those citizens and not only those who are subject to an expulsion order or a prohibition on residing in Germany.
 38. Secondly, the national court is of the opinion that, in the circumstances of the main proceedings, Mr Huber falls within the scope of application of Article 43 EC. Since the freedom of establishment extends not only to the taking up of activities as a self-employed person but also the framework conditions for that activity, the national court raises the question whether the general processing of data relating to Mr Huber in the AZR is liable to affect those conditions to such an extent that it comprises a restriction on the exercise of that freedom.
 39. Thirdly, the national court raises the question whether the criterion of necessity imposed by Article 7(e) of Directive 95/46 can be a criterion for assessing a system of general data processing such as the system put in place under the AZR. The national court does not, in fact, rule out the possibility that the directive may leave it open to the national legislature itself to define that requirement of necessity. However, should that not be the case, the question arises how that requirement is to be understood, and more particularly whether the objective of administrative simplification might justify data processing of the kind put in place by the AZRG.
 40. In those circumstances, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
 - '(1) Is the general processing of personal data of foreign citizens of the Union in a central register of foreign nationals compatible with ... the prohibition of discrimination on grounds of nationality against citizens of the Union who exercise their right to move and reside freely within the territory of the Member States (Article 12(1) EC, in conjunction with Articles 17 EC and 18(1) EC)[?]
 - (2) [Is such processing compatible with] the prohibition of restrictions on the freedom of

establishment of nationals of a Member State in the territory of another Member State (first paragraph of Article 43 EC)[?]

(3) [Is such treatment compatible with] the requirement of necessity under Article 7(e) of Directive 95/46 ...?'

The questions referred

Preliminary observations

41. By its questions, the national court asks the Court whether the processing of personal data which is undertaken in a register such as the AZR is compatible with Community law.
42. In that regard, it must be noted that Paragraph 1(2) of the AZRG provides that, through the storage of certain personal data relating to foreign nationals in the AZR and the making available of those data, the Bundesamt, which is responsible for maintaining that register, assists the public authorities responsible for the application of the legislation relating to the law on foreign nationals and the law on asylum, together with other public bodies. In particular, the German Government has stated in its written observations that the AZR is used for statistical purposes and on the exercise by the security and police services and by the judicial authorities of their powers in relation to the prosecution and investigation of activities which are criminal or threaten public security.
43. At the outset, it must be stated that data such as those which, according to the order for reference, the AZR contains in relation to Mr Huber constitute personal data within the meaning of Article 2(a) of Directive 95/46, because they represent 'information relating to an identified or identifiable natural person'. Their collection, storage and transmission by the body responsible for the management of the register in which they are kept thus represents the 'processing of personal data' within the meaning of Article 2(b) of that directive.
44. However, Article 3(2) of Directive 95/46 expressly excludes from its scope of application, inter alia, the processing of personal data concerning public security, defence, State security and the activities of the State in areas of criminal law.
45. It follows that, while the processing of personal data for the purposes of the application of the legislation relating to the right of residence and for statistical purposes falls within the scope of

application of Directive 95/46, the position is otherwise where the objective of processing those data is connected with the fight against crime.

46. Consequently, the compatibility with Community law of the processing of personal data undertaken through a register such as the AZR should be examined, first, in the context of its function of providing support to the authorities responsible for the application of the legislation relating to the right of residence and to its use for statistical purposes, by having regard to Directive 95/46 and more particularly, in view of the third question, to the condition of necessity laid down by Article 7(e) of that directive, as interpreted in the light of the requirements of the Treaty including in particular the prohibition of any discrimination on grounds of nationality under Article 12(1) EC, and, secondly, in the context of its function in the fight against crime, by having regard to primary Community law.

The processing of personal data for the purpose of the application of the legislation relating to the right of residence and for statistical purposes

The concept of necessity

47. Article 1 of Directive 95/46 requires Member States to ensure the protection of the fundamental rights and freedoms of natural persons, and in particular their privacy, in relation to the handling of personal data.
48. Chapter II of Directive 95/46, entitled 'General rules on the lawfulness of the processing of personal data', provides that, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 (see, to that effect, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I4989, paragraph 65).
49. In particular, Article 7(e) provides that personal data may lawfully be processed if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'.
50. In that context, it must be noted that Directive 95/46 is intended, as appears from the

eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.

51. Thus, it has been held that the harmonisation of those national laws is not limited to minimal harmonisation but amounts to harmonisation which is generally complete (see Case C-101/01 Lindqvist [2003] ECR I12971, paragraph 96).
52. Consequently, having regard to the objective of ensuring an equivalent level of protection in all Member States, the concept of necessity laid down by Article 7(e) of Directive 95/46, the purpose of which is to delimit precisely one of the situations in which the processing of personal data is lawful, cannot have a meaning which varies between the Member States. It therefore follows that what is at issue is a concept which has its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objective of that directive, as laid down in Article 1(1) thereof.

The necessity for the processing of personal data, such as the processing undertaken through the AZR, for the purpose of the application of the legislation relating to the right of residence and for statistical purposes

53. It is apparent from the order for reference that the AZR is a centralised register which contains certain personal data relating to Union citizens who are not German nationals and that it may be consulted by a number of public and private bodies.
54. As regards the use of a register such as the AZR for the purpose of the application of the legislation relating to the right of residence, it is important to bear in mind that, as Community law presently stands, the right of free movement of a Union citizen in the territory of a Member State of which he is not a national is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, to that effect, Case C33/07 Jippa

[2008] ECR I-0000, paragraph 21 and the case-law cited).

55. Thus, Article 4 of Directive 68/360, read in conjunction with Article 1 thereof, and Article 6 of Directive 73/148, read in conjunction with Article 1 thereof, provided that, in order for a national of a Member State to be entitled to reside for a period of more than three months in the territory of another Member State, that person had to belong to one of the categories laid down by those directives and provided for that entitlement to be subject to certain formalities linked to the presentation or the provision by the applicant of a residence permit together with various documents and particulars.
56. In addition, Article 10 of Directive 68/360 and Article 8 of Directive 73/148 permitted Member States to derogate from the provisions of those directives on grounds of public policy, public security or public health and to limit the right of entry and residence of a national of another Member State in their territory.
57. While Directive 2004/38, which fell to be transposed by 30 April 2006 and which accordingly did not apply at the time of the facts of the present case, repealed both of the abovementioned directives, it sets out, in Article 7, conditions which are generally equivalent to those laid down under its predecessors as regards the right of residence of nationals of other Member States and, in Article 27(1), restrictions relating to that right which are essentially identical to those laid down under its predecessors. It also provides, in Article 8(1), that the host Member State may require every Union citizen who is a national of another Member State and who wishes to reside in its territory for a period of more than three months to register with the relevant authorities. In that regard, the host Member State may, by virtue of Article 8(3), require certain documents and particulars to be provided in order to enable those authorities to determine that the conditions for entitlement to a right of residence are satisfied.
58. It must therefore be held that it is necessary for a Member State to have the relevant particulars and documents available to it in order to ascertain, within the framework laid down under the applicable Community legislation, whether a right of residence in its territory exists in relation to a national of another Member State and to establish that there are no grounds which would justify a restriction on that right. It follows that the use of a register such as the AZR

for the purpose of providing support to the authorities responsible for the application of the legislation relating to the right of residence is, in principle, legitimate and, having regard to its nature, compatible with the prohibition of discrimination on grounds of nationality laid down by Article 12(1) EC.

59. However, such a register must not contain any information other than what is necessary for that purpose. In that regard, as Community law presently stands, the processing of personal data contained in the documents referred to in Articles 8(3) and 27(1) of Directive 2004/38 must be considered to be necessary, within the meaning of Article 7(e) of Directive 95/46, for the application of the legislation relating to the right of residence.
60. Moreover, while the collection of the data required for the application of the legislation relating to the right of residence would be of no practical benefit if those data were not to be stored, it must be emphasised that, since a change in the personal situation of a party entitled to a right of residence may have an impact on his status in relation to that right, it is incumbent on the authority responsible for a register such as the AZR to ensure that the data which are stored are, where appropriate, brought up to date so that, first, they reflect the actual situation of the data subjects and, secondly, irrelevant data are removed from that register.
61. As regards the detailed rules for the use of such a register for the purposes of the application of the legislation relating to the right of residence, only the grant of access to authorities having powers in that field could be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.
62. Lastly, with respect to the necessity that a centralised register such as the AZR be available in order to meet the requirements of the authorities responsible for the application of the legislation relating to the right of residence, even if it were to be assumed that decentralised registers such as the district population registers contain all the data which are relevant for the purposes of allowing the authorities to undertake their duties, the centralisation of those data could be necessary, within the meaning of Article 7(e) of Directive 95/46, if it contributes to the more effective application of that legislation as regards the right of residence of Union citizens who wish to reside in a Member State of which they are not nationals.
63. As regards the statistical function of a register such as the AZR, it must be recalled that, by creating the principle of freedom of movement for persons and by conferring on any person falling within its ambit the right of access to the territory of the Member States for the purposes intended by the Treaty, Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory (see Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 17).
64. Similarly, Regulation No 862/2007, which provides for the transmission of statistics relating to migratory flows in the territory of the Member States, presupposes that information will be collected by those States which allows those statistics to be determined.
65. However, the exercise of that power does not, of itself, mean that the collection and storage of individualised personal information in a register such as the AZR is necessary, within the meaning of Article 7(e) of Directive 95/46. As the Advocate General stated at point 23 of his Opinion, it is only anonymous information that requires to be processed in order for such an objective to be attained.
66. It follows from all of the above that a system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, such as that put in place by the AZRG and having as its object the provision of support to the national authorities responsible for the application of the legislation relating to the right of residence, does not satisfy the requirement of necessity laid down by Article 7(e) of Directive 95/46, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:
- it contains only the data which are necessary for the application by those authorities of that legislation, and
 - its centralised nature enables that legislation to be more effectively applied as regards the right of residence of Union citizens who are not nationals of that Member State.
67. It is for the national court to ascertain whether those conditions are satisfied in the main proceedings.
68. The storage and processing of personal data

containing individualised personal information in a register such as the AZR for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

The processing of personal data relating to Union citizens who are nationals of other Member States for the purposes of fighting crime

69. As a preliminary point, it should be noted that, according to settled case-law, citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, to that effect, Grzelczyk, paragraphs 30 and 31; Case C148/02 Garcia Avello [2003] ECR I11613, paragraphs 22 and 23; and Bidar, paragraph 31).
70. In that regard, a Union citizen lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law (see Martínez Sala, paragraph 63; Grzelczyk, paragraph 32; and Bidar, paragraph 32).
71. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC (see, to that effect, Bidar, paragraph 33 and the case-law cited).
72. It is apparent from Paragraph 1 of the AZRG, read in conjunction with the general administrative circular of the Federal Ministry of the Interior of 4 June 1996 relating to the AZRG and to the regulation implementing that Law, that the system of storage and processing of personal data put in place through the AZR concerns all Union citizens who are not nationals of the Federal Republic of Germany and who reside in Germany for a period of over three months, irrespective of the reasons which lead them to reside there.
73. That being the case, since Mr Huber exercised his freedom to move and reside within that territory as conferred by Article 18 EC, reference should, having regard to the circumstances of the main proceedings, be made to Article 12(1) EC in order to determine whether a system for the storage and processing of personal data such as that at issue in the main proceedings is compatible with the principle that any discrimination on grounds of nationality is prohibited, in so far as those data are stored and processed for the purposes of fighting crime.
74. In that context, it should be pointed out that the order for reference does not contain any detailed information which would allow it to be established whether the situation at issue in the main proceedings is covered by Article 43 EC. However, even if the national court were to consider that to be the case, the application of the principle of non-discrimination cannot vary depending on whether it finds its basis in that provision or on Article 12(1) EC, read in conjunction with Article 18(1) EC.
75. It is settled case-law that the principle of non-discrimination, which has its basis in Articles 12 EC and 43 EC, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued (see, to that effect, Case C-164/07 Wood [2008] ECR I-0000, paragraph 13 and the case-law cited).
76. It is therefore, in circumstances such as those at issue in the main proceedings, necessary to compare the situation of Union citizens who are not nationals of the Member State concerned and who are resident in the territory of that Member State with that of nationals of that Member State as regards the objective of fighting crime. In fact, the German Government relies only on that aspect of the protection of public order.
77. Although that objective is a legitimate one, it cannot be relied on in order to justify the systematic processing of personal data when that processing is restricted to the data of Union citizens who are not nationals of the Member State concerned.
78. As the Advocate General noted at point 21 of his Opinion, the fight against crime, in the general sense in which that term is used by the German Government in its observations, necessarily involves the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators.

79. It follows that, as regards a Member State, the situation of its nationals cannot, as regards the objective of fighting crime, be different from that of Union citizens who are not nationals of that Member State and who are resident in its territory.
80. Therefore, the difference in treatment between those nationals and those Union citizens which arises by virtue of the systematic processing of personal data relating only to Union citizens who are not nationals of the Member State concerned for the purposes of fighting crime constitutes discrimination which is prohibited by Article 12(1) EC.
81. Consequently, Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

Costs

82. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. A system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, such as that put in place by the Law on the central register of foreign nationals (Gesetz über das Ausländerzentralregister) of 2 September 1994, as amended by the Law of 21 June 2005, and having as its object the provision of support to the national authorities responsible for the application of the law relating to the right of residence does not satisfy the requirement of necessity laid down by Article 7(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:
 - it contains only the data which are necessary for the application by those authori-

ties of that legislation, and

- its centralised nature enables the legislation relating to the right of residence to be more effectively applied as regards Union citizens who are not nationals of that Member State.

It is for the national court to ascertain whether those conditions are satisfied in the main proceedings.

The storage and processing of personal data containing individualised personal information in a register such as the Central Register of Foreign Nationals for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

2. Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

[Signatures]

MEANING OF PERSONAL DATA, PROCESSING OF PERSONAL DATA, EXCEPTIONS OF APPLICABILITY OF DIRECTIVE 95/46/EC, APPLICABILITY IN RESPECT TO PUBLISHED INFORMATION, RIGHT TO PRIVACY, RECONCILIATION OF FUNDAMENTAL FREEDOMS, TRANSMITTING PROCESSED DATA FOR JOURNALISTIC PURPOSES

CASE C-73/07 TIETOSUOJA- VALTUUTETTU v SATAKUNNAN MARKKINAPÖRSSI OY AND SATAMEDIA OY

(Reference for a preliminary ruling from the Korkein hallinto-oikeus)

(Directive 95/46/EC – Scope – Processing and flow of tax data of a personal nature – Protection of natural persons – Freedom of expression)

KEYWORDS

1. *Approximation of laws – Protection of individuals with regard to the processing of personal data – Directive 95/46 (European Parliament and Council Directive 95/46, Art. 3(1))*
2. *Approximation of laws – Protection of individuals with regard to the processing of personal data – Directive 95/46 (European Parliament and Council Directive 95/46, Art. 9)*
3. *Approximation of laws – Protection of individuals with regard to the processing of personal data – Directive 95/46 (European Parliament and Council Directive 95/46)*

SUMMARY OF THE JUDGMENT

1. Article 3(1) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which governs the scope of application of the directive, is to be interpreted as meaning that an activity in which data on the earned and unearned income and the assets of natural persons are:
 - collected from documents in the public domain held by the tax authorities and processed for publication,

- published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,
- transferred onward on CD-ROM to be used for commercial purposes, and,
- processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual's name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,

must be considered as the 'processing of personal data' within the meaning of that provision.

(see para. 37, operative part 1)

2. Article 9 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which governs the relationship between the protection of such data and freedom of expression, is to be interpreted as meaning that an activity in which data on the earned and unearned income and the assets of natural persons are:
 - collected from documents in the public domain held by the tax authorities and processed for publication,
 - published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,
 - transferred onward on CD-ROM to be used for commercial purposes, and,
 - processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual's name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,

- collected from documents in the public domain held by the tax authorities and processed for publication,
- published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,
- transferred onward on CD-ROM to be used for commercial purposes, and,
- processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual's name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,

must be considered as activities involving the processing of personal data carried out 'solely for journalistic purposes', within the meaning of that provision, if the sole object of those activities is the disclosure to the public, irrespective of the medium which is used to transmit them, of information, opinions or ideas. Whether that is the case is a matter for the national court to determine.

In any event, those activities are not limited to media undertakings and may be undertaken for profit-making purposes.

(see paras 61-62, operative part 2)

3. The scope of application of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data extends to the processing of personal data which consists in transferring onward on CD-ROM, in order for them to be used for commercial purposes, data on the earned and unearned income and the assets of natural persons which has been collected from documents in the public domain held by the tax authorities and processed for publication and which has already been published in the media. The scope of application of the directive also extends to the processing of such data for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual's name and municipality of residence to a given number, receive those data.

(see para. 49, operative part 3)

JUDGMENT OF THE COURT (GRAND CHAMBER)

16 December 2008²¹

(Directive 95/46/EC – Scope – Processing and flow of tax data of a personal nature – Protection of natural persons – Freedom of expression)

In Case C73/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 8 February 2007, received at the Court on 12 February 2007, in the proceedings

Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Ó Caoimh, Presidents of Chambers, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet, J. Klučka, U. Löhms and E. Levits (Rapporteur), Judges, Advocate General: J. Kokott, Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 February 2008, after consider-

ing the observations submitted on behalf of:

- Satakunnan Markkinapörssi Oy and Satamedia Oy, by P. Vainio, asianajaja,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the Estonian Government, by L. Uibo, acting as Agent,
- the Portuguese Government, by L.I. Fernandes and C. Vieira Guerra, acting as Agents,
- the Swedish Government, by A. Falk and K. Petkovska, acting as Agents,
- the Commission of the European Communities, by C. Docksey and P. Aalto, acting as Agents,

after hearing the Advocate General at the sitting on 8 May 2008, gives the following Judgment

1. This reference for a preliminary ruling relates to the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) ('the directive').
2. The reference was made in proceedings between the Tietosuojavaltuutettu (Data Protection Ombudsman) and the Tietosuojalautakunta (Data Protection Board) relating to activities involving the processing of personal data undertaken by Satakunnan Markkinapörssi Oy ('Markkinapörssi') and Satamedia Oy ('Satamedia').

Legal context

Community legislation

3. As is apparent from Article 1(1) of the directive, its objective is to protect the fundamental rights and freedoms of natural persons, and, in particular, their right to privacy with respect to the processing of personal data.
4. Article 1(2) of the directive states:

'Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.'
5. Article 2 of the directive, entitled 'Definitions', provides:

'For the purposes of this Directive:

²¹ Language of the case: Finnish.

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c)

“personal data filing system” (“filing system”) shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

...’

6. Article 3 of the directive defines its scope of application in the following manner:

‘1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household activity.’

7. The relationship between the protection of personal data and freedom of expression is governed by Article 9 of the directive, entitled ‘Processing of personal data and freedom of expression’, in the following terms:

‘Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.’

8. In that connection, recital 37 in the preamble to the directive is worded as follows:

‘Whereas the processing of personal data for purposes of journalism or for purposes of literary or artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of [expression] and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-post powers, e.g. to publish a regular report or to refer matters to the judicial authorities.’

9. Article 13 of the directive, entitled ‘Exemptions and restrictions’, states:

‘1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

(a) national security;

...’

10. Article 17 of the directive, entitled ‘Security of processing’, provides:

‘1. Member States shall provide that the controller must implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all

other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures.

...'

National legislation

11. Paragraph 10(1) of the Constitution (Perustuslaki (731/1999)) of 11 June 1999 states:

'The right to privacy, honour and the inviolability of the home of every person shall be guaranteed. More detailed provisions on the protection of personal data shall be laid down by law.'

12. Paragraph 12 of the Constitution provides:

'Everyone shall have the right to freedom of expression. Freedom of expression entails the right to express oneself and to disseminate and receive information, opinions and other communications without prior hindrance. More detailed provisions relating to the exercise of the right to freedom of expression shall be laid down by law. ...'

Documents and other records in the possession of the authorities shall be in the public domain, unless specifically restricted by law for compelling reasons. Every person shall have the right of access to public documents and records.'

13. The Law on personal data (Henkilötietolaki (523/1999)) of 22 April 1999, which transposed the directive into national law, applies to the processing of those data (Paragraph 2(1)), apart from personal data files which contain solely, and in unaltered form, material that has been published in the media (Paragraph 2(4)). It applies only in part to the processing of personal data for journalistic purposes and for the purpose of artistic or literary expression (Paragraph 2(5)).
14. Paragraph 32 of the Law on personal data provides that the controller is to take all technical and organisational measures necessary in or-

der to protect personal data against unauthorised access to those data, and their accidental or unlawful destruction, alteration, disclosure or transfer, together with any other unlawful processing of those data.

15. The Law on public access in relation to official activities (Laki viranomaisten toiminnan julkisuudesta (621/1999)) of 21 May 1999 also governs access to information.
16. Paragraph 1(1) of the Law on public access in relation to official activities states that the general principle is that documents covered by that law are to be in the public domain.
17. Paragraph 9 of that law provides that every person is to have the right of access to a public document held by the public authorities.
18. Paragraph 16(1) of that law lays down the detailed rules governing access to a document of that kind. It provides that the public authorities are to explain the contents of the document orally, make the document available in their offices where it may be studied, copied or listened to, or issue a copy or a print-out of the document concerned.
19. Paragraph 16(3) of that law specifies the circumstances in which data in files containing personal data kept by the public authorities may be disclosed:
- 'A file containing personal data may be disclosed in the form of a print-out, or those data may be disclosed in electronic form, unless provided otherwise by law, if the recipient is authorised to store and use such data by virtue of the provisions governing the protection of personal data. However, access to personal data for the purposes of direct marketing, market surveys or market research shall not be permitted unless specifically provided for by law or if the data subject has given his consent.'
20. The national court states that the provisions of the Law on the public disclosure and confidentiality of tax information (Laki verotustietojen julkisuudesta ja salassapidosta (1346/1999)) of 30 December 1999 are to prevail over those of the Law on personal data and the Law on public access in relation to official activities.
21. Paragraph 2 of the Law on the public disclosure and confidentiality of tax information provides that the provisions of the Law on public access in relation to official activities and the Law on personal data are to apply to documents and information relating to tax matters, save as may

be otherwise provided in a legislative measure.

22. Paragraph 3 of the Law on the public disclosure and confidentiality of tax information states:

‘Information relating to tax matters shall be in the public domain in accordance with the detailed rules laid down in this law.

Every person shall have the right to obtain access to a document relating to tax matters which is in the public domain and held by the tax authorities, in accordance with the detailed rules laid down in the Law on public access in relation to official activities, subject to the exceptions laid down in this law.’

23. Paragraph 5(1) of the Law on the public disclosure and confidentiality of tax information provides that details of the taxpayer’s name, his date of birth and his municipality of residence, as set out in his annual tax return, are to be in the public domain. The following information is also in the public domain:

‘1. Earned income for the purposes of national taxation;

2. Unearned income and income from property for the purposes of national taxation;

3. Earned income for the purposes of municipal taxation;

4. Taxes on income and property, municipal taxes and the total amount of taxes and charges levied.

...’

24. Lastly, Paragraph 8 of Chapter 24 of the Criminal Code (Rikoslaki), in the version brought into force by Law 531/2000, imposes penalties in respect of the disclosure of information which infringes an individual’s right to privacy. Under those provisions, it is an offence to disseminate, through the media or otherwise, any information, innuendo or images relating to the private life of another person where to do so would be liable to cause harm or suffering to the person concerned or to bring that person into disrepute.

The dispute in the main proceedings and the questions referred

25. For several years, Markkinapörssi has collected public data from the Finnish tax authorities for the purposes of publishing extracts from those data in the regional editions of the Veropörssi newspaper each year.

26. The information contained in those publications comprises the surname and given name of approximately 1.2 million natural persons whose income exceeds certain thresholds as well as the amount, to the nearest EUR 100, of their earned and unearned income and details relating to wealth tax levied on them. That information is set out in the form of an alphabetical list and organised according to municipality and income bracket.

27. According to the order for reference, the Veropörssi newspaper carries a statement that the personal data disclosed may be removed on request and without charge.

28. While that newspaper also contains articles, summaries and advertisements, its main purpose is to publish personal tax information.

29. Markkinapörssi transferred personal data published in the Veropörssi newspaper, in the form of CD-ROM discs, to Satamedia, which is owned by the same shareholders, with a view to those data being disseminated by a text-messaging system. In that connection, those companies signed an agreement with a mobile telephony company which put in place, on Satamedia’s behalf, a text-messaging service allowing mobile telephone users to receive information published in the Veropörssi newspaper on their telephone, for a charge of approximately EUR 2. Personal data are removed from that service on request.

30. The TietosuojaValtuutettu and the TietosuojaValtakunta, who are the Finnish authorities responsible for data protection, supervise the processing of personal data and have the regulatory powers laid down in the Law on personal data.

31. Following complaints from individuals alleging infringement of their right to privacy, on 10 March 2004, the TietosuojaValtuutettu responsible for investigating the activities of Markkinapörssi and Satamedia requested the TietosuojaValtakunta to prohibit the latter from carrying on the personal data processing activities at issue.

32. That request having been rejected by the TietosuojaValtakunta, the TietosuojaValtuutettu brought proceedings before the Helsingin hallinto-oikeus (Administrative Court, Helsinki), which also rejected his application. The TietosuojaValtuutettu then brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court).

33. The national court emphasises that the appeal brought by the Tietosuojavaltuutettu does not concern the transfer of information by the Finnish authorities. It also states that the public nature of the tax data in question is not at issue. On the other hand, it has concerns as regards the subsequent processing of those data.

34. In those circumstances, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Can an activity in which data relating to the earned and unearned income and assets of natural persons are:

(a) collected from documents in the public domain held by the tax authorities and processed for publication,

(b) published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,

(c) transferred onward on CD-ROM to be used for commercial purposes, and

(d) processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual’s name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,

be regarded as the processing of personal data within the meaning of Article 3(1) of [the directive]?

(2) Is [the directive] to be interpreted as meaning that the various activities listed in Question 1(a) to (d) can be regarded as the processing of personal data carried out solely for journalistic purposes within the meaning of Article 9 of the directive, having regard to the fact that data on over one million taxpayers have been collected from information which is in the public domain under national legislation on the right of public access to information? Does the fact that publication of those data is the principal aim of the operation have any bearing on the assessment in this case?

(3) Is Article 17 of [the directive] to be interpreted in conjunction with the principles and purpose of the directive as precluding the publication of data collected for journalistic purposes and its onward transfer for commercial purposes?

(4) Is [the directive] to be interpreted as meaning that personal data files containing, solely and in unaltered form, material that has al-

ready been published in the media fall altogether outside its scope?’

The questions referred

The first question

35. It must be held that the data to which this question relates, which comprise the surname and given name of certain natural persons whose income exceeds certain thresholds as well as the amount, to the nearest EUR 100, of their earned and unearned income, constitute personal data within the meaning of Article 2(a) of the directive, since they constitute ‘information relating to an identified or identifiable natural person’ (see also Joined Cases C465/00, C138/01 and C139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 64).

36. It is sufficient to hold, next, that it is clear from the wording itself of the definition set out in Article 2(b) of the directive that the activity to which the question relates involves the ‘processing of personal data’ within the meaning of that provision.

37. Consequently, the answer to the first question must be that Article 3(1) of the directive is to be interpreted as meaning that an activity in which data on the earned and unearned income and the assets of natural persons are:

- collected from documents in the public domain held by the tax authorities and processed for publication,
- published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,
- transferred onward on CD-ROM to be used for commercial purposes, and
- processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual’s name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,

must be considered as the ‘processing of personal data’ within the meaning of that provision.

The fourth question

38. By its fourth question, which should be examined next, the national court asks, in essence, whether activities involving the processing of personal data such as those referred to at points (c) and (d) of the first question and relating to personal data files which contain solely, and in unaltered form, material that has already been published in the media, fall within the scope of application of the directive.
39. By virtue of Article 3(2) of the directive, the directive does not apply to the processing of personal data in two situations.
40. The first situation involves the processing of personal data undertaken in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and, in any case, to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.
41. Those activities, which are mentioned by way of example in the first indent of Article 3(2) are, in any event, activities of the State or of State authorities unrelated to the fields of activity of individuals. They are intended to define the scope of the exception provided for there, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category (*ejusdem generis*) (see Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraphs 43 and 44).
42. Activities involving the processing of personal data of the kind referred to at points (c) and (d) of the first question concern the activities of private companies. Those activities do not fall in any way within a framework established by the public authorities that relates to public security. Consequently, such activities cannot be assimilated to those covered by Article 3(2) of the directive (see, to that effect, Joined Cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-4721, paragraph 58).
43. As regards the second situation, which is covered by the second indent of that provision, recital 12 in the preamble to the directive – relating to that exception – mentions as examples of data processing carried out by a natural person in the course of a purely personal or household activity, correspondence and the

holding of records of addresses.

44. It follows that the latter exception must be interpreted as relating only to activities which are carried out in the course of private or family life of individuals (see *Lindqvist*, paragraph 47). That clearly does not apply to the activities of *Markkinapörssi* and *Satamedia*, the purpose of which is to make the data collected accessible to an unrestricted number of people.
45. It must therefore be held that activities involving the processing of personal data of the kind referred to at points (c) and (d) of the first question are not covered by any of the situations referred to in Article 3(2) of the directive.
46. Moreover, it should be pointed out that the directive does not lay down any further limitation of its scope of application.
47. In that regard, the Advocate General observes at point 125 of her Opinion that Article 13 of the directive permits derogations from its provisions only in certain cases, which do not extend to the provisions of Article 3.
48. Lastly, it must be held that a general derogation from the application of the directive in respect of published information would largely deprive the directive of its effect. It would be sufficient for the Member States to publish data in order for those data to cease to enjoy the protection afforded by the directive.
49. The answer to the fourth question should therefore be that activities involving the processing of personal data such as those referred to at points (c) and (d) of the first question and relating to personal data files which contain solely, and in unaltered form, material that has already been published in the media, fall within the scope of application of the directive.

The second question

50. By its second question, the national court asks, in essence, whether Article 9 of the directive should be interpreted as meaning that the activities referred to at points (a) to (d) of the first question, relating to data from documents which are in the public domain under national legislation, must be considered as activities involving the processing of personal data carried out solely for journalistic purposes. The national court states that it seeks clarification as to whether the fact that the principal aim of those activities is the publication of the data in question is relevant to the determination of

- that issue.
51. It must be observed, as a preliminary point, that, according to settled case-law, the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system it establishes (see, to that effect, Case C-265/07 Caffaro [2008] ECR I-0000, paragraph 14).
 52. In that regard, it is not in dispute that, as is apparent from Article 1 of the directive, its objective is that the Member States should, while permitting the free flow of personal data, protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy, with respect to the processing of personal data.
 53. That objective cannot, however, be pursued without having regard to the fact that those fundamental rights must, to some degree, be reconciled with the fundamental right to freedom of expression.
 54. Article 9 of the directive refers to such a reconciliation. As is apparent, in particular, from recital 37 in the preamble to the directive, the object of Article 9 is to reconcile two fundamental rights: the protection of privacy and freedom of expression. The obligation to do so lies on the Member States.
 55. In order to reconcile those two 'fundamental rights' for the purposes of the directive, the Member States are required to provide for a number of derogations or limitations in relation to the protection of data and, therefore, in relation to the fundamental right to privacy, specified in Chapters II, IV and VI of the directive. Those derogations must be made solely for journalistic purposes or the purpose of artistic or literary expression, which fall within the scope of the fundamental right to freedom of expression, in so far as it is apparent that they are necessary in order to reconcile the right to privacy with the rules governing freedom of expression.
 56. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Secondly, and in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary.
 57. In that context, the following points are relevant.
 58. First, as the Advocate General pointed out at point 65 of her Opinion and as is apparent from the legislative history of the directive, the exemptions and derogations provided for in Article 9 of the directive apply not only to media undertakings but also to every person engaged in journalism.
 59. Secondly, the fact that the publication of data within the public domain is done for profit-making purposes does not, *prima facie*, preclude such publication being considered as an activity undertaken 'solely for journalistic purposes'. As Markkinapörssi and Satamedia state in their observations and as the Advocate General noted at point 82 of her Opinion, every undertaking will seek to generate a profit from its activities. A degree of commercial success may even be essential to professional journalistic activity.
 60. Thirdly, account must be taken of the evolution and proliferation of methods of communication and the dissemination of information. As was mentioned by the Swedish Government in particular, the medium which is used to transmit the processed data, whether it be classic in nature, such as paper or radio waves, or electronic, such as the internet, is not determinative as to whether an activity is undertaken 'solely for journalistic purposes'.
 61. It follows from all of the above that activities such as those involved in the main proceedings, relating to data from documents which are in the public domain under national legislation, may be classified as 'journalistic activities' if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes.
 62. The answer to the second question should therefore be that Article 9 of the directive is to be interpreted as meaning that the activities referred to at points (a) to (d) of the first question, relating to data from documents which are in the public domain under national legislation, must be considered as activities involving the processing of personal data carried out 'solely for journalistic purposes', within the

meaning of that provision, if the sole object of those activities is the disclosure to the public of information, opinions or ideas. Whether that is the case is a matter for the national court to determine.

The third question

63. By its third question, the national court asks, in essence, whether Article 17 of the directive should be interpreted as meaning that it precludes the publication of data which have been collected for journalistic purposes and their onward transfer for commercial purposes.
64. Having regard to the answer given to the second question, there is no need to reply to this question.

Costs

65. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 3(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data is to be interpreted as meaning that an activity in which data on the earned and unearned income and the assets of natural persons are:**
 - collected from documents in the public domain held by the tax authorities and processed for publication,
 - published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,
 - transferred onward on CD-ROM to be used for commercial purposes, and
 - processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual's name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,

- **must be considered as the 'processing of personal data' within the meaning of that provision.**
2. **Article 9 of Directive 95/46 is to be interpreted as meaning that the activities referred to at points (a) to (d) of the first question, relating to data from documents which are in the public domain under national legislation, must be considered as activities involving the processing of personal data carried out 'solely for journalistic purposes', within the meaning of that provision, if the sole object of those activities is the disclosure to the public of information, opinions or ideas. Whether that is the case is a matter for the national court to determine.**
 3. **Activities involving the processing of personal data such as those referred to at points (c) and (d) of the first question and relating to personal data files which contain solely, and in unaltered form, material that has already been published in the media, fall within the scope of application of Directive 95/46.**

[Signatures]

FREEDOM OF EXPRESSION, FUNDAMENTAL RIGHTS,
LIMITATIONS TO FREEDOM OF EXPRESSION

CASE C-421/07 CRIMINAL PROCEEDINGS AGAINST FREDE DAMGAARD

(Reference for a preliminary ruling from the Vestre Landsret)

(Medicinal products for human use – Directive 2001/83/EC – Concept of ‘advertising’ – Dissemination of information about a medicinal product by a third party acting on his own initiative)

SUMMARY OF THE JUDGMENT

Approximation of laws – Medicinal products for human use – Directive 2001/83 – Advertising

(European Parliament and Council Directive 2001/83, as amended by Directive 2004/27, Art. 86)

Article 86 of Directive 2001/83 on the Community code relating to medicinal products for human use, as amended by Directive 2004/27, is to be interpreted as meaning that dissemination by a third party of information about a medicinal product, including its therapeutic or prophylactic properties, may be regarded as advertising within the meaning of that article, even though the third party in question is acting on his own initiative and completely independently, *de jure* and *de facto*, of the manufacturer and the seller of such a medicinal product. It is for the national court to determine whether that dissemination constitutes a form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products.

(see para. 29, operative part)

JUDGMENT OF THE COURT (SECOND CHAMBER)

2 April 2009²²

(Medicinal products for human use – Directive 2001/83/EC – Concept of ‘advertising’ – Dissemination of information about a medicinal product by a third party acting on his own initiative)

²² Language of the case: Danish.

tion of information about a medicinal product by a third party acting on his own initiative)

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 6 August 2007, received at the Court on 13 September 2007, in the criminal proceedings against Frede Damgaard,

THE COURT (Second Chamber), composed of C.W.A. Timmermans, President of the Chamber, J.C. Bonichot, K. Schiemann (Rapporteur), J. Makarczyk and C. Toader, Judges, Advocate General: D. Ruiz-Jarabo Colomer, Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2008, after considering the observations submitted on behalf of:

- Mr Damgaard, by S. Stærk Ekstrand, advokat,
- the Danish Government, by B. Weis Fogh, acting as Agent,
- the Belgian Government, by J.C. Halleux, acting as Agent,
- the Czech Government, by M. Smolek, acting as Agent,
- the Greek Government, by N. Dafniou, S. Alexandriou and K. Georgiadis, acting as Agents,
- the Polish Government, by T. Krawczyk, P. Dąbrowski and M. Dowgiewiewicz, acting as Agents,
- the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and J. Stratford and J. Coppel, Barristers,
- the Commission of the European Communities, by H. Støvlbæk and M. Šimerdová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 November 2008, gives the following Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 86 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34).
2. The reference was made in the context of criminal proceedings brought by the Anklagemyndigheden (Public Prosecutor) against Mr Damgaard, a journalist, who has been charged with

having publicly disseminated information about the properties and availability of a medicinal product the marketing of which is not authorised in Denmark.

Legal context

Directive 2001/83

3. Recitals 2 and 3 in the preamble to Directive 2001/83 state the following:

'(2) The essential aim of any rules governing the production, distribution and use of medicinal products must be to safeguard public health.

(3) However, this objective must be attained by means which will not hinder the development of the pharmaceutical industry or trade in medicinal products within the Community.'

4. According to recital 40 in the preamble to the same directive:

'The provisions governing the information supplied to users should provide a high degree of consumer protection, in order that medicinal products may be used correctly on the basis of full and comprehensible information.'

5. Recital 45 in the preamble to that directive is worded as follows:

'Advertising to the general public, even of non-prescription medicinal products, could affect public health, were it to be excessive and ill-considered. Advertising of medicinal products to the general public, where it is permitted, ought therefore to satisfy certain essential criteria which ought to be defined.'

6. Title III of Directive 2001/83, as amended by Directive 2004/27 ('Directive 2001/83'), concerns the placing of medicinal products on the market, whilst Title IV thereof lays down rules governing their manufacture and importation. Title VII of that directive lays down rules governing wholesale distribution of medicinal products.

7. Article 86 of Directive 2001/83, the first article under Title VIII thereof, entitled 'Advertising', provides:

'1. For the purposes of this Title, "advertising of medicinal products" shall include any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products; it shall include in particular:

– the advertising of medicinal products to the general public,

– advertising of medicinal products to persons qualified to prescribe or supply them,

– visits by medical sales representatives to persons qualified to prescribe [or supply] medicinal products,

– the supply of samples,

– the provision of inducements to prescribe or supply medicinal products by the gift, offer or promise of any benefit or bonus, whether in money or in kind, except when their intrinsic value is minimal,

– sponsorship of promotional meetings attended by persons qualified to prescribe or supply medicinal products,

– sponsorship of scientific congresses attended by persons qualified to prescribe or supply medicinal products and in particular payment of their travelling and accommodation expenses in connection therewith.

2. The following are not covered by this Title:

– the labelling and the accompanying package leaflets, which are subject to the provisions of Title V,

– correspondence, possibly accompanied by material of a non-promotional nature, needed to answer a specific question about a particular medicinal product,

– factual, informative announcements and reference material relating, for example, to pack changes, adverse-reaction warnings as part of general drug precautions, trade catalogues and price lists, provided they include no product claims,

– information relating to human health or diseases, provided that there is no reference, even indirect, to medicinal products.'

8. Article 87 of the same directive provides:

'1. Member States shall prohibit any advertising of a medicinal product in respect of which a marketing authorisation has not been granted in accordance with Community law.

2. All parts of the advertising of a medicinal product must comply with the particulars listed in the summary of product characteristics.

3. The advertising of a medicinal product:

– shall encourage the rational use of the medicinal product, by presenting it objectively and without exaggerating its properties,

– shall not be misleading.’

National legislation

9. Paragraph 27b of the Danish Law on medicinal products (Lægemiddellov, Consolidating Law No 656/1995) provides:

‘Advertising of medicinal products which may not lawfully be marketed or supplied in Denmark shall be prohibited.’

The dispute in the main proceedings and the question referred for a preliminary ruling

10. Hyben Total in powder and capsule form, after having been classified as a medicinal product by the Lægemiddelstyrelsen (Danish agency for medicinal products), was previously marketed in Denmark by its manufacturer, Natur-Drogeriet A/S (‘Natur-Drogeriet’), as a product relieving or treating gout, gallstones, kidney disorders, bladder disorders, sciatica, bladder bleeding, diarrhoea, stomach cramps, diabetes and kidney stones. The information material on the medicinal product was prepared by Mr Damgaard. Sales of that medicinal product were halted in 1999, however, when marketing authorisation was refused.
11. In 2003, Mr Damgaard stated on his website that Hyben Total contained roship powder, which is supposed to relieve the pain caused by various types of gout or arthrosis, and that the medicinal product was on sale in Sweden and Norway. By decision of 16 June 2003, the Lægemiddelstyrelsen informed Mr Damgaard that those statements constituted advertising contrary to Paragraph 27b of Law No 656/1995 on medicinal products and criminal proceedings were commenced against him.
12. By judgment of 2 December 2005, the Retten i Århus (Århus City Court) (Denmark) found Mr Damgaard guilty under the aforementioned national provision and sentenced him to a fine. He appealed against that judgment before the Vestre Landsret (Western Regional Court) (Denmark), arguing in those proceedings that he was not employed by Natur-Drogeriet and had no interest in that company or in sales of Hyben Total. His activities as a journalist in the health food sector were limited to the communication, to retailers and other interested parties, of information on food supplements. Mr Damgaard did not receive any remuneration from Natur-Drogeriet for the information he

disseminated concerning Hyben Total.

13. The Anklagemyndigheden, who brought the proceedings against Mr Damgaard, maintains that that dissemination of information was aimed at encouraging consumers to buy Hyben Total, irrespective of whether there was a link between Mr Damgaard and the manufacturer or seller of that medicinal product. Accordingly, that activity constitutes ‘advertising’ within the meaning of Article 86 of Directive 2001/83 and must be prohibited, since the marketing of that medicinal product, whose consumption that activity seeks to promote, is prohibited in Denmark.
14. Mr Damgaard contends that the information published on his website did not constitute advertising as contemplated in Article 86 of Directive 2001/83, as that concept must be construed more narrowly, that is, as not covering door-to-door information effected by an independent third party.
15. It is in those circumstances that the Vestre Landsret decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
- ‘Is Article 86 of Directive 2001/83 ... to be interpreted as meaning that dissemination by a third party of information about a medicinal product, including in particular information about the medicinal product’s therapeutic or prophylactic properties, is to be understood as constituting advertising, even though the third party in question is acting on his own initiative and completely independently, de jure and de facto, of the manufacturer and the seller?’

The question referred for a preliminary ruling

16. Recital 2 in the preamble to Directive 2001/83 states that the essential aim of any rules governing the production, distribution and use of medicinal products must be to safeguard public health. That aim is reiterated in the various titles of that directive, including Titles III, IV and VII thereof, the provisions of which guarantee that no medicinal product is placed on the market, manufactured or distributed without the necessary authorisations first having been obtained.
17. Similarly, in the area of information and advertising relating to medicinal products, recital 40 in the preamble to Directive 2001/83 states

- that the provisions governing the information supplied to users should provide a high degree of consumer protection, in order that medicinal products may be used correctly on the basis of full and comprehensible information. Recital 45 in the preamble to the directive further states that since advertising to the general public of non-prescription medicinal products could affect public health, were it to be excessive and ill-considered, it should therefore, where it is permitted, satisfy certain essential criteria which ought to be defined.
18. Article 87(1) of Directive 2001/83 prohibits any advertising of a medicinal product in respect of which a marketing authorisation has not been granted in accordance with Community law.
 19. The public dissemination of information about a medicinal product which is not authorised in a particular Member State may, depending on the context in which that dissemination takes place, influence consumers' behaviour and encourage them to purchase the medicinal product in question, which could affect public health. As the case-file referred to the Court shows, Mr Damgaard stated on his website that Hyben Total was available in Sweden and Norway.
 20. Article 86(1) of Directive 2001/83 defines the concept of 'advertising of medicinal products' as 'any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products'. Whilst that definition explicitly emphasises the purpose of the message, it does not provide any indication as to the people who disseminate that information.
 21. Thus, the wording of Directive 2001/83 does not rule out the possibility that a message originating from an independent third party may constitute advertising. Nor does the directive require a message to be disseminated in the context of commercial or industrial activity in order for it to be held to be advertising.
 22. In that regard, it must be stated that, even where it is carried out by an independent third party outside any commercial or industrial activity, advertising of medicinal products is liable to harm public health, the safeguarding of which is the essential aim of Directive 2001/83.
 23. It is for the national court to determine whether Mr Damgaard's actions constituted a form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of Hyben Total.
 24. To that end and as the Advocate General observed in point 37 of his Opinion, the situation of the author of a communication about a medicinal product and, in particular, his relationship with the company which manufactures or distributes it, are a factor which, although it may help to determine whether the communication constitutes advertising, must be evaluated together with other circumstances, such as the nature of the activity carried out and the content of the message.
 25. Regarding Mr Damgaard's argument alleging infringement of his right to freedom of expression as a result of his criminal conviction, it should be borne in mind that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.
 26. Whilst the principle of freedom of expression is expressly recognised by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see Case C71/02 Karner [2004] ECR I3025, paragraph 50).
 27. It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as

complex and fluctuating as advertising (see Karner, paragraph 51).

28. If the information disseminated on Mr Damgaard's website, which is at issue in the main proceedings, were to be found to constitute 'advertising' for the purposes of Directive 2001/83, his conviction could be considered reasonable and proportionate, in the light of the legitimate aim pursued, namely the protection of public health.
29. In the light of all the foregoing, the answer to the question referred is that Article 86 of Directive 2001/83 is to be interpreted as meaning that dissemination by a third party of information about a medicinal product, including its therapeutic or prophylactic properties, may be regarded as advertising within the meaning of that article, even though the third party in question is acting on his own initiative and completely independently, de jure and de facto, of the manufacturer and the seller of such a medicinal product. It is for the national court to determine whether that dissemination constitutes a form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products.

Costs

30. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 86 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004, is to be interpreted as meaning that dissemination by a third party of information about a medicinal product, including its therapeutic or prophylactic properties, may be regarded as advertising within the meaning of that article, even though the third party in question is acting on his own initiative and completely independently, de jure and de facto, of the manufacturer and the seller of

such a medicinal product. It is for the national court to determine whether that dissemination constitutes a form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products.

[Signatures]

PERSONAL DATA, INFORMATION ON RECIPIENTS OF DATA, TIME-LIMITS FOR STORAGE OF DATA, IMPORTANCE OF PROTECTING PRIVACY, OBLIGATIONS OF DATA PROCESSORS/CONTROLLERS, RIGHTS OF DATA SUBJECTS

CASE C-553/07 COLLEGE VAN BURGEMEESTER EN WETHOUDERS VAN ROTTERDAM V M.E.E. RIJKEBOER

(Reference for a preliminary ruling from the Raad van State)

(Protection of individuals with regard to the processing of personal data – Directive 95/46/EC – Respect for private life – Erasure of data – Right of access to data and to information on the recipients of data – Timelimit on the exercise of the right to access)

SUMMARY OF THE JUDGMENT

Approximation of laws – Protection of individuals with regard to the processing of personal data – Directive 95/46

(European Parliament and Council Directive 95/46, Art. 12(a))

The right to privacy, set out in Article 1(1) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, means that the data subject may be certain that his personal data are processed in a correct and lawful manner, that is to say, in particular, that the basic data regarding him are accurate and that they are disclosed to authorised recipients. As is stated in recital 41 in the preamble to the directive, in order to carry out the necessary checks, the data subject must have a right of access to the data relating to him which are being processed.

Article 12(a) of Directive 95/46 requires Member States to ensure a right of access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed not only in respect of the present but also in respect of the past. It is for Member States to fix a time-limit for storage of that information and to provide for access to that information which constitutes a fair

balance between, on the one hand, the interest of the data subject in protecting his privacy, in particular by way of his rights to object and to bring legal proceedings and, on the other, the burden which the obligation to store that information represents for the controller.

Rules limiting the storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed to a period of one year and correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue, unless it can be shown that longer storage of that information would constitute an excessive burden on the controller. It is, however, for national courts to make the determinations necessary.

(see paras 49, 70, operative part)

JUDGMENT OF THE COURT (THIRD CHAMBER)

7 May 2009²³

(Protection of individuals with regard to the processing of personal data – Directive 95/46/EC – Respect for private life – Erasure of data – Right of access to data and to information on the recipients of data – Timelimit on the exercise of the right to access)

In Case C553/07,

REFERENCE for a preliminary ruling under Article 234 EC made by the Raad van State (Netherlands), by decision of 5 December 2007, received at the Court on 12 December 2007, in the proceedings

College van burgemeester en wethouders van Rotterdam v M.E.E. Rijkeboer,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J. Klučka, U. Löhmus and P. Lindh (Rapporteur), Judges, Advocate General: D. Ruiz-Jarabo Colomer, Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 November 2008, after considering the observations submitted on behalf of:

- the College van burgemeester en wethouders van Rotterdam, by R. de Bree, advocaat,
- M.E.E. Rijkeboer, by W. van Bentem, juridisch

²³ Language of the case: Dutch.

adviseur,

- the Netherlands Government, by C.M. Wisels and C. ten Dam, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the Greek Government, by E.-M. Mamouna and V. Karra, acting as Agents,
- the Spanish Government, by M. Muñoz Pérez, acting as Agent,
- the Government of the United Kingdom of Great Britain and Northern Ireland, by Z. Bryanston-Cross and H. Walker, acting as Agents, and by J. Stratford, Barrister,
- the Commission of the European Communities, by R. Troosters and C. Docksey, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 December 2008,

gives the following Judgment

1. The reference for a preliminary ruling relates to the interpretation of Article 12(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31; 'the Directive').
2. This reference has been made in the context of proceedings between Mr Rijkeboer and the College van burgemeester en wethouders van Rotterdam (Board of Aldermen of Rotterdam; 'the College') regarding the partial refusal of the College to grant Mr Rijkeboer access to information on the disclosure of his personal data to third parties during the two years preceding his request for that information.

Legal context

Community legislation

3. Recitals 2 and 10 in the preamble to the Directive, relating to fundamental rights and freedoms, state:

'(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

...

(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law...'

4. Pursuant to recital 25 in the preamble to the Directive, the principles of protection must be reflected, on the one hand, in the obligations imposed on persons responsible for processing, in particular regarding data quality, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances.
5. Recital 40 in the preamble to the Directive, which relates to the obligation to inform a data subject when the data have not been gathered from him, states that there will be no such obligation if the provision of information to the data subject proves impossible or would involve disproportionate efforts and that, in that regard, the number of data subjects, the age of the data, and any compensatory measures adopted may be taken into consideration.
6. Pursuant to recital 41 in the preamble to the Directive, any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing.
7. Article 1, entitled 'Object of the Directive', reads as follows:
 - '1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.'
8. The concept of 'personal data' is defined in Article 2(a) of the Directive as any information relating to an identified or identifiable natural person ('data subject').
9. The Directive defines, in Article 2(b)

thereof, 'processing of personal data' as:

'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

10. In accordance with Article 2(d) of the Directive, the 'controller' is the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.
11. Article 2(g) of the Directive defines 'recipient' as a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not, as defined in Article 2(f) of the Directive.
12. Article 6 of the Directive sets out the principles relating to data quality. With regard to storage, Article 6(1)(e) provides that Member States are to ensure that personal data are 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use'.
13. Articles 10 and 11 of the Directive set out the information with which the controller or his representative must provide a data subject, either where data relating to him are collected from him or where such data have not been collected from him.
14. Article 12 of the Directive, entitled 'Right of access', states as follows:

'Member States shall guarantee every data subject the right to obtain from the controller:

(a) without constraint, at reasonable intervals and without excessive delay or expense:

– confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,

– communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,

– knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1);

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.'

15. Article 13(1) of the Directive, entitled 'Exemptions and restrictions', authorises Member States to derogate, inter alia, from Articles 6 to 12 thereof, if necessary to safeguard certain public interests, including national security, defence, the prevention, investigation, detection and prosecution of criminal offences and other interests, namely, the protection of the data subject or of the rights and freedoms of others.
16. Article 14 of the Directive provides that Member States are to grant the data subject the right, on certain grounds, to object to the processing of data relating to him.
17. In accordance with the second subparagraph of Article 17(1) of the Directive, Member States are to provide that the controller must implement appropriate technical and organisational measures which, having regard to the state of the art and the cost of their implementation, are to ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.
18. Pursuant to Articles 22 and 23(1) of the Directive, Member States are to provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question and to provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

National legislation

19. The Directive was transposed into Netherlands law by a general provision, the Law on the

protection of personal data (Wet bescherming persoonsgegevens). Furthermore, certain laws were adapted in order to take account of the Directive. Such is the case of the Law at issue in the main proceedings, that is to say, the Law on personal data held by local authorities (Wet gemeentelijke basisadministratie persoonsgegevens, Stb. 1994, No 494; the Wet GBA).

20. Article 103(1) of the Wet GBA provides that, on request, the College must notify a data subject in writing, within four weeks, whether data relating to him from the local authority personal records have, in the year preceding the request, been disclosed to a purchaser or to a third party.
21. In accordance with Article 110 of the Wet GBA, the College is to retain details of any communication of data for one year following that communication, unless that communication is apparent in another form in the database.
22. It is apparent from the written observations of the College that the data held by the local authority include, in particular, the name, the date of birth, the personal identity number, the social security/tax number, the local authority of registration, the address and date of registration at the local authority, civil status, guardianship, the custody of minors, the nationality and residence permit of aliens.

The dispute in the main proceedings and the question referred for a preliminary ruling

23. By letter of 26 October 2005, Mr Rijkeboer requested the College to notify him of all instances in which data relating to him from the local authority personal records had, in the two years preceding the request, been disclosed to third parties. He wished to know the identity of those persons and the content of the data disclosed to them. Mr Rijkeboer, who had moved to another municipality, wished to know in particular to whom his former address had been disclosed.
24. By decisions of 27 October and 29 November 2005, the College complied with that request only in part by notifying him only of the data relating to the period of one year preceding his request, by application of Article 103(1) of the Wet GBA.
25. Communication of the data is registered and stored in electronic form in accordance with

the 'Logisch Ontwerp GBA' (GBA Logistical Project). This is an automated system established by the Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Netherlands Ministry of the Interior and Home Affairs). It is apparent from the reference for a preliminary ruling that the data requested by Mr Rijkeboer dating from more than one year prior to his request were automatically erased, which accords with the provisions of Article 110 of the Wet GBA.

26. Mr Rijkeboer lodged a complaint with the College against the refusal to give him the information relating to the recipients to whom data regarding him had been disclosed during the period before the year preceding his request. That complaint having been rejected by decision of 13 February 2006, Mr Rijkeboer brought an action before the Rechtbank Rotterdam.
27. That court upheld the action, taking the view that the restriction on the right to information on provision of data to the year before the request, as provided for in Article 103(1) of the Wet GBA, is at variance with Article 12 of the Directive. It also held that the exceptions referred to in Article 13 of that directive are not applicable.
28. The College appealed against that decision to the Raad van State. That court finds that Article 12 of the Directive on rights of access to data does not indicate any time period within which it must be possible for those rights to be exercised. In its view, that article does not necessarily, however, preclude Member States from imposing a time restriction in their national legislation on the data subject's right to information concerning the recipients to whom personal data have been provided, but the court has doubts in that regard.
29. In those circumstances the Raad van State decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the restriction, provided for in the [Netherlands] Law [on local authority personal records], on the communication of data to one year prior to the relevant request compatible with Article 12(a) of [the] Directive ..., whether or not read in conjunction with Article 6(1)(e) of that directive and the principle of proportionality?'

The question referred

30. It should be recalled at the outset that, under

the system of judicial cooperation established by Article 234 EC, it is for the Court of Justice to interpret provisions of Community law. As far as concerns national provisions, under that system their interpretation is a matter for the national courts (see Case C449/06 Gysen [2008] ECR I553, paragraph 17).

31. Accordingly, the question referred by the national court should be understood, essentially, as seeking to determine whether, pursuant to the Directive and, in particular, to Article 12(a) thereof, an individual's right of access to information on the recipients or categories of recipient of personal data regarding him and on the content of the data communicated may be limited to a period of one year preceding his request for access.
32. That court highlights two provisions of the Directive, that is to say, Article 6(1)(e) on the storage of personal data and Article 12(a) on the right of access to those data. However, neither that court nor any of the parties which submitted observations to the Court has raised the question of the exceptions set out in Article 13 of the Directive.
33. Article 6 of the Directive deals with the quality of the data. Article 6(1)(e) requires Member States to ensure that personal data are kept for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The data must therefore be erased when those purposes have been served.
34. Article 12(a) of the Directive provides that Member States are to guarantee data subjects a right of access to their personal data and to information on the recipients or categories of recipient of those data, without setting a time-limit.
35. Those two articles seek, therefore, to protect the data subject. The national court wishes to know whether there is a link between those two articles in that the right of access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed could depend on the length of time for which those data are stored.
36. The observations submitted to the Court give different points of view on the interaction between those two provisions.
37. The College and the Netherlands, Czech, Spanish and United Kingdom Governments submit that the right of access to information on the recipients or categories of recipients referred to in Article 12(a) of the Directive exists only in the present and not in the past. Once the data have been erased in accordance with national legislation, the data subject can no longer have access to them. That consequence does not run contrary to the Directive.
38. The College and the Netherlands Government also submit that Article 103(1) of the Wet GBA, pursuant to which the local authority is to inform a data subject, on request, of data relating to him which, in the year preceding the request, have been disclosed to recipients, goes beyond the requirements laid down in the Directive.
39. The Commission and the Greek Government submit that the Directive provides for a right of access not only in the present but also for the period preceding the request for access. However, their views diverge with regard to the exact duration of that right of access.
40. In order to assess the scope of the right of access which the Directive must make possible, it is appropriate, first, to determine what data are covered by the right of access and, next, to turn to the objective of Article 12(a) examined in the light of the purposes of the Directive.
41. A case such as that of Mr Rijkeboer involves two categories of data.
42. The first concerns personal data kept by the local authority on a person, such as his name and address, which constitute, in the present case, the basic data. It is apparent from the oral observations submitted by the College and the Netherlands Government that those data may be stored for a long time. They constitute 'personal data' within the meaning of Article 2(a) of the Directive, because they represent information relating to an identified or identifiable natural person (see, to that effect, Joined Cases C465/00, C138/01 and C139/01 *Österreichischer Rundfunk and Others* [2003] ECR I4989, paragraph 64; Case C101/01 *Lindqvist* [2003] ECR I12971, paragraph 24; and Case C524/06 *Huber* [2008] ECR I0000, paragraph 43).
43. The second category concerns information on recipients or categories of recipient to whom those basic data are disclosed and on the content thereof and thus relates to the processing of the basic data. In accordance with the national legislation at issue in the main proceed-

- ings, that information is stored for only one year.
44. The time-limit on the right of access to information on the recipient or recipients of personal data and on the content of the data disclosed, which is referred to in the main proceedings, thus concerns that second category of data.
45. In order to determine whether or not Article 12(a) of the Directive authorises such a time-limit, it is appropriate to interpret that article having regard to its objective examined in the light of the purposes of the Directive.
46. Pursuant to Article 1 of the Directive, its purpose is to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, and thus to permit the free flow of personal data between Member States.
47. The importance of protecting privacy is highlighted in recitals 2 and 10 in the preamble to the Directive and emphasised in the case-law of the Court (see, to that effect, *Österreichischer Rundfunk and Others*, paragraph 70; *Lindqvist*, paragraphs 97 and 99; *Case C275/06 Promusicae* [2008] ECR I271, paragraph 63; and *Case C73/07 Satakunnan Markkinapörssi and Satamedia* [2008] ECR I0000, paragraph 52).
48. Furthermore, as follows from recital 25 in the preamble to the Directive, the principles of protection must be reflected, on the one hand, in the obligations imposed on persons responsible for processing, in particular regarding data quality – the subject-matter of Article 6 of the Directive – and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request rectification and even to object to processing in certain circumstances.
49. That right to privacy means that the data subject may be certain that his personal data are processed in a correct and lawful manner, that is to say, in particular, that the basic data regarding him are accurate and that they are disclosed to authorised recipients. As is stated in recital 41 in the preamble to the Directive, in order to carry out the necessary checks, the data subject must have a right of access to the data relating to him which are being processed.
50. In that regard, Article 12(a) of the Directive provides for a right of access to basic data and to information on the recipients or categories of recipient to whom the data are disclosed.
51. That right of access is necessary to enable the data subject to exercise the rights set out in Article 12(b) and (c) of the Directive, that is to say, where the processing of his data does not comply with the provisions of the Directive, the right to have the controller rectify, erase or block his data, (paragraph (b)), or notify third parties to whom the data have been disclosed of that rectification, erasure or blocking, unless this proves impossible or involves a disproportionate effort (paragraph (c)).
52. That right of access is also necessary to enable the data subject to exercise his right referred to in Article 14 of the Directive to object to his personal data being processed or his right of action where he suffers damage, laid down in Articles 22 and 23 thereof.
53. With regard to the right to access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed, the Directive does not make it clear whether that right concerns the past and, if so, what period in the past.
54. In that regard, to ensure the practical effect of the provisions referred to in paragraphs 51 and 52 of the present judgment, that right must of necessity relate to the past. If that were not the case, the data subject would not be in a position effectively to exercise his right to have data presumed unlawful or incorrect rectified, erased or blocked or to bring legal proceedings and obtain compensation for the damage suffered.
55. A question arises as to the scope of that right in the past.
56. The Court has already held that the provisions of the Directive are necessarily relatively general since it has to be applied to a large number of very different situations and that the Directive includes rules with a degree of flexibility, in many instances leaving to the Member States the task of deciding the details or choosing between options (see *Lindqvist*, paragraph 83). Thus, the Court has recognised that, in many respects, the Member States have some freedom of action in implementing the Directive (see *Lindqvist*, paragraph 84). That freedom, which becomes apparent with regard to the transposition of Article 12(a) of the Directive, is not, however, unlimited.

57. The setting of a time-limit with regard to the right to access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed must allow the data subject to exercise the different rights laid down in the Directive and referred to in paragraphs 51 and 52 of the present judgment.
58. The length of time the basic data are to be stored may constitute a useful parameter without, however, being decisive.
59. The scope of the Directive is very wide, as the Court has already held (see *Österreichischer Rundfunk and Others*, paragraph 43, and *Lindqvist*, paragraph 88), and the personal data covered by the Directive are varied. The length of time such data are to be stored, defined in Article 6(1)(e) of the Directive according to the purposes for which the data were collected or for which they are further processed, can therefore differ. Where the length of time for which basic data are to be stored is very long, the data subject's interest in exercising the rights to object and to remedies referred to in paragraph 57 of the present judgment may diminish in certain cases. If, for example, the relevant recipients are numerous or there is a high frequency of disclosure to a more restricted number of recipients, the obligation to keep the information on the recipients or categories of recipient of personal data and on the content of the data disclosed for such a long period could represent an excessive burden on the controller.
60. The Directive does not require Member States to impose such burdens on the controller.
61. Accordingly, Article 12(c) of the Directive expressly provides for an exception to the obligation on the controller to notify third parties to whom the data have been disclosed of any correction, erasure or blocking, namely, where this proves impossible or involves a disproportionate effort.
62. In accordance with other sections of the Directive, account may be taken of the disproportionate nature of other possible measures. With regard to the obligation to inform the data subject, recital 40 in the preamble to the Directive states that the number of data subjects and the age of the data may be taken into consideration. Furthermore, in accordance with Article 17 of the Directive concerning security of processing, Member States are to provide that the controller must implement appropriate technical and organisational measures which, having regard to the state of the art and the cost of their implementation, are to ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.
63. Analogous considerations are relevant with regard to the fixing of a time-limit on the right of access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed. In addition to the considerations referred to in paragraph 57 of the present judgment, a number of parameters may accordingly be taken into account by the Member States, in particular applicable provisions of national law on time-limits for bringing an action, the more or less sensitive nature of the basic data, the length of time for which those data are to be stored and the number of recipients.
64. Thus it is for the Member States to fix a time-limit for storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed and to provide for access to that information which constitutes a fair balance between, on the one hand, the interest of the data subject in protecting his privacy, in particular by way of his rights to rectification, erasure and blocking of the data in the event that the processing of the data does not comply with the Directive, and rights to object and to bring legal proceedings and, on the other, the burden which the obligation to store that information represents for the controller.
65. Moreover, when fixing that time-limit, it is appropriate to take account also of the obligations which following from Article 6(e) of the Directive to ensure that personal data are kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.
66. In the present case, rules limiting the storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed to a period of one year and correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue, unless it can be shown that longer storage of that information would constitute an excessive burden on the controller. It is, however, for national courts to make the verifications necessary in

the light of the considerations set out in the preceding paragraphs.

67. Having regard to the foregoing considerations, the argument of some Member States that application of Articles 10 and 11 of the Directive renders superfluous a grant in respect of the past of a right to access to information on the recipients or categories of recipient referred to in Article 12(a) of the Directive cannot be accepted.
68. Articles 10 and 11 impose obligations on the controller or his representative to inform the data subject, in certain circumstances, in particular of the recipients or categories of recipient of the data. The controller or his representative must communicate that information to the data subject of their own accord, *inter alia* when the data are collected or, if the data are not collected directly from the data subject, when the data are registered or, possibly, when the data are disclosed to a third party.
69. In that way, those provisions are intended to impose obligations distinct from those which follow from Article 12(a) of the Directive. Consequently, they in no way reduce the obligation placed on Member States to ensure that the controller is required to give a data subject access to the information on the recipients or categories of recipient and on the data disclosed when that data subject decides to exercise his right to access conferred on him by Article 12(a). Member States must adopt measures transposing, firstly, the provisions of Articles 10 and 11 of the Directive on the obligation to provide information and, secondly, those of Article 12(a) of the Directive, without it being possible for the former to attenuate the obligations following from the latter.
70. The answer to the question referred must therefore be that:
 - Article 12(a) of the Directive requires Member States to ensure a right of access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed not only in respect of the present but also in respect of the past. It is for Member States to fix a time-limit for storage of that information and to provide for access to that information which constitutes a fair balance between, on the one hand, the interest of the data subject in protecting his privacy, in particular by way of his rights to object and to bring legal proceedings and, on the other, the burden which

the obligation to store that information represents for the controller.

- Rules limiting the storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed to a period of one year and correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue, unless it can be shown that longer storage of that information would constitute an excessive burden on the controller. It is, however, for national courts to make the determinations necessary.

Costs

71. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 12(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data requires Member States to ensure a right of access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed not only in respect of the present but also in respect of the past. It is for Member States to fix a time-limit for storage of that information and to provide for access to that information which constitutes a fair balance between, on the one hand, the interest of the data subject in protecting his privacy, in particular by way of his rights to object and to bring legal proceedings and, on the other, the burden which the obligation to store that information represents for the controller.

Rules limiting the storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed to a period of one year and correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue, unless

it can be shown that longer storage of that information would constitute an excessive burden on the controller. It is, however, for national courts to make the determinations necessary.

[Signatures]

INTERNET ACCESS PROVIDER, DISCLOSURE OF PERSONAL DATA IN CIVIL PROCEEDINGS, 'INTERMEDIARIES' PURSUANT TO DIRECTIVE 2001/29/EC

LSG-GESELLSCHAFT ZUR WAHRNEHMUNG VON LEISTUNGSSCHUTZ-RECHTEN GMBH v TELE2 TELECOMMUNICATION GMBH

19 February 2009²⁴

(Article 104(3) of the Rules of Procedure – Information society – Copyright and related rights – Saving and disclosure of certain traffic data – Protecting the confidentiality of electronic communications – 'Intermediaries' within the meaning of Article 8(3) of Directive 2001/29/EC)

In Case C557/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberster Gerichtshof (Austria), made by decision of 13 November 2007, received at the Court on 14 December 2007, in the proceedings

LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH,

THE COURT (Eighth Chamber), composed of T. von Danwitz, President of the Chamber, G. Arestis and J. Malenovský (Rapporteur), Judges, Advocate General: Y. Bot, Registrar: R. Grass,

proposing to give its decision on the second question by reasoned order in accordance with the first subparagraph of Article 104(3) of the Rules of Procedure, having informed the referring court that the Court proposes to give its decision on the first question by reasoned order in accordance with the second subparagraph of Article 104(3) of the Rules of Procedure, after calling on the interested persons referred to in Article 23 of the Statute of the Court of Justice to submit their observations in that regard, after hearing the Advocate General,

makes the following Order

1. This reference for a preliminary ruling concerns the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).
2. The reference has been made in the context of proceedings brought by LSGGesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH ('LSG') against Tele2 Telecommunication GmbH ('Tele2') concerning Tele2's refusal to send LSG the names and addresses of the persons for whom it provides Internet access.

Legal context

Community legislation

- The provisions concerning the information society and the protection of intellectual property, particularly copyright
 - Directive 2000/31/EC
3. Under Article 1(1) thereof, Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.
 - Directive 2001/29
 4. Recital 59 in the preamble to Directive 2001/29 states:

'In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, right-holders should have the possibility of applying

for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

5. Under Article 1(1) thereof, Directive 2001/29 concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.
6. Paragraph 1 of Article 5 of Directive 2001/29, which is entitled 'Exceptions and limitations', provides:

'Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.'

7. Article 8 of Directive 2001/29, which is entitled 'Sanctions and remedies', provides:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

- Directive 2004/48

8. Article 8 of Directive 2004/48 is worded as follows:

'1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities; or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the processing of personal data.'

The provisions concerning the protection of

personal data

- Directive 95/46/EC

9. Paragraph 1 of Article 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), which is entitled 'Exceptions and restrictions', provides:

'1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

- (a) national security;
- (b) defence;
- (c) public security;
- (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
- (e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
- (f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);
- (g) the protection of the data subject or of the rights and freedoms of others.'

- Directive 2002/58

10. Article 5(1) of Directive 2002/58 provides:

'Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.'

11. Article 6 of Directive 2002/58 provides:

'1. Traffic data relating to subscribers and us-

ers processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his/her consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

...

5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.'

12. Under Article 15(1) of Directive 2002/58:

'Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the

electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.'

National legislation

13. Paragraph 81 of the Austrian Federal Law on copyright in literary and artistic works and related rights (Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte), in the version published in BGBl. I, 81/2006 (the Austrian Federal Law on Copyright), provides:

'(1) A person who has suffered an infringement of any exclusive rights conferred by this Law, or who fears such an infringement, shall be entitled to bring proceedings for a restraining injunction. Legal proceedings may also be brought against the proprietor of a business if the infringement is committed in the course of the activities of his business by one of his employees or by a person acting under his control, or if there is a danger that such an infringement will be committed.

1(a) If the person who has committed such an infringement, or by whom there is a danger of such an infringement being committed, uses the services of an intermediary for that purpose, the intermediary shall also be liable to an injunction under subparagraph (1).

...'

14. Paragraph 87b(2) to (3) of the Austrian Federal Law on Copyright is worded as follows:

'(2) A person who has suffered an infringement of any exclusive rights conferred by this Law shall be entitled to require information as regards the origin and distribution channels of infringing goods and services, to the extent that this would not be disproportionate to the gravity of the infringement and would not infringe statutory obligations of confidentiality; the obligation to disclose information is on the infringer and on any persons who in the course of business:

1. have been in possession of infringing goods;
2. have received infringing services; or
3. have supplied services used for the infringe-

ment.

(2a) So far as is necessary, the obligation under subparagraph (2) to disclose information includes:

1. the names and addresses of the producers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

2. the quantities produced, delivered, received or ordered, as well as the price paid for the goods or services in question.

- 3) Intermediaries within the meaning of Paragraph 81(1a) shall give the person whose rights have been infringed information as to the identity of the infringer (name and address) or the information necessary to identify the infringer, following an application in writing by the person whose rights have been infringed, such application to include sufficient reasons. The reasons given must include in particular sufficiently precise details as to the facts which give rise to a suspicion that there has been an infringement of rights. The person whose rights have been infringed shall pay the intermediary reasonable compensation for the costs incurred in the provision of that information.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15. LSG is a collecting society. It enforces as trustee the rights of recorded music producers in their worldwide recordings and the rights of the recording artists in respect of the exploitation of those recordings in Austria. The rights concerned are, in particular, the right to reproduce and distribute the recordings and the right to make them available to the public.
16. Tele2 is an Internet access provider which assigns to its clients Internet Protocol Addresses ('IP addresses'), which are most often dynamic rather than static. Tele2 is able to identify individual clients on the basis of the IP address and the period or date when it was assigned.
17. The holders of the rights defended by LSG suffer financial loss as a result of the creation of filesharing systems which make it possible for participants to exchange copies of saved data. In order to be able to bring civil proceedings against the perpetrators, LSG applied for an order requiring Tele2 to send it the names and addresses of the persons to whom it had

provided an Internet access service and whose IP addresses, together with the day and time of the connection, were known. Tele2 took the view that it was obliged to refuse that request for information. It stated that it is not an intermediary and is not authorised to save access data.

18. By judgment of 21 June 2006, the Handelsgericht Wien (Commercial Court, Vienna) granted LSG's application, on the view that, as an Internet access provider, Tele2 is an intermediary within the meaning of Paragraph 81(1a) of the Austrian Federal Law on Copyright and that, as such, it is required to provide the information referred to in Paragraph 87b(3) thereof.
19. According to the order for reference, the decision at first instance was confirmed on appeal by the Oberlandesgericht Wien (Higher Regional Court, Vienna) by judgment of 12 April 2007, in respect of which an appeal on a point of law has been brought before the Oberster Gerichtshof (Austrian Supreme Court).
20. Before the Oberster Gerichtshof, Tele2 claims, first, that it is not an intermediary within the meaning of Paragraph 81(1a) of the Austrian Federal Law on Copyright or Article 8(3) of Directive 2001/29, since, as Internet access provider, it indeed enables the user to access the Internet, but it exercises no control, whether *de iure* or *de facto*, over the services which the user makes use of. Secondly, the tensions in the relationship between the right to information entailed by the legal protection of copyright and the limits placed by data protection laws on the saving and disclosure of personal data have been resolved, in favour of data protection, by the Community directives.
21. The Oberster Gerichtshof is of the view that the Opinion of the Advocate General in Case C-275/06 *Promusicae* [2008] ECR I 271, delivered after the present order for reference, raises doubts as to whether the right to information conferred by Paragraph 87b(3) of the Austrian Federal Law on Copyright, read in conjunction with Paragraph 81(1a) thereof, is in conformity with the directives adopted in the data protection field and, in particular, with Articles 5, 6 and 15 of Directive 2002/58. The aforementioned provisions of Austrian law require private third parties to be provided with information on personal data relating to Internet traffic, thereby imposing a duty to disclose, which presupposes that the Internet traffic

data have first been processed and saved.

22. In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the term "intermediary" in Article 5(1)(a) and Article 8(3) of Directive [2001/29] to be interpreted as including an access provider who merely provides a user with access to the network by allocating him a dynamic IP address but does not himself provide him with any services such as email, FTP or filesharing services and does not exercise any control, whether *de iure* or *de facto*, over the services which the user makes use of?

(2) If the first question is answered in the affirmative:

Is Article 8(3) of Directive [2004/48], regard being had to Article 6 and Article 15 of Directive [2002/58], to be interpreted (restrictively) as not permitting the disclosure of personal traffic data to private third parties for the purposes of civil proceedings for alleged infringements of exclusive rights protected by copyright (rights of exploitation and use)?

The questions referred for a preliminary ruling

23. Under Article 104(3) of the Rules of Procedure – that is to say, *inter alia*, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt – the Court may give its decision by reasoned order.

The second question

24. By its second question, which it is appropriate to consider first, the national court essentially asks whether Community law, in particular Article 8(3) of Directive 2004/48, read in conjunction with Articles 6 and 15 of Directive 2002/58, precludes Member States from imposing an obligation to disclose to private third parties personal data relating to Internet traffic in order to enable them to bring civil proceedings for copyright infringements.
25. The reply to that question can be clearly inferred from the case-law of the Court.
26. In paragraph 53 of *Promusicae*, the Court stated that the exceptions provided for in Article 15(1) of Directive 2002/58, which refers expressly to

Article 13(1) of Directive 95/46, include measures which are necessary for the protection of the rights and freedoms of others. As it does not specify the rights and freedoms covered by that exception, Directive 2002/58 must be interpreted as reflecting the intention of the Community legislature not to exclude from its scope the protection of the right to property or situations in which authors seek to obtain that protection through civil proceedings.

27. The Court inferred from this, in paragraphs 54 and 55 of *Promusicae*, that Directive 2002/58 – in particular, Article 15(1) thereof – does not preclude the Member States from imposing an obligation to disclose personal data in the context of civil proceedings, nor does it oblige them to impose such an obligation.
28. Moreover, the Court pointed out that the freedom which Member States retain to give priority to the right to privacy or to the right to property is qualified by a number of requirements. Accordingly, when transposing Directives 2000/31, 2001/29, 2002/58 and 2004/48 into national law, it is for the Member States to ensure that they rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Furthermore, when applying the measures transposing those directives, the authorities and courts of Member States must not only interpret their national law in a manner consistent with those directives, but must also make sure that they do not rely on an interpretation of those directives which would conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (*Promusicae*, paragraph 70).
29. Accordingly, the answer to the second question is that Community law – in particular, Article 8(3) of Directive 2004/48, read in conjunction with Article 15(1) of Directive 2002/58 – does not preclude Member States from imposing an obligation to disclose to private third parties personal data relating to Internet traffic in order to enable them to bring civil proceedings for copyright infringements. Community law nevertheless requires Member States to ensure that, when transposing Directives 2000/31, 2001/29, 2002/58 and 2004/48 into national law, they rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights involved. Moreover, when applying the

measures transposing those directives, the authorities and courts of Member States must not only interpret their national law in a manner consistent with those directives, but must also make sure that they do not rely on an interpretation of those directives which would conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

The first question

30. By its first question, the national court asks, essentially, whether access providers which merely provide users with Internet access, without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, are 'intermediaries' within the meaning of Articles 5(1)(a) and 8(3) of Directive 2001/29.
31. On the view that the answer to that question admits of no reasonable doubt, the Court informed the national court, in accordance with the second paragraph of Article 104(3) of the Rules of Procedure, that it proposed to give its decision by reasoned order, and called on the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations they might have in that regard.
32. LSG, the Spanish and United Kingdom Governments and the Commission of the European Communities indicated to the Court that they had no objection to the Court's proposal to give its decision by reasoned order.
33. Tele2 confines its observations in that regard, essentially, to those matters already raised in its written pleadings. According to Tele2, Community law accords Internet access providers privileged treatment, in terms of liability, which is incompatible with an unlimited obligation to disclose information. However, those arguments are not such as to lead the Court to rule out the procedural route envisaged.
34. It follows clearly both from the order for reference and from the wording of the questions referred that, by its first question, the national court wishes to know whether Internet access providers who merely enable the user to access the Internet may be required to provide the information referred to in the second question.
35. First, it should be pointed out that Article 5(1)(a) of Directive 2001/29 requires Member States to provide for exemptions from repro-

duction rights.

36. The point at issue in the dispute before the referring court is whether LSG can rely on a right to information as against Tele2, not whether Tele2 has infringed reproduction rights.
37. It follows that an interpretation of Article 5(1) (a) of Directive 2001/29 serves no purpose in relation to the outcome of the dispute before the referring court.
38. Tele2 maintains, *inter alia*, that intermediaries must be in a position to bring copyright infringements to an end. Internet access providers, on the other hand, in as much as they exercise no control, whether *de iure* or *de facto*, over the services accessed by the user, are not capable of bringing such infringements to an end and, accordingly, are not 'intermediaries' within the meaning of Directive 2001/29.
39. It should be noted at the outset that *Promusicae* concerned the communication by *Telefónica de España SAU* – a commercial undertaking engaged, *inter alia*, in the provision of Internet access services – of the identities and physical addresses of certain persons to whom it provided such services and whose IP addresses and dates and times of connection were known (*Promusicae*, paragraphs 29 and 30).
40. It is common ground, as is apparent from the question referred and from the facts in *Promusicae*, that *Telefónica de España SAU* was an Internet access provider (*Promusicae*, paragraphs 30 and 34).
41. Accordingly, in holding – in paragraph 70 of *Promusicae* – that Directives 2000/31, 2001/29, 2002/58 and 2004/48 do not require the Member States to impose, in a situation such as that in *Promusicae*, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings, the Court did not immediately rule out the possibility that Member States may, pursuant to Article 8(1) of Directive 2004/48, place Internet access providers under a duty of disclosure.
42. It should also be pointed out that, under Article 8(3) of Directive 2001/29, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.
43. Access providers who merely enable clients to access the Internet, even without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.
44. Moreover, according to Recital 59 in the preamble to Directive 2001/29, rightholders should have the possibility of applying for an injunction against an intermediary who 'carries a third party's infringement of a protected work or other subject-matter in a network'. It is common ground that access providers, in granting access to the Internet, make it possible for such unauthorised material to be transmitted between a subscriber to that service and a third party.
45. That interpretation is borne out by the aim of Directive 2001/29 which, as is apparent in particular from Article 1(1) thereof, seeks to ensure the legal protection of copyright and related rights in the framework of the internal market. The protection sought by Directive 2001/29 would be substantially diminished if 'intermediaries', within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights.
46. In view of the foregoing, the answer to the first question is that access providers which merely provide users with Internet access, without offering other services such as email, FTP or filesharing services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, must be regarded as 'intermediaries' within the meaning of Article 8(3) of Directive 2001/29.

Costs

47. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. Community law – in particular, Article 8(3) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, read in conjunction with Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) – does not preclude Member States from imposing an obligation to disclose to private third parties personal data relating to Internet traffic in order to enable them to bring civil proceedings for copyright infringements. Community law nevertheless requires Member States to ensure that, when transposing into national law Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, and Directives 2002/58 and 2004/48, they rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights involved. Moreover, when applying the measures transposing those directives, the authorities and courts of Member States must not only interpret their national law in a manner consistent with those directives but must also make sure that they do not rely on an interpretation of those directives which would conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.
2. Access providers which merely provide users with Internet access, without offering other services such as email, FTP or file-sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as 'intermediaries' within the meaning of Article 8(3) of Directive 2001/29.

[Signatures]

INDEX

- Business secrets** 1222
- Common foreign and security policy** 1210
- Community competence** 996, 1122
- Confidentiality** 1222
- Criminal law** 996, 1014
- Data** 908
 - disclosure to third parties 908, 916
 - free movement of 916
 - information on recipients of 1260
 - processing for public security purposes 1074
 - quality of 1230
 - transmitting for journalistic purposes 1244
 - time-limits for storage of 1260
 - transfer 932
 - use by the police or judicial authorities 1198
- Database** 908
- Data processors/controllers** 1260
- Data retention** 1198, 1230
- Data subject** 1050
 - rights of 1260
- Direct applicability** 916
- Document** 866
 - access to 1050
 - limitations to 866
 - Access to 866
- ECHR** 884, 960, 1014, 1050, 1222
- Electronic communications system** 1184
- ENISA** 1198, 1210, 1222
- Framework decision** 996, 1166
- Freedom of expression** 884, 960, 1254, 1260, 1270
 - limitations to 884
- Fundamental rights** 884, 908, 932, 960, 968, 1014, 1122, 1184, 1210, 1222, 1230, 1244, 1254, 1260, 1270
- Gambling** 948
- Goods** 960
 - free movement of 960, 1176
- Hosting provider** 932
- Information society service** 1004
- Interests**
 - public and private 1050
- Intermediaries** 1270
- International law** 968, 1088, 1114, 1176
- International peace and security** 1088
- Internet access provider** 1270
- ne bis in idem principle** 1104
- Necessity** 1230
- Perpetrator** 1014
- Personal data** 916, 932, 1050, 1184, 1230, 1244, 1260, 1270
 - processing 932, 1050
 - transfer to third countries 932
- Private life** 916, 1050, 1184, 1222
- Private operators** 1074
- Public interest** 866
- Public security** 851, 860, 866, 1074, 1198
- Public services** 884
- Published information** 1244
- Publishing** 884
 - prior permission for 884
- Security** 851
 - of a Member State 860
- Security Council** 968, 1122
- Services** 948
 - freedom to provide and receive 948, 960
- State authorities** 1074
- Territoriality** 1088
- Traffic data** 1184
- Victim** 1166

