DOCUMENTS

I

COUNCIL OF EUROPE

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

by

A. B. Mc NULTY *

Secretary to the European Commission of Human Rights

A

NOTE ON APPLICATION

The European Convention on Human Rights came into force on 3rd September 1953 and has been ratified by 15 of the 17 Member States (all except France and Switzerland[1]) of the Council of Europe. Cyprus ratified the Convention on 6th October 1962.

The Convention contains a list of certain personal and political rights and freedoms. These are limitatively defined and there are clauses which allow a Government to take measures for the protection of a democratic society. The Convention has not attempted to provide for economic or social rights as has the United Nations Declaration of Human Rights. On the other hand, unlike the United Nations Declaration which inspired it but which itself remains an unimplemented statement of principles, the Convention is an operative document.

---

*) Mr. **Mc Nulty** has based his Lecture of 24 th January, 1964 at Istanbul Faculty of Law on these notes.

1) Switzerland became a Member State of the Council of Europe on 6th May 1963.

It provides for the collective enforcement of the rights and freedoms concerned by the establishment of a Court of Human Rights and a Commission of Human Rights (Art. 19), which are composed, each on a slightly different basis, of members from each Party to the Convention.

The Court was established on 3rd Sptember 1958 after its optional competence had been accepted by the necessary minimum of eight States[2]. Briefly, the Court has competence to determine the issue of a violation of the Convention only in cases where the Commission, having declared en application admissible, has subsequently failed in its task of achieving a friendly settlement of the matter between the parties. The Committe of Ministers of the Council of Europe acts in place of the Court where a case is not referred to the latter. The Commission, a complainant State or the State complained against may bring a case before the Court, but an individual who has lodged an application with the Commission has no such right (Arts. 44-48).

Two individual cases have been the subject of decisions by the Court[3] and 8 cases have been dealt with by the Committee of Ministers[4].

The Commission of Human Rights has an obligatory competence in regard to inter-State applications (Art. 24) and an optional competence in regard to applications lodged by an individual, non-governmental organisation or group of individuals (Art. 25). This optional competence was achieved on 5th July 1955 after the necessary minimum of 6 States had declared their acceptance. Today, 10 States[5] have accepted by the Commission's competence to receive applications lodged by individuals.

The Commission sits in two instances: first, on the basis of a report of a working group of three of its members to decide whether an application is, *prima facie*, admissible; secondly, where

---

2) Austria, Belgium, Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg and the Netherlands.

3) Lawless v. Ireland; De Becker v. Belgium.

4) Greece v. United Kingdom (2 cases); Nielsen v. Denmark; Ofner/Hopfinger and Pataki/Dunshirn v. Austria; Austria v. Italy.

5) All except Cyprus, France, Greece, Italy, Switzerland, Turkey and the United Kingdom.

an application is declared admissible, to ascertain the full facts and attempt to achieve a friendly settlement between the parties. The second stage is carried out by a Sub-Commission of seven members. If a friendly settlement is reached, a brief report is made by the Sub-Comcission to the Committee of Ministers of the Council of Europe. If it is not reached, a comprehensive report of the case is made by the Sub-Commission to the Commission which makes its own report to the Committee of Ministers, including an opinion on the issue of violation of the Convention. It is then for the Court, if seized of the case or, if not, the Committe of Ministers, to decide whether or not there has been a violation of the Convention and to prescribe any measures to be taken by the respondent Government. Proceedings before the Commission are free and no formalities are imposed for the presentation of an Application. At the end of 1963 a system of free legal aid was approved by the Member States for a testperiod of two years. Such aid may be granted at the Commission's discretion in appropriate cases to an applicant lacking adequate means for the proper presentation of his case. The Court and Commission have each established their own rules of procedure.

Three inter-State applications have been lodged with the Commission. Two were brought in 1956-57 by Greece against the United Kingdom in regard to alleged violations of the Convention in Cyprus and were later withdrawn by mutual agreement. The third case, brought in 1960 by Austria against Italy, was in respect of alleged violations of the Convention arising out of certain criminal proceedings in courts in South Tyrol. The Commission, having failed to achieve a friendly settlement between the parties, submitted its report to the Committee of Ministers stating its opinion that there had been no violation of the Convention. It also expressed the opinion that it was highly desirable for humanitarian reasons, including the youth of the prisoners, that measures of clemency be taken in their favour. The Committee of Ministers in October 1963 passed a resulution agreeing with the Commission's reasoning and deciding that there had been no violation of the Convention. This resulotion was sent to the parties with the information that the Ministers had taken note of the Commission's opinion regarding clemency.

As regards individual applications, about 2,100 have now been registered with the Commission and the total for 1963 was 340 as compared with 442 in 1962 and 340 in 1961. The Commission had seven sessions in 1963 and has dealt altogether with about 1,600 cases of which 30 have been declared admissible, about 70 have been referred to the Government concerned for written and sometimes oral comments on the issue of admissibility, and the remainder have been at once rejected. In the past years about 50% of applications have been lodged by persons detained in prison and about 10% of applicants have been represented by lawyers.

It is not appropriate to include full notes on the Commission's jurisprudence, but the following are the principal grounds of inadmissibility:

1. *ratione temporis*: the facts concerned occurred prior to the entry into force of the Convention as regards the Government concerned.
2. non - exhaustion of domestic remedies: it is an established rule of international law, and also provided for in the Convention (Art. 26), that all effective domestic remedies must be exhausted before the Commission can be seized of a complaint; an application must also be lodged within six months of the final domestic decision, if any;
3. incompatibility with the Convention: the responsibility of the State complained against is not involved, e.g. the allegations concern a right or freedom which is not contained in the Convention;
4. manifestly ill - founded: no *prima facie* violation of the Convention. A large group of cases, for example, are those in which convicted persons allege that they have been the victims of erroneous proceedings. The Commission has frequently stated that it is not a court of appeal to examine alleged mistakes of law or fact committed by national tribunals unless a breach of the Convention is involved, in particular, of the provisions guaranteeing a proper administration of justice (Art. 6).

Perhaps the most important class of cases with which the Commission is called upon to deal are those where it has, as it

were, to balance the right of the individual against the right and duty of a State to take measures in the interest of, for example, public safety, public morals or the protection of the rights and freedoms of others. Such limitations are provided for in many Articles of the Convention and two overriding provisions allow a State to derogate from certain Articles in times of emergency (Art. 15) and to prevent an abuse of the Convention by persons whose own object is shown to be the destruction of the rights and freedoms contained therein (Art. 17).

In this context, the Commission has had to examine the following situations: the emergency laws, in particular, providing for punishment by whipping and for various forms of collective punishment, imposed by the Cyprus Government in 1955 - 56[6]; the detention measures taken in 1957 by the Irish Government to deal with suspected members of the Irish Republican Army[7]; the dissolution and proscription of the German Communist Party in 1956 on the motion of the Federal German Government[8]; periods of detention of accused persons awaiting trial by domestic courts[9]; interference by the authorities with the right to family life, for example, where the custody of, or access to[10], children of divorced parents is concerned, or where deportation has been ordered[11]; cases where, under Belgian law, persons convicted of collaboration with the Nazi regime have been deprived of a wide measure of civil rights, in particular, that of freedom of expression[12]; interference by the authorities with the right to peaceful enjoyment of

---

6) Yearbook of the Convention on Human Rights, Vol. 2, pp. 175 et. seq.

7) Yearbook of the Convention on Human Rights, Vol. 2, pp. 308-341.

8) Yearbook of the Convention on Human Rights, Vol. 1, pp. 222-224.

9) Yearbook of the Convention on Human Right, Vol. 1, pp. 228-229, Vol. 2, p. 344, Vol, 3, p. 184, and Vol. 4, p. 240; Collection of Decisions: No. 8, p. 46, p. 112, No. 9, p. 58.

10) Yearbook of the Convention on Human Rights, Vol. 3, 196; Vol. 4, p. 198; Collection of Decisions No. 9, p. 20, p. 34.

11) Yearbook of the Convention on Human Rights, Vol. 2, pp. 352-354; Vol. 4, p. 240.

12) Yearbook of the Convention on Human Rights, Vol 2, pp. 214-254.

property for the purposes of legitimate taxation[13]; or of monetary reform[14].

In such cases, a line of thought emerges from the Commission's jurisprudence to the effect that, although it concedes to a State a margin of appreciation in applying these provisions of limitation, it will jealously examine the justification of any such legislative or administrative measures in relation to the terms of the Convention.

In 1963, the Commission had before it various important cases brought by individuals but equally affecting sections of the public. In particular, it dealt with a series of cases in which the applicants, who were all convicted of various criminal offences, alleged that the Austrian Code of Criminal Procedure, in its provisions governing appeal procedure, violated the Convention by reason of an unequal representation of the prosecution and defence. During the proceedings the Austrian Government not only amended its legislation after referring expressly to the proceedings pending before the Commission, but also enacted a law under which applicants whose cases had been admitted by the Commision could claim a rehearing by the Austrian Courts of the appeal proceedings in question. The Commission stated in its report on one group of cases its opinion that the proceedings had not been in conformity with the Convention, but that the new law gave the applicants an adequate remedy. The Committee of Ministers in September 1963 adopted a resolution by which it agreed with the Commission's reasoning, expressed satisfaction at the new law and decided that no further action was required[15].

Another group of cases, recently admitted by the Commission and now being examined by a Sub - Commission, concerns the Walloon - Flemish linguistic situation in Belgium where various French - speaking groups allege that the authorities have failed to provide suitable facilities for educating their children in French and have thereby violated the right of education guaranteed in

---

13) Yearbook of the Convention on Human Rights, Vol. 3, pp. 394-427.

14) Yearbook of the Convention on Human Rights, Vol. 3, pp. 244-253, Vol. 4, p. 286.

15) Yearbook of the Convention on Human Rights, Vol. 3, p. 356; Vol. 4, p. 186.

the Protocol to the Convention. On the other hand, the Commission declared inadmissible an application by a young Norwegian dentist who alleged that the law providing for the direction of dentists to specific posts violated, both generally and as particularly applied to him, provisions of the Convention guaranteeing freedom from forced or compulsory labour.

A full account of the Court's and Commission's jurisprudence is contained in the Yearbook of the European Convention on Human Rights and in the collection of decisions periodically published by the Commission's Secretariat at the Council of Europe.

Strasbourg 6 th January 1964

B

THE RELATIONSHIP BETWEEN THE INDIVIDUAL AND THE STATE SHOWN IN CERTAIN JURISPRUDENCE OF THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

EFFECT ON THE RELATIONSHIP BETWEEN THE INDIVIDUAL AND THE STATE

The European Convention on Human Rights affirms in its Preamble the "profound belief" of the High Contracting Parties "in those Fundamental Freedoms which are the foundation of justice and peace in the world and 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 they depend.

The Convention is a record of one aspect of the relationship between the individual and the State which modern European democracies have together accepted. The Commission and Court of Human Rights, which were set up as instruments of the collective enforcement of the Parties' obligations as set out in the Convention, have the task of applying and interpreting its provisions in the spirit intended by the Convention's authors.

The rights and freedoms set out in Section 1 of the Convention and Articles 1 and 3 of the Protocol are not absolute. They are defined in a limitative manner and nearly all have qualifying expressions or "escape" clauses designed to protect the interests of the public in a democratic society. There are also two overriding Articles which provide for the right of a State to preven-

tion of the abuse of the Convention by applicants whose purpose is the destruction of the rights or freedoms contained therein (Art. 17).

The Commission of Human Rights has now dealt with some 1.100 cases since it achieved the competence in 1955 to receive applications from individuals and has found that the most difficult and usually the most important category of cases are those in which it is called upon to carry out this very task of balancing the right or freedom claimed by the individual against the right or duty of the government to protect its democratic institutions. In some cases, the Commission's jurisprudence shows that the "escape" clauses may in their application overlap. The protection of private correspondence under Art. 8 may, for example, be dealt with under Art. 9 (freedom of expression) and, in some cases, under Art. 25 (right of application to the Commission).

A jurisprudence is being created and, in one important respect, a consistent attitude of the Commission has emerged in the sense that, although it concedes to a State a margin of appreciation in applying the provisions of the Convention which limit the rights or freedoms guaranteed to an individual, the Commission will jealously examine the justification of any such limitations imposed by either a legislative or executive measure.

The object of this paper is to group under the Articles concerned, starting with the overriding Articles 15 and 17, a summary of the most important decisions of the Commission and the Court in this particular application of the Convention on Human Rights. The Commission's procedure, when it admits an application, is set out in Articles 28-32 of the Convention and Rules 47-62 of the Rules Procedure.

22 nd May 1963

ARTICLE 15

Right of a Party to derogate from certain provisions of the Convention

Application No. 176/56, Greece against United Kingdom[1]. (declared admissible on 2nd June 1956).

---

1) Summary notes on the case and the Commission's decision on admissiblity haye alone been published (Yearbook, Vol. 2, pp. 175-178,

The Greek Governement alleged that the government authorities in Cyprus, and thereby the United Kingdom Government, were responsible for a series of emergency laws, in particular providing for punishment by whipping and various forms of collective punishment, which infringed Art. 3 of the Convention and that, further, Art. 15 did not allow derogation by a Contracting Party from that Article.

The United Kingdom Government denied that it had violated the Convention. It also relied, *inter alia*, upon the existence in Cyprus of a "public emergency" threatening the life of the nation within the meaning of Art. 15, and referred to certain Notes Verbales by which, in 1955 and 1956, it had notified the Secretary-General of the existence of that "public emergency".

The Greek Government submitted that these derogations were irregular in form and that the conditions required by Art. 15 had not been fulfilled.

The Commission, in its decision admitting the Application, stated that "the effects of derogation... relate to the merits of the case and to the admissibility of the Application".

A Sub - Commission was then set up, in accordance with Articles 28 and 29 of the Convention, with the dual tasks of ascertaining the facts and attempting to reach a friendly settlement of the matter. No friendly settlement was reached between the parties and the Commission, on 26th Semtember 1958, having received the Sub - Commission's report, adopted its own report, which was then sent to the Committee of Ministers (Art. 31 of the Convention).

Published notes on the Commission's report show that the question arose as to what were the Commission's powers when a State, invoking Art. 15, departed from the obligations mentioned in the Convention. The Commission considered that it was "competent to pronounce on the existence of a public danger which, under Art. 15, would grant to the Contracting Party the right to

---

182-186). The Commission's report to the Committee of Ministers has not been published and the Committee of Ministers, having been seized of the case, finally stated that, having regard to the general settlement of the Cyprus question, "no further action was called for" (Resolution (59) 12).

derogate from the obligations laid down in the Convention", and "competent to decide whether measures taken by a Party under Art. 15 had been taken to the extent strictly required by the exigencies of the situation".

It added that "the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation".

Application No. 214/56. De Becker against Belgium (see also Arts. 10, 17) (declared admissible on th June 1958)[2].

The Applicant, as a result of his conviction in 1946 for offences of collaboration with the Nazi occupation forces, was subjected to Art. 123 sexies of the Belgian Penal Code, and there-by deprived for life of a wide measure of civic rights, in particular, that of free expression. He alleged a violation of Art. 10 of the Convention and asked for recognition of the right to express his ideas by all lawful means.

The Application being admitted, a Sub - Commission was set up but failed to achieve a friendly settlement between the parties. It then sent its report to the Commission which adopted its own report on 8th January 1960, and brought the case before the Court of Human Rights under Art. 48 of the Convention.

The Belgian Government had submitted to the Commission, *inter alia*, that wartime measures originally justified under Art. 15 could not automatically cease to be effective when the war was ended.

The Commission in its report[3] did not accept this submission. It held that measures of derogation under Art. 15 are only justified in the circumstances defined in para. (3) and, if they remained in force after these circumstances had disappeared, they represented a breach of the Convention.

The Court[4], following representations made by the Commission and the Belgian Government relating to new amending legisla-

---

2) Yearbook of the Convention, Vol. 2, pp. 214-254.

3) In course of publication by Registry of European Court.

4) Publications of the European Court of Human Rights. Serie A. "De Becker" Case, Strasbourg. 1962.

tion, struck the case out of its list and made no finding in regard to Art. 15.

Application No. 332/57. Gerard Lawless against the Republic of Ireland (see also under Art. 17) (declared admissible on 30th August 1960)[5].

The Applicant's case was that in July 1957 he had been arrested and subsequently detained in the Curragh Military Camp until December 1957. His detention was under an Order of the Minister of Justice pursuant to Section 4 of the "Offences Against the State (Amendment) Act 1940". The Applicant alleged that his arrest and detention constituted breaches of the Convention, in particular of Arts. 5 and 6. He claimed his release from detention, damages and costs.

The Applicant was in fact released during the proceedings before the Commission but maintained his claim for damages and costs.

The Respondent Government, at the stage of admissibility, relied, *inter alia*, on a letter sent to the Secretary - General in July 1957 in which it gave notice of derogation "insofar as the bringing into operation of.. the Act, which confers special powers of arrest and detention, may involve any derogation from the obligations imposed by the Convention...".

The Commission, in its decision admitting the Application, found that arrest and detention under the 1940 Act was not a measure authorised by Art. 5, para. (1), of the Convention, and could only be justified if it was shown, in the powers conferred upon a State by Art. 15. It further stated that the two questions whether there was in existence a "public emergency threatening the life of the nation" and whether the special powers of arrest and detention under the 1940 Act were measures "strictly required by the exigencies of the situation" depended on matters of fact which were in dispute between the parties. The Commission added that this was closely connected with matters arising upon the merits of the claim and decided to join to the merits the Respondent Government's preliminary objection based on Art. 15.

---

5) Yearbook of the Convention, Vol. 2, pp. 308-341.

A Sub - Commission was set up but no friendly settlement was reached between the parties and the Commission's report[6] was sent to the Committee of Ministers on 9th February 1960 and the case referred by the Commission to the Court of Human Rights in April 1960.

The same two questions were dealt with by the Commission in its report and by the Court in its judgment.

1. Did a public emergency exist which threatened the life of the nation?

The majority opinion of the Commission, as set out in its report, was to the effect that, in July 1957, there existed in Ireland a public emergency threatening the life of the nation within the meaning of Art. 15. The Commission, in its majority opinion, first stated two preliminary findings of principle:

(a) A "public emergency threatening the life of a nation" means a "situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question".

(b) "A certain discretion — a certain margin of appreciation — must be left to the Government in determining whether there exists a public emergency which must be dealt with by exceptional measures". The Commission referred to its decision in the Cyprus case (No. 176/56) in this Commission has the competence and the duty under Article 15 to examine and pronounce upon the Government's determination" of this question.

As to the facts of the case, the Commission's majority opinion that a state of emergency existed in July 1957 was based on three appreciations of the voluminous evidence before it:

(c) An illegal organisation (the Irish Republican Army) existed which repudiated the authority of the Government elected by the people and which was dedicated to achieving the ending of the partition of Ireland by the use of armed force

---

6) To be published by the Registry of the European Court.

(d) The activities of the I.R.A. showed a general campaign of violence in which many people were killed or wounded and much damage was done to property. Although this campaign primarily took place in Northern Ireland, i.e. outside the Republic, its activities within the Republic caused the diversion of a considerable body of police and security forces but did not render wholly impossible, as alleged by the Respondent Government, the application of the criminal law to members of the I.R.A.

(e) In view of all the facts and consideration in this case, the Respondent Government did not go beyond the proper margin of discretion, allowed to it under Art. 15, in determining in July 1957 that there existed a public emergency threatening the life of the nation. In particular, the Government had to consider its obligation under international law, and its special responsibility to another member State of the Council of Europe, to prevent upon territory being used as a base for armed raids upon Northern Ireland.

The Court in its judgment[7] found, as a point of principle, that it had the power to determine whether the conditions laid down in Art. 15 had been fulfilled in the present case.

It first defined a public emergency as "an exceptional situation of crisis or emergency which affects the whole population and constitutes atheat to the organised life of the community of which the State is composed"[8].

The Court then examined the facts and found that the existence of a public emergency was "reasonably deduced" by the Government from a combination of several factors: the existence of a secret army engaged in unconstitutional activities and using violence to attain its purpose; the operation of this army outside the State, thus jeopardising the Republic's relations with its neighbour; the steady and alarming increase in terrorist activities during the period concerned.

---

7) Publications of the European Court of Human Rights, Series A, "Lewless" Case (Merits), Strasbourg, 1961.

8) Idem, p. 56 et seq.

2. If such an emergency existed, was the measure of detention without trial strictly required by the exigencies of the situation?

The Court in its judgment again referred to the Commission's majority opinion as published in its report, that the measures taken under the 1940 Act were, in the circumstances, strictly required by the exigencies of the situation.

Various individual opinions had composed the Commission's majority opinion and the Court based its judgment on the following findings:

(a) "In 1957 the application of the ordinary law had proved unable to check the growing danger which threatened the Republic";

(b) "the ordinary criminal courts or even the special criminal courts or military courts could not suffice to restore peace and order";

(c) the amassing of evidence to convict persons involved with the I.R.A. activities was meeting with great difficulties caused by the military, secret and terrorist character of these groups and the fear which they created among the population, particularly as these groups operated mainly in Northern Ireland;

(d) the sealing of the border would have had extremely serious repurcussions on the population as a whole, beyond the extent required by the exigencies of the emergency.

The Court then stated that consequently "the administrative detention.. of individuals suspected of intending to take part in terrorits activities appeared, despite its gravity, to be a measure required by the circumstances; it added that a number of safeguards had been provided for to prevent abuses in the operation of this measure. The Applicant had made use of one of these safeguards, namely the obtaining of his release upon undertaking not to take part in any activities that were illegal under the 1939 and 1940 Acts.

Application No. 493/59 against the Republic of Ireland (declared inadmissible on 27th July 1961)[9].

---

9) Collection of Decisions of the Commission of Human Rights (No. 7); Strasbourg, March 1962.

The substance of this claim was largely similar to that of Lawless[10] and the Commission adjourned its examination of the case until the Court had pronounced judgment in the "Lawless" Case. The Applicant was arrested in February 1958, interned in the Curragh Internment Camp where he escaped in December 1958. He apparently remained in hiding for three months and then resumed his normal life without interference from the police.

The Commission, in its decision on admissibility, referred to the Court's judgment in the "Lawless" Case, which stated that arrest and detention under conditions of derogation under Art. 15 had been satisfied by the Respondent Government. As to the existence in 1958 of a state of emergency, the Commission found that the Court clearly considered the public emergency to have still existed until at least December 1957. It also found that the Respondent Government "had sufficient grounds for considering" it still to subsist in February 1958, and 1940 Act, persons engaged in activities prejudicial to the preservation of public peace and order or to the security of the State.

ARTICLE 17

Abuse of Convention

Application No. 250/57. German Communist Party (dissolved by Decision of the Federal Constitutional Court on 12th August 1956) against the Federal Republic of Germany (declared inadmissible on 20th July 1957)[11].

The German Communist Party alleged that the Federal Government was responsible for the legal proceedings against it which resulted in its dissolution and prohibition being ordered by the Federal Constitutional Court. The Government had thereby violated the Convention, in particular, Arts. 9, 10 and 11.

The Commission, in its decision, stated that the Federal Constitutional Court had ruled that the German Communist Party

---

10) Application No. 332/57 above.

11) Yearbook of the Convention, Vol. 1, pp. 222-225.

was anti - constitutional and should be dissolved. The Federal Government had submitted that its dissolution had a legal basis, compatible with the Convention, in Art. 21, para. 2, of the Basic Law (Grundgesetz), which stated:

> "Parties which, according to their aims and the behaviour of their membres, seek to impair or abolish the free and democratic basic order or to jeopardise the existence of the Federal Republic of Germany, shall be anti - constitutional. The Federal Constitutional Court shall decide on the question of anti - constitutionality";

The Commission found that there was no need to consider the application of the paras. (12) of Arts. 10 and 11 of the Convention as Art. 17 contained a more general provision. The Commission stated that Art. 17 was designed to safeguard the rights listed in the Convention by protecting the free operation of democratic institutions. It referred to the Preparatory Work (2) of the drafting of the Convention, which expressed the view:

> "It is necessary to prevent totalitarian Communists from exploiting, in their own interests, the principles enunciated by the Convention; that is, from invoking the rights of freedom in order to suppress Human Rights".

The Commission in its decision went on to examine the activities of the Applicants and found that it was patent:

(a) that the "aim of the Communist Party was to establish a Socialist - Communist system by means of a proletarian revolution and the dictatorship of the proletariat" (statement of the German Communist Party reproduced in the Federal Court's decision)[13].

(b) that the German Communist Party continued to vaunt their principles[14].

The Commission added that, even if the Communist Party could be shown to be directed towards the seizure of power solely

---

12) Official records of the Consultative Assembly 1949, First Session, pp. 1235-37 and 1239.

13) "Entscheidungen des Bundesverfassungsgerichts", Vol. 5, 156, p. 163.

14) Idem, pp. 191, 193-195.

through constitutional means according to the Basic Law, this would not imply that it had renounced its traditional objectives. The pursuit of such objectives, on the Applicants' own admission, implied transition through the stages advocated by fundamental Communist doctrine, the essential stage being dictatorship of "the proletariat". Recourse to dictatorship was incompatible with the Convention inasmuch as it includes the destruction of many of the rights and freedoms enshrined therein.

Finally, the Commission found that the organisation and operation of the German Communist Party, in the circumstances of the case, constitute an activity within the meaning of Art. 17 and, therefore, that its Application could not rest upon any provision of the Convention, least of all on Arts. 9, 10 and 11.

Application No. 332/57. Gerard Lawless against the Republic of Ireland (see also under Article 15) (declared admissible on 20th August 1960).

The Applicant's case was that in July 1957 he had been arrested and subsequently detained in the Curragh Military Camp until December 1957. His detention was under an Order of the Minister of Justice pursuant to Section 4 of the "Offences Against the State (Amendment) Act 1940". The Applicant alleged that his arrest and detention constituted breaches of the Convention, in particular of Arts. 5 and 6. He claimed his release from detention, damages and costs.

The Commission, in its decision on admissibility, decided to join to the merits the Respondent Government's preliminary objection based on Art. 17.

It referred to its decision in the German Communist Party case (No. 250/57) and stated that the same principle might be applicable in the Lawless case. In that connection, there was a conflict of view between the parties on a crucial point of fact, i.e. whether the Applicant had, at the time of his arrest, ceased to be a member of an illegal organisation or group engaged in activity aimed at the destruction of the rights and freedoms set forth in the Convention within the meaning of Art. 17.

A Sub - Commission was set up but no friendly settlement

was reached between the parties and the Commission's report[15] was sent to the Committee of Ministers on 9th February 1960 and the case referred by the Commission to the Court of Human Rights in April 1960.

In its report, the Commission found that Art. 17 did not deprive persons who seek to destroy the rights and freedoms set forth in the Convention of the general protection of the rights and freedom guaranteed therein. It merely precluded such persons from deriving from the Convention a right to engage in any of the rights and freedoms set forth in the right to freedom of thought, freedom of press or freedom of assembly and association for the purpose of destroying the free, democratic order protected by the Convention. The rights set forth in Arts. 5 and 6 of the Convention, on the other hand, are in no way diminished by Art. 17. Thus, an agitator who pursues communist, fascist, national, socialist or, generally, totalitarian aims is entitled to avail himself of the provisions on procedure contained in Arts. 5 and 6. These provisions are not concerned with rights relating to the actions of a group or of an individual but with the duties of the public authorities towards all individuals. Such duties are not affected by Art. 17, which is concerned solely with the actions of a group or of an individual who makes use of positive rights for the purpose of destroying the free, democratic order. For this reason the Applicant cannot be deprived under Art. 17 of the rights guaranteed by Arts. 5 and 6, even if it be admitted that he was acting with revolutionary intent or, in any case, with an intent incompatible with the Convention.

The Court, in its Judgment[16] referred to the Commission's opinion as stated in its report and dismissed the plea in bar derived by the Respondent Government from Art. 17[17].

It found that "the purpose of 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 or perform any act aimed

---

15) To be published by the Registry of the Court.

16) Publication of the European Court of Human Rights, Series A. "Lawless" Case (Merits). Strasbourg 1961.

17) Idem, p. 44.

at destroying in any activity 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 Arts. 5 and 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 contary to the rights and freedoms recognised therein but has complained of being deprived of the guarantees granted in Arts. 5 and 6 of the Convention; whereas, accordingly, the Court cannot, on this ground, accept the submissions of the Irish Government".

Application No. 214/56. De Becker against Belgium[18] *(see also Arts. 10, 15) (declared admissible on 9th June 1958).*

The Applicant, as a result of his conviction in 1946 for offences of collaboration with the Nazi occupation forces, was subjected to Art. 123 sexies of the Belgian Penal Code and there - by deprived for life of a wide measure of civic rights. He alleged a violation of Art. 10 of the Convention and asked for recognition of the right to express his ideas by all lawful means.

The Application being admitted, a Sub - Commission was set up but failed to achieve a friendly settlement between the partiens and the Commission adopted its report on 8th January 1960. It then brought the case before the Court of Human Rights under Art. 48 of the Convention.

In its submissions to the Commission, the Belgian Government admitted that it did not suggest that the Applicant was attempting to recover his rights with the intention of advancing Nazism or any similar doctrine.

The Commission in its report[19] found that Art. 17 was not applicable in this case. It referred to its decision in the Lawless case[20] and stated that "Article 17 cannot be used to deprive an

---

18) Publication of the European Court of Human Rights. Series A. "De Becker" Case. Strasbourg 1962.

19) In course of publication by Registry of European Court.

20) Application No. 332/57 above.

individual of his rights and freedoms permanently merely because at some given moment he displayed totalitarian convictions and acted consequently. Certainly Mr. De Becker's past conduct may be considered as being within the meaning of Article 17 of the Convention, even though it occurred before the Convention came into force. This does not mean, however, that the Applicant is today estopped by the provisions of that Article unless he tries to abuse the freedom of expression which he claims.. The Commission therefore has no proof that Art. 17 applies to Mr. De Becker now..".

The Court struck the case out of its list and made no finding in regard to Art. 17.

Application No. 712/60 against the Federal Republic of Germany (declared inadmissible on 16th December 1961)[21].

The Applicant was a company registered in Switzerland whose property in Germany was confiscated without compensation pursuant to a judgment of the Federal Court of Justice in October 1959. The Applicant claimed the restitution, or compensation for the loss, of its property.

The Federal Government submitted to the Commission, *inter alia*, that the Federal Court had found the Applicant company to have been created with the object of protecting Communist property in Western Germany and whose aim thus to destroy the rights and freedoms guaranteed in the Convention. The Government referred to and distinguished the Lawless case[22]. It submitted that the present case was not, as was the Lawless case, concerned with procedural rights under Arts. 5 and 6 of the Convention, but with the right under Art. 1 of the Protocol of the peaceful enjoyment of possessions. Such a right could be diverted for the activities described in Art. 17.

The Applicant submitted, on the other hand, that a shareholding company was not a "group" within the meaning of Art. 17 and that the present proceedings, which related to confisca-

---

21) Collection of Decisions of the Commission of Human Rights (No. 8), Strasbourg, June 1962.

22) Application No. 332/57 above.

tion of property, could not serve an activity directed at the destruction or limitation of the rights protected by the Convention.

The Commission declared this Application inadmissible for non - exhaustion of domestic remedies (Arts. 26, 27) and did not make a finding regarding Art. 17.

ARTICLE 5

Para. (3) : Right of arrested person to trial within a reasonable time

Application No. 297/57 against the Federal Republic of Germany (see also under Art. 15. Applications No: 176/56, 332/57) (declared inadmissible on 22nd March 1958)[23].

The Applicant, a commercial traveller, was arrested and placed in preventive detention in May, 1957, having been charged with holding a leading position in the German Communist Party. He was released from detention in October, 1957, and the warrant for his arrest was withdrawn.

The Applicant alleged that his detention constituted a violation of Article 5, para. (3) of the Convention. The Respondent Government submitted that complicated enquiries into the Applicant's journeys had been necessary and that the question of his detention had twice been examined by the courts.

The Commission found that the Applicant's detention was not unduly prolonged in view of the complex nature of the case and the fact that the German courts had the matter under continual consideration owing to the Applicant's repeated protests which had also delayed the conduct of the proceedings against him.

Application No. 222/56 against the Federal Republic of Germany (declared inadmissible on 8th January 1959)[24].

The Applicant was arrested in May, 1956, on charges of having actively participated in the German Communist Party and of ha-

---

23) Yearbook of the Convention, Vol. 2, p. 204.
24) Yearbook of the Convention, Vol. 2, p. 344.

ving acted to the prejudice of the security of the Federal Republic. He was detained pending trial for 8 months.

The Commission found that this period was not unreasonable considering the complaint of the case and the fact that the period of his detention was considered when the court fixed his sentence.

Application No. 343/57 against Denmark (declared admissible on 2nd September 1959)[25].

The Applicant, Schouw Nielsen, was arrested in March, 1951 on suspicion of bank robbery and released in May, 1951. He was subjected during 1951 to psychiatric examination and rearrested in January, 1952 on charges of having committed with another person robbery with violence and homicide. He was then held in detention until his trial in June 1954.

The Applicant submitted that the period of his detention was unreasonable. The Respondent Government submitted that the delay was due to the need for extensive investigation including a prolonged psychiatric examination of the Applicant and his co-accused.

The Commission rejected the Respondent Government's submission that this part of the application was inadmissible as being manifestly ill - founded (Art. 27, para. 2).

The Commission then found, *ex officio*, that, as the Convention came into force in respect of Denmark on 3rd September 1953, the only period of the Applicant's detention to be considered under the Convention, was from 3rd September 1953 until 16th June 1954. No proceedings were instituted on behalf of the Applicant in order to expedite his trial or to obtain his release the Commission until this Application.

The Commission accordingly found that the Applicant's allegation of a violation of Article 5, para. (3) was inadmissible:

a. as being *ratione temporis* for the period prior to 3rd September 1953;
b. as being excluded under Art. 26 of the Convention on the ground that the final decision of the Danish court in this regard took place more than 6 months before the lodging of the Application with the Commission.

---

25) Yearbook of the Convention, Vol. 2, p. 412, especially p. 448.

Application No. 530/59 against the Federal Republic of Germany (declared inadmissible on 4th January 1960)[26].

The Applicant, who was charged in 1958 under Art. 175 (homosexual offences) of Penal Code, was detained for 18 months pending trial. The Applicant had filed numerous protests against his arrest and seizure of documents.

The Commission found that it was competent to judge whether the period of detention was reasonable and took into consideration the complexity of the case. It also noted that the offences had been committed in several places and abroad. The Applicant's detention was constantly under review by the Courts and his own protests had delayed the enquiry.

The Commission decided that, in all the circumstances, the period of detention was not unreasonable.

Application No. 892/60 against the Federal Republic of Germany (declared inadmissible on 13th April 1961)[27].

The Applicant, who had been previously convicted, was arrested in April 1957 and sentenced in February 1960 to 10 years' imprisonment, as the head of a gang which had committed aggravated and repeated (on 36 occasions) thefts of motor - cars. He was held in detention pending trial for 30 months and had lodged a series of formal and substantial appeals against his arrest and detention.

The Commission found that the question was to be considered in the light of the specific circumstances of the case. In particular, it considered the very large number of offences involved. It also took into account the number of appeals lodged by the Applicant which, although they allowed the case to be under the constant control of the judicial authorities, invitably delayed the trial.

Application No. 1047/61 against Austria (declared inadmissible on 15th December 1961)[28].

---

26) Yearbook of the Convention, Vol. 3, p. 184.

27) Yearbook of the Convention, Vol. 4, p. 240.

28) Yearbook of the Convention, Vol. 4, p. 356.

29) Collection of Decisions of the Commission of Human Rights (No. 8, p. 46). Strasbourg, June 1962.

The Applicant was ordered by the administrative authorities to be imprisoned under Motor Vehicles Act 1955 and Road Traffic Act 1947.

The Commission held that these two Acts were in force when Austria adhered to the Convention and, being administrative measures, were covered by the Austrian reservation.

Application held to be incompatible.

Application No. 920/60 against the Federal Republic of Germany (declared inadmissible on 19th December 1961)[29].

The Applicant was originally arrested in February 1960 on a charge of having participated as an SS oficial in mass execution of Jews in 1942-3. He was later released but rearrested in May 1960. Relying upon Art. 5 of the Convention, he then made a series of applications for an immediate trial or release pending trial but these applications were all rejected. On 30th March 1961, he was released by order of the District Court of K. but this order was reversed on the same day by the Regional Court of K. It was not until 3rd May 1961 that the Court began its examination of the case.

The Commission took into consideration the fact that the alleged offences had been committed 18 years previously in circumstances which made a thorough enquiry difficult. It also noted that a large - scale trial had to be prepared in order to determine not only the Applicant's guilt but also the guilt of others associated with him in the extermination programme. The Applicant's participation an consequent guilt could only be properly evaluated it seen in its full perspective and this would involve the trial of all those concerned.

The Commission finally found that, "it did not feel called upon to hold that the delay in bringing the Applicant to trial, although prolonged, must be considered to be unreasonable".

Application No. 1103/61 against Belgium (declared inadmissible on 12th March 1962)[30].

The Applicant, who was *en poste* in the Belgian Embassy in

30) Collection of Decisions of the Commission of Human Rights (No. 8, p. 42). Strasbourg, June 1962.

Bonn, was arrested in 1956 on charges of improperly accepting sums of money in consideration for facilitating the granting of import licences to a certain company.

He was released on 20th June, 1956, rearrested on 26th June and again provisionally released on 14th July 1956. The Court of first instance convicted him in November 1958 and sentenced him to 6 months' imprisonment and a fine. His appeal was rejected by the Court of Cassation in December 1960.

The Commission first confirmed that the question of a "reasonable" period of detention pending trial must be ragerded in the particular circumstances of each case. It referred to the facts that the Applicant's case-file contained 1200 pages and very voluminous ("hundreds of kilograms") of exhibits and also that other persons were concerned in the offences which had stretched over a period of about 10 years. The Applicant had, in fact, been released during the enquiry and had altogether only been detained for 3 weeks pending his trial which resulted in his sentence of 6 months.

The Commission found that, in the circumstances, the Applicant's sentence had not been unreasonable.

Application No. 1546/62 against the Federal Republic of Germany (declared inadmissible on 4th October 1962)[31].

The Applicant, who had 17 previous convictions, was arrested on 12th April 1961 on a charge of committing against a hotel a fraud involving DM 5.60. He was detained pending oral hearings of his case on 14th August and again on 28th September 1961. He was then transferred to a hospital for a psychiatric examination as to his state of criminal responsibility. On 28 th September, the Applicant was released from prison but arrested again on 8th October on a further charge of fraud in a hotel involving DM 3.30.

The proceedings on the two charges were joined by order of the Court on 18th December 1961 and the Applicant was convicted on 18th September 1962 on the first charge and acquitted on the second. He received a sentence of 10 months' imprison-

---

31) Collection of Decisions of the Commission of Human Rights (No. 9, p. 58). Strasbourg, January 1963.

ment, which he was considered to have served during his detention pending trial, and he was immediately released.

In the meanwhille, the Applicant had lodged several unsuccessful appeals against his continued detention and had also undergone two psychiatric examinations.

The Commission found that, although the amounts involved were relatively small, the Applicant's criminal record at the age of 33 had naturally given rise to the questions of his criminal responsibility and whether normal penal sanctions were appropriate in his case. These questions could, in the opinion of the Commission, only be decided after a conscientious examination of the Applicant's personality and social responsability.

The Commission referred to its findig in Application No. 920/60 (see above) that, in certain circumstances, investigation might "extend over a longer period than might be considered in an ordinary case to be reasonable". In the present case, the judicial authorities had been continually concerned with the case and were attempting to find the best solution.

The sentence finally imposed upon the Applicant was admittedly shorter than the period of his detention pending trial but the Commission found that "the very exceptional circumstances of the case" justified his detention for 17 months.

ARTICLE 8

Right to private and family life

Application No. 104/55 against the Federal Republic of Germany (followed in 167/56, 261/57, 530/59, 600/59, 700/60) (declared inadmissible on 17th December 1955)[32].

The Applicant in this case was a man convicted under Article 175 of the German Penal Code for homosexual offences.

He complained that this legislation infringed the right to respect of his private life and was a violation of Art. 14 in that it

32) Yearbook of the Convention, Vol. 1, pp. 228-229.

discriminated between the treatment of male and female homosexuals.

The Commission declared this Application inadmissible on the ground that the exercise of this right could in a democratic society be subject to interference by law "for the protection of health or morals".

It also found that Article 14 did prevent a State differentiating between the sexes in measures taken regarding homosexuality for the protection of health or morals.

Application No. 172/56 against Sweden (declared inadmissible on 26th December 1957)[33].

The Applicant, of Polish origin, had been married to a Latvian and became resident in Sweden. In divorce proceedings the wife was awarded custody of the only child.

This complaint was rejected by the Commission on the ground that the Applicant had not exhausted the domestic remedies available to him (Art. 26).

The Commission ruled, in pursuance of Art. 8, para. (1), that a parent, who in divorce proceedings is deprived of the custody of an infant, may not be prevented from access to that infant unless special circumstances, as defined in para. (2) of that Article, so demand. It also found that Article 10, Chapter 6, of the Swedish Parents Law stated the same principle and gave to a dissatisfied parent a recourse to the courts which had not been exercised by the present Applicant.

Application No. 1449/62 against the Netherlands (declared inadmissible on 16th January 1963).

Custody of daughter of divorced parents has been awarded to mother. The father was previously convicted of committing acts of indecency with his daughter. Court's decision awarding custody clearly considered the need to protect crime and also the health and morals of the child and had not acted inconsistently with Art. 8, para. (2).

The Commission again stated that para. (2) left a consider-

---

33) Yearbook of the Convention, Vol. 1, pp. 211-219.

able measure of discretion to courts in appreciating such a situation although it was ultimately for the Commission to judge whether or not the measures taken were justifiable under para. (2).

Application No. 514/59 against Austria (followed in No. 845/60)[34] (declared inadmissible on 5th January 1960).

In accordance with the Austrian law, an illegitimate child of the Applicant (mother) became as from birth a ward of the Youth Welfare Office which had the power to take decisions regarding its care and education. The Office refused to entrust the care of the child to the Applicant on the ground that she had for many years taken no interest in the child.

The Commission found that the Austrian legislation concerned, which took account of the interests of the child and of the natural mother, was in no way contrary to Art. 8. It also found that, in the present case, the competent tribunals had not applied the law in a manner contrary to the Convention and, in particular, to Art. 8. Finally, the Commission stated that, although this measure was an interfereuce with the right to respect for family life, it was "justified as being in the moral interests of the child."

Application No. 911/60 against Sweden (same Applicant as No. 172/56) (see also under Art. 10) (declared inadmissible on 10th April 1961)[35].

The facts in this case were the same as those in Application No. 172/56.

The Commission referred to its decision in that case when it found that;

> "The parent who is deprived of the custody of an infant may not be prevented, under Article 8, paragraph (1), from access to that infant unless special circumstances, as defined in paragraph (2) of the same Article, so demand"

In the present Application, the Commission held that the term "the protection of health or morals" in para. (2) covered not only the protection of the general health or morals of the community as whole but also of individual members of the community;

---

34) Yearbook of the Convention, Vol. 3, pp. 196-205.

35) Collection of Decisions of the Commission of Human Rights (No. 7), Strasbourg, March 1962.

further, that "health or morals" included the psychological as well as the physical well - being of individuals and, in the present case, the child's "mental stability and freedom from serious psychic disturbance".

The Commission further found that domestic courts may take these factors into consideration when determining questions of custody and access and, under para. (2), courts have a considerable measure of discretion in this respect. Where right of access has been refused, however, it is for the Commision ultimately to judge whether that refusal is justifiable under para. (2).

In the present case, the Commission decided that the Court, in refusing to give the Applicant o right of access to the child, had examined the large volume of evidence before it regarding the personalities of the parents, their mutual relationship and the possible impact on the child of granting the Applicant a right of access. In particular, the Court of Appeal had evidence before it showing that such access might endanger the health or morals of the child and that this was an exceptional circumstance in which, under para. (2), interference by a public authority was permitted.

Application No. 219/56 against Belgium (followed in 369/58, 424/58, 499/59, 530/59, 538/59, 646/59, 793/60, 833/60, 892/60) (declared inadmissible on 20th March 1958)[36].

The Commission has repeatedly found that the measure commonly accepted in the law of democratic societies of permitting prison authorities to examine the correspondence of the prisoners under their charge falls within the exceptions permitted under para. (2) of Ar. t 8.

It has also found that Art. 25, under which a Contracting Party undertakes not to hinder the effective exercise of the right of application, confirms the right of a person, even if detained, to correspond freely with the Commission. This does not necessarily imply that correspondence between a detained Applicant and the Commission shal not be subject to any control by the prison authorities so long as no undue hindrance or delay is thereby caused.

---

36) Collection of Decisions of the Commission of Human Rights (No. 1), Strasbourg, January 1960.

Application No. 312/57 against Belgium (followed in No. 381/58) (declared inadmissible on 8 th/9th January 1959)[37].

The Applicant, an Italian national, lived in Belgium and was convicted in 1947 for offences of collaboration with the Nazi occupation forces. He remained in prison until 1957 when he was released and deported.

The Commission confirmed that it was competent to decide in each case whether an interference by a public authority was in accordance with para. (2). The expulsion of the Applicant had been ordered under a valid Belgian law on the ground that his presence was dangerous to public safety. The Commission decided that, having regard to the decision of the Belgian military tribunals, the expulsion order was covered by the limitations defined in para. (2) and was not therefore a violation of Art. 8.

Application No. 530/59 against the Federal Republic of Germany (followed in No. 1216/61) (declared inadmissible on 4th January)[38].

The Applicant was a man convicted under Article 175 of the German Penal Code for homosexual offences.

He complained that, on his arrest in 1958, the police searched his home and seized documents and private correspondence.

The Commission declared the Application inadmissible on the ground that there cannot be said to be an interference with the exercise of this right "insofar as such interference is provided for by law and constitutes a measure which, in a democratic society, is necessary for the prevention of disorder or crime and for the protection of public morals, which was the position in this case".

Application No. 1307/61 against the Federal Republic of Germany (declared inadmissible on 4th October 1961)[39].

The Applicant, who was convicted before the war, received a remission of sentence in 1960. The Court refused to accept the Applicant's plea that the entry in the criminal register concerning his conviction should be deleted.

---

37) Yearbook of the Convention, Vol. 2, pp. 352-354.

38) Yearbook of the Convention, Vol. 3, pp. 184-197.

39) Collection of the Decisions of the Commission of Human Rights. (No. 9, p. 35). Strasbourg, January 1963.

The Commission held:

(a) that the keeping of criminal records relating to past convictions is necessary in a modern society for the prevention of crime and is in the interests of public safety within the meaning of para. (2) of Art. 8;

(b) that the Federal Act on Shop - Closing Hours is justified as being in the interests of "the economic well - being of the country" (Art. 8, para. (2)) and in order to "control the use of property in accordance with the general interest" (Art. 1 of Protocol, para. (2)).

ARTICLE 9

Freedom of Religion

Application No. 172/56 against Sweden (see also under Article 8) (declared inadmissible on 20th December 1957)[40].

The facts are as set out under Articles 8.

The Applicant, who was Roman Catholic, claimed that the bringing up of his child by his mother and stepfather, in a way contrary to the doctrine of the Catholic Church, was a violation of Article 9 of the Convention. He added that his wife, at the time of their marriage, had made a solemn promise to educate any children in the Roman Catholic religion.

The Commission found that this complaint did not involve the responsibility of the courts or the Swedish Government, but only of the Applicant's wife. It stated that, "without underestimating the moral obligation under Canon Law", Article 9 could not be invoked as the complaint was directed against a private individual and therefore incompatible with the Convention.

Application No. 1068/61 against the Netherlands (declared inadmissible on 14th December 1962)[41]

The Applicant was a farmer and member of the Reformed

---

40) Yearbook of the Convention, Vol. 1, p. 211.

41) Collection of Decisions of the Commission of Human Rights (No. 10).

Dutch Church. He had refused to sign an application for membership of the Cattle Health Service on the ground that it was against his religious conscience. He alleged that the Act of 1952 which provided for this service, was a violation of Article 9.

The Commission noted that the purpose of the 1952 Act was to prevent tuberculosis among cattle. It found that the term "protection of health" in para. (2) of Article 8 might reasonably be interpreted to cover such a health scheme which was in the interest of the community. The Commission stated that a considerable measure of discretion was left to the parliaments in appreciating the vital interests of the community, although it was ultimately for the Commission to judge whether measures taken were justifiable. The Commission furtherfound that compulsory membership of the Health Service was a justifiable measure to be taken by the Government and that there was no violation of Article 8.

Application No. 1747/62 against Austria (see also under Article 10) (declared inadmissible on 13th December 1963)

The Commission found that legislation under which a person was convicted for neo-Nazi activities were necessary in a democratic society in the interests of public order and safety under Article 9, para. (2).

ARTICLE 10

Freedom of expression

Application No. 214/56. De Becker against Belgium (see also under Arts. 15, 17) (declared admissible on 9th June 1958)[42]

Convicted person lost right to all forms of expression for indefinite period :

The Applicant, as a result of his conviction in 1946 for offences of collaboration with the Nazi occupation forces, was subjected to Art. 123 sexies of the Belgian Penal Code and thereby deprived for life of a wide measure of civic rights, in particular,

42) Yearbook of the Sonvention, Vol. 2, pp. 214-254.

that of free expression. He alleged a violation of Art. 10 of the Convention and asked for recognition of the right to express his ideas by all lawful means.

The Application being admitted, a Sub-Commission was set up but failed to achieve a friendly settlement between the parties and sent its report to the Commission which adopted its own report on 8th January 1960. It then brought the case before the Court of Human Rights under Art. 48 of the Convention.

The Belgian Goverment submitted that the measures taken against the Applicant under Art. 123 sexies constituted penal sanctions rather than preventive measures of public security and, as such, were justifiable under Arts. 2 to 7 of the Convention and unafected by Art. 10.

The Commission in its report[43] did not accept this submission and declared that Art. 10 and Art. 1 of the Protocol also contained penal sanctions. In proclaiming the rights and freedoms in the Convention, it was found necessary to ensure that legitimate measures for preventing crime and preserving national security etc. shoud not be made invalid. The framers of the Convention adopted the method of inserting in each Article the reservations considered appropriate to the particular right or freedom dealt with. Accordingly, it would be counter to the whole plan of the Convention to seek justification in Arts 2 to 7 of restrictions to the freedom of expression rather than in Art. 10 itself.

In regard to Art. 123 sexies of the Belgian Penal Code, the Commission found that the provisions of this Article were a "very substantial deprivation or restriction of the right to freedom of expression", and were incomptable with para. (1) of Art. 10. They prohibited, for example, any publication of any form of writings, political or non-political, and all kinds of poetry.

In para. (2) of Art. 10, "the authors of this paragraph no doubt had in mind primarily the conditions, restrictions and penalties to which freedom of expression is commonly subject in a democratic society as being necessary to prevent seditious, libellous, blasphemous and obscene publications, to ensure the proper ad-

---

43) Published by the Registry of the European Court of Human Rights.

ministration of justice, to protect the secrecy of confidential information, etc." The restrictions on freedom of information contained in paras. (e), (f) and (g) of Art. 123 sexies are, however, of a somewhat different kind. They are imposed as penal sanctions and deterrent measures on persons convicted of certain crimes committed in time of war which do not necessarily involve misuses of the right to freedom of expression. It is true that in the present case the particullar acts which led to the conviction of the Applicant of a crime which brought upon him the sanctions of Art. 123 sexies did take the form of a misuse of the right to freedom of expression. But the sanctions in paras. (e), (f) and (g) have a general character and apply equally to persons guilty of acts quite unconnected with freedom of expression. The fact that the incapacities in regard to freedom of expression imposed by Art. 123 sexies are sanctions and preventive measures of an unusual kind means that the question of their justification as "measures necessary in a democratic society" has to be considered with special care.

The crimes to which Art. 123 sexies is applicable involve treachery in time of war and of the utmost gravity. The Commission gives also full weight to the observation of the Respondent Government that in modern society ideologies do not respect international frontiers and that subversive propaganda has been a feature of modern wars. The need for strong sanctions and effective preventive measures to protect the community against crimes of the kind committed by the Applicant may therefore be readily conceded. The Commission considers, however, that para. (2) of Art. 10 of the Convention does not permit the infliction of incapacities in regard to freedom of expression whether that is done by way of penal sanctions or preventive measures, except where the nature itself of the offence obviously necessitates such incapacities.

The Commission considers that to impose on persons convicted of treachery in time of war a total incapacity for life to publish their political opinions may be justifiable under Art. 10, para. (2), as a deterrent sanction and a preventive measure of public security. But Art. 123 sexies goes beyond the imposition of incapacities in regard to the publication of political opinions and includes incapacities which have no direct relation to the offence committed.

Even so, the Commission believes that the imposition of the incapacities contained in paras. (e), (f) and (g) of that Article may be justifiable in time of war and for such period as may be necessary after the conclusion of a war. During a war and in the immediate post-war period considerations of public morale and public order may justify persons convicted of traitorous association with the enemy being subjected by a State to a total or almost total deprivation of their freedom of expression. Furthermore, when a country has experienced a long period of occupation by the enemy with all its effects on public morale, the process of re-establishing public morale and the risk of disturbances to public order may necessitate and justify the maintenance of these incapacities in full force for some period of time after the end of hostilities. On the other hand, a law which inflexibly takes away for life, without reference to the evolution of public morale and public order, all freedom of publication in regard to non-political as well as political writings, appears to the Commission to go beyond what is justifiable under para. (2) of Art. 10.

The Commission does not overlook the need for strong deterrents to prevent persons from committing crimes of the kind to which the sanctions in Art. 123 sexies are directed. In view, however, fully adequate deterrents can be devised under Arts. 2, 4, 5 and 10 of the Convention without recourse to the lifelong deprivation of freedom of expression, including non-political writings, which is found in Art. 123 sexies. Such a lifelong and all-embracing deprivation of freedom of expression scarcely appears to be reconciliable with the ideals and traditions of the democracies of the Council of Europe and, in the opinion of the Commission, goes beyond what is "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." Certainly, the other States of the Council of Europe which introduced special legislation to deal with those who had collaborated with the enemy during the period of the occupation of their countries did not find it necessary to have re-

cuorse to so inflexible a deprivation of freedom of expression as that in Art. 123 sexies, or at least did not prolong it indefinitely.

The Commission accordingly concludes that paras. (e), (f) and (g) of Art. 123 sexies, insofar as they affect freedom of expression, are not fully justifiable under the Convention whether they be regarded as providing for penal sanctions or for preventive measures in the interests of public security. They are not justifiable insofar as the deprivation of freedom of expression in regard to nonpolitical matters, which they contain, is imposed inflexibly for life without any provision for its relaxation when with the passage of time public morale and public order have been re-established and the continued imposition of that particular incapacity has ceased to be a measure "necessary in a democratic society" within the meaning of Art. 10, para. (2) of the Convention.

The Court in its Judgment [44] of 27th March 1962 decided to strike the case out of its list following representations made by the Commission and the Belgian Government regarding new legislation enacted in June 1961 and amending Art. 123 sexies of the Penal Code. The Court was satisfied that there were no grounds which might jeopardise, in regard to the Applicant, the observance of the Convention and it found that it had no need to give a decision on the question whether the original text of Art. 123 sexies was in conformity with Art. 10 of the Convention.

Application No. 924/60 against Belgium (declared inadmissible on 27the March 1963)

The same problem arose as in the De Becker case. The Commission first found that the new law of 30th June 1961 as applied to the Applicant was not inconsistent with Article 10 (2). It then dealt with the application of Art. 123 sexies to the Applicant. The Commission noted that the objects of the new law were the abolition of the unsatisfactory elements of the previous law, i.e. its permanent and quasi-absolute qualities. It found that Art. 123 sexies as applied to the Applicant did not violate the Convention. The Government and Parliament had the right to appreciate that

---

44) Publication of the European Court of Human Rights. Series A. "DE Becker" Case. Strasbourg, 1962.

certain measures were "necessary in a democratic society". This appreciation had to be within the framework of the Convention and subject to the Commission's control. There had been no abuse of this power and the Government had not unduly delayed the modification of the criticised provisions of Art. 123 sexies.

Application No. 753/60 against Austria (declared inadmissible on 5the August 1960)[45]

Printed article injurious to reputation of others

The Applicant had been sentenced under the Austrian Penal Code for attacking the honour of the army through the medium of printed matter.

The Commission confirmed that it had the competence and duty to appreciate whether interference by a public authority complied with the conditions in para. (2). It declared that a close study of its provision shows that Art. 10 leaves to States "a certain margin of appreciation in determining the limits that may be placed on freedom of expression". It also stated that, in exercising supervision, the Commission must bear in mind not only the extent of such limits but also their aim since, under Art. 18, such restrictions shall not be applied for any purpose other than those for which they have been prescribed.

The Commission found in this case that the relevant provisions of the Austrian Penal Code constituted restrictions on freedom of expression such as are authorised under para. (2), since they are provided for by law and represent measures necessary "for the protection of the reputation of otherrs". It also found that the Penal Code had not been applied in a manner contrary to the Convention and, in particular, to. Art. 18.

Application No. 1167/61 against the Federal Republic of Germany (declared inadmissible on 16the December 1963)

The Commission again referred to the principle of "margin of appreciation" and found that the measures taken in regard to an alleged indecent publication were in the interest of "public health and morals". Art. 10, para. (2).

---

45) Yearbook of the Convention, Vol. 3, p.p. 310-321.

Application No. 1747/62 against Austria (see also Article 9) (declared inadmissible on 13th December 1963)

The Commission found that the measures taken in the case of alleged neo-Nazi activites were necessary in a democratic society in the interests of "public safety" under Art. 10, para. (2).

Application No. 911/60 against Sweden (see also under Art. 8) (declared inadmissible on 10th Apris 1961)[46].

Printed article taken into consideration in custody proceedings

The Applicant had apparently published a strongly anti-Swedish article and complained that this was taken into account by the Swedish courts in deciding, in divorce proceedings, the questions of custody of, and access to, this child.

The Commission declared this part of the Application to be inadmissible and stated that a court was not precluded, when confronted with the duty of appreciating an individual's character and personality, from taking into consideration statements made by him out of court which might throw light, favourably or unfavourably, on his character or personality. It found, in particular, that it was in this connection that the courts had taken into consideration the Applicant's anti-Swedish article.

ARTICLE 1

(Protocol to the Convention)

Right to peaceful enjoyment of property

(with Article 14)

Application No. 511/59 against Iceland (declared inadmissible on 4th January 1960)[47]

Taxation not considered as confiscation of property

The Applicants in this case were an Icelandic citizen and a

---

46) Collection of Decisions of the Commission of Human Rights (No. 7). Strasbcurg, March 1962.

47) Yearbook of the Convention, Vol. 3, pp. 394-427.

company registered in Iceland in which the former was the majority shareholder. It had been claimed that certain taxation imposed by the Icelandic Govenment was excessive and dicriminatory and thereby constituted a confiscation of the Applicants' property.

The Commission in its decision referred to the first paragraph of Art. 1 and declared that "it is undoubtedly within the sovereign power of a State to enact legislation for the purpose of imposing taxes... the proceedings of which are to be appropriated to public purposes; ... the tax complained of was levied... for the express purpose of achieving monetary and economic stability within the State and was therefore clearly a means introduced with a public purpose and considered by the Government to be in the public interest; whereas it is true that this tax took the form of a levy on capital assets; whereas, however, under Law No. 44, the maximum incidence of the tax could not exceed 25 per cent of the real value of the taxable assets and, further, it was permitted to pay the tax claim by instalments over a period of ten years; whereas, in view of the general purpose of the law, the maximum percentage and terms of payment affecting the particular category of taxpayers were not such, even in combination with other applicable fiscal legislation, as could deprive Law No. 44 of the character of a tax imposed with the view of furthering the public interest".

The Commission further found that the other conditions in the first paragraph had been complied with as the taxation in question had been carried out according to Icelandic law and was consistent with the general principles of international law.

The Commission also made a reference to the second paragraph and stated that, in any event, the levies concerned fall "within the power to levy taxes or other contributions which is expressly reserved to States" in this paragraph.

As regards the complaint that the levies were discriminatory and thereby a violation of Art. 14, the Commission found that "it is a common incidence of taxation laws that they apply in different ways or in different degrees to different persons or entities in the community".

Application No. 551/59 againts the Federal Republic of Germany (followed in No. 673/59) (declared inadmissible on 31st May 1960)[48].

Measures taken to ensure economic reform

The Commission has dealt with a series of cases in which complaints have been made as to the incidence of the Liability Equalisation Act (Lastenausgleichesetz) of 1948. Briefly, this Act provided for the replacement of the Reischmark by the Deutschmark and for a reduction by 90% of all capital whether held in the form of mortgage deeds, shares, bonds or in bank accounts.

In this particular case, the Applicant complained that his assets had been reduced to 10% of their previous value while his liabilities, in the form of mortgaged debts, had not benefited from any devaluation.

The Commission found that there had been no violation of the conditions of the first paragraph of Art. 1. It stated that the Act had been introduced as a measure forming part of financial an monetary reforms after the war and "considered to be necessary for establishing a sonud economic basis for a new democratic society" in Germany. "It was an express purpose of the... reforms to ensure that the economic burdens arising out of the war and out of the change in the value of German currency should be distributed proportionately amongst the citizens"... it follows that the... measure... was introduced in the public interest and was administered to the Applicant subject to... the relevant law".

Reference was also made to the second paragraph of Art. 1 by the Commission, which stated that the Act was clearly covered by the provision that the right mentioned in the first paragraph did not 'in any way impair the right of a State to enforce such laws as it deems necessary... to secure the payment of taxes or other contributions or penalties'.

Application No. 1017/61 against the Netherlands (declared inadmissible on 18th September 1961)

The Applicant in this case complained that Dutch banknotes

48) Yearbook of the Convention, Vol. 3, pp. 244-253.

of 500 fl. and 1,000 fl. denomination, which he had acquired legitimately in 1949 were withdrawn and declared valuless by a provisional measure of 1944 and confirmed by a law of 1959.

The Comission found that the withdrawal of these banknotes formed part of a financial reform undertaken after the war to re-establish a sound economic situation in the Netherlands. Such a measure was accordingly in the public interest within the meaning of the first paragraph of Art. 1, and, in this connection, the Commission referred to its jurisprudence in the "Lasten-ausgleich" cases. It further found that the measure had been applied to the Applicant in accordance with the law in force and that therefore there had been no violation of the first paragraph of Art. 1.

NOTE :

The texts of all decisions, whether published elsewhere or not, are available on application to the Secretary to the Commission of Human Rights, Council of Europe, Strasbourg.