*524 Golder v United Kingdom

Positive/Neutral Judicial Consideration

Court
European Court of Human Rights

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Before the European Court of Human Rights

(The President , Judge Balladore Pallieri ; Judges Mosler , Verdross , Rodenbourg , Zekia , Cremona , Pedersen , Vilhjàlmsson , Ryssdal , Bozer , Ganshof van der Meersch and Fitzmaurice .)

21 February 1975

In October 1969, there was a serious disturbance at the prison where the applicant was imprisoned. The following day a prison officer tentatively identified the applicant as having participated in the incident. The applicant was placed in segregation and given notice that disciplinary proceedings might be brought against him. The prison governor stopped letters written by the applicant about the incident to his Member of Parliament and a Chief Constable. In November, the prison officer, who had suggested that he had been assaulted by the applicant, withdrew the allegation; the applicant was returned to his ordinary cell. The charges against the applicant were not proceeded with and a note to this effect was placed in his prison record which nevertheless carried entries about the incident. In March 1970, the applicant sought, but was refused, permission to consult a solicitor with a view to instituting libel proceedings against the prison officer. Before the Commission, the applicant alleged breaches of Articles 6 (1) and 8 . The Commission held inadmissible for non-exhaustion of local remedies the complaint about the stopping of the applicant's letters to his M.P. and the Chief Constable, but it found that Articles 6 (1) and 8 had been violated by the refusal to allow the applicant to consult a solicitor with a view to commencing legal proceedings.

Held, by nine votes to three, that there had been a breach of Article 6 (1) and, unanimously, that Article 8 had been violated and that these findings in themselves amounted to just satisfaction under Article 50 .

1. Right to a Court (Art. 6 (1)). Whether Article 6 (1) includes the 'right of access'. Principles for interpreting the Convention. Implied limitations.

(a) By refusing the applicant permission to contact a solicitor, the Home Secretary hindered his right of access to the courts. Hindrance in fact was capable of contravening the Convention just like a legal impediment [26] .
(b) The right claimed by the applicant was a 'civil right' [27] .
(c) Although the right of access to a court was not expressly stated in Article 6 (1) , it had to be decided whether it formed an aspect of the basic single right contained in the Article [28] .
(d) The Convention's preamble included the 'rule of law' and in civil matters, the rule of law was scarcely conceivable without the possibility of access to the courts [34] . The *525 principle that a civil claim had to be capable of submission to a judge was one of the 'universally “recognised” fundamental principles of law' . It was inconceivable that Article 6 (1) should have detailed procedural guarantees for civil cases without first having protected the right of access to a court [35] . The right of access was an inherent element in Article 6 (1) [36] .

(e) Article 6 (1) embodied the 'right to a court' . The right of access was only one aspect of this right, which also included the guarantees laid down by Article 6 (1) [36] .
(f) The right of access to a court was not absolute and there was room for implied limitations [38] .
(g) Refusing the applicant access to a solicitor was in breach of Article 6 (1) [40] .

2. Right to respect for correspondence (Art. 8). Implied limitations. Whether restriction 'in accordance with the law and … necessary in a democratic society … for the prevention of disorder or crime … or for the protection of the rights … of others' (Art. 10 (2)).

(a) Refusing the applicant permission to write to a solicitor was an interference with his right to respect for correspondence (Art. 8 (1)) [43] .
(b) The restrictive wording of Article 8 (2) excluded the concept of implied limitations [44] .
(c) The interference was 'in accordance with the law' . Appreciation of the 'necessity for interferences with a prisoner's correspondence was to be made 'having regard to the ordinary and reasonable requirements of imprisonment' . Preventing the applicant from contacting a solicitor with a view to civil litigation was not 'necessary in a democratic society' [45] .

3. Just satisfaction (Art. 50).

(a) It was not necessary to afford the applicant any just satisfaction other than that resulting from a finding that his rights had been violated [46] .

Case referred to the Court by the United Kingdom Government arising out of an individual application lodged with the Commission in 1969 against the United Kingdom. The chamber of seven judges appointed to hear the case decided under rule 48 of the Rules of Court to relinquish jurisdiction in favour of the plenary court as the case raised 'serious questions affecting the interpretation of the Convention' . [1]

Representation

F. Fifoot , Foreign and Commonwealth Office (Agent), Sir Francis Vallat, Q.C. , Professor of International Law, University of London, formerly Legal Adviser, Foreign Office, G. Slynn, Q.C. , Recorder of Hereford (Counsel), Sir William Dale, K.C.M.G. , formerly Legal Adviser, Commonwealth Office and R. M. Morris , Home Office (Advisers), for the Government.
G. Sperduti (Principal Delegate), T. Opsahl and K. Mangan (Delegates), assisted by N. Tapp, Q.C. (Counsel for the applicant before the Commission), for the Commission. ***526**
Mr. Fifoot, Sir Francis Vallat and Messrs. Slynn, Sperduti, Opsahl and Tapp addressed the Court.

The following cases are referred to in the Judgment:

1. *Belgian Linguistic Case (No. 2) (1968), Series A, No. 6; 1 E.H.R.R. 252 .*
2. *De Becker v. Belgium (1962) , Series A, No. 4; 1 E.H.R.R. 43 .*
3. *Delcourt v. Belgium (1970), Series A, No. 11; 1 E.H.R.R. 355 .*
4. *De Wilde, Ooms and Versyp v. Belgium (No. 1) (1971), Series A, No. 12; 1 E.H.R.R. 373 .*
5. *Lawless v. Ireland (No. 3) (1961) , Series A, No. 3; 1 E.H.R.R. 15 .*
6. *Matznetter v. Austria (1969) , Series A, No. 10; 1 E.H.R.R. 198 .*
7. *Neumeister v. Austria (No. 2) (1974), Series A, No. 17; 1 E.H.R.R. 136 .*
8. *Ringeisen v. Austria (1971) , Series A, No. 13; 1 E.H.R.R. 455 .*
9. *Wemhoff v. Germany (1968), Series A, No. 7; 1 E.H.R.R. 55 .*

The Facts

10. In 1965, Mr. Sidney Elmer Golder, a United Kingdom citizen born in 1923, was convicted in the United Kingdom of robbery with violence and was sentenced to 15 years' imprisonment. In 1969, Golder was serving his sentence in Parkhurst Prison on the Isle of Wight.

11. On the evening of 24 October 1969, a serious disturbance occurred in a recreation area of the prison where Golder happened to be.

On 25 October, a prison officer, Mr. Laird, who had taken part and been injured in quelling the disturbance, made a statement identifying his assailants, in the course of which he declared: 'Frazer was screaming … and Frape, Noonan and another prisoner whom I know by sight, I think his name is Golder … were swinging vicious blows at me' .

12. On 26 October Golder, together with other prisoners suspected of having participated in the disturbance, was segregated from the main body of prisoners. On 28 and 30 October, Golder was interviewed by police officers. At the second of these interviews he was informed that it had been alleged that he had assaulted a prison officer; he was warned that 'the facts would be reported in order that consideration could be given whether or not he would be prosecuted for assaulting a prison officer causing bodily harm' .

13. Golder wrote to his Member of Parliament on 25 October and 1 November, and to a Chief Constable on 4 November 1969, about the disturbance of 24 October and the ensuing hardships it had entailed for him; the prison governor stopped these letters since Golder had failed to raise the subject-matter thereof through the authorised channels beforehand.

14. In a second statement, made on 5 November 1969, Laird qualified as follows what he had said earlier: ***527**

> When I mentioned the prisoner Golder, I said 'I think it was Golder', who was present with Frazer, Frape and Noonan, when the three latter were attacking me.
>
> If it was Golder and I certainly remember seeing him in the immediate group who were screaming abuse and generally making a nuisance of themselves, I am not certain that he made an attack on me.
>
> Later when Noonan and Frape grabbed me, Frazer was also present but I cannot remember who the other inmate was, but there were several there one of whom stood out in particular but I cannot put a name to him.

On 7 November, another prison officer reported that:

> during the riot of that night I spent the majority of the time in the T.V. room with the prisoners who were not participating in the disturbance.
>
> 740007, Golder was in this room with me and to the best of my knowledge took no part in the riot.
>
> His presence with me can be borne out by officer … who observed us both from the outside.

Golder was returned to his ordinary cell the same day.

15. Meanwhile, the prison authorities had been considering the various statements, and on 10 November prepared a list of charges which might be preferred against prisoners, including Golder, for offences against prison discipline. Entries relating

thereto were made in Golder's prison record. No such charge was eventually preferred against him and the entries in his prison record were marked 'charges not proceeded with' . Those entries were expunged from the prison record in 1971 during the examination of the applicant's case by the Commission.

16. On 20 March 1970, Golder addressed a petition to the Secretary of State for the Home Department, that is, the Home Secretary. He requested a transfer to some other prison and added:

> I understand that a statement wrongly accusing me of participation in the events of 24 October last, made by Officer Laird, is lodged in my prison record. I suspect that it is this wrong statement that has recently prevented my being recommended by the local parole board for parole.
>
> I would respectfully request permission to consult a solicitor with a view to taking civil action for libel in respect of this statement … Alternatively, I would request that an independent examination of my record be allowed by Mrs. G. M. Bishop who is a magistrate. I would accept her assurance that this statement is not part of my record and be willing to accept then that the libel against me has not materially harmed me except for the two weeks I spent in the separate cells and so civil action would not be then necessary, providing that an apology was given to me for the libel. …

17. In England the matter of contacts of convicted prisoners with persons outside their place of detention is governed by the Prison Act 1952 , as amended, and subordinate legislation made under that Act. ***528**

Section 47 (1) of the Prison Act provides that—

> the Secretary of State may make rules for the regulation and management of prison … and for the … treatment … discipline and control of persons required to be detained. …

The rules made by the Home Secretary in the exercise of this power are the Prison Rules 1964 , which were laid before Parliament and have the status of a statutory instrument. [2] The relevant provisions concerning communications between prisoners and persons outside prison are contained in Rules 33, 34 and 37 as follows:

> **Letters and visits generally**
>
> Rule 33
>
> (1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime or in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.
>
> (2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State. …

Personal letters and visits

Rule 34 …

(8) A prisoner shall not be entitled under this Rule to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State. …

Legal advisers

Rule 37

(1) The legal adviser of a prisoner in any legal proceedings, civil or criminal, to which the prisoner is a party shall be afforded reasonable facilities for interviewing him in connection with those proceedings, and may do so out of hearing but in the sight of an officer.

(2) A prisoner's legal adviser may, with the leave of the Secretary of State, interview the prisoner in connection with any other legal business in the sight and hearing of an officer.

18. On 6 April 1970, the Home Office directed the prison governor to notify Golder of the reply to his petition of 20 March as follows:

The Secretary of State has fully considered your petition but is not prepared to grant your request for transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition.

19. Before the Commission, Golder submitted two complaints relating respectively to the stopping of his letters [3] and to the refusal of the Home Secretary to permit him to consult a solicitor. On 30 March 1971, the Commission declared the first complaint inadmissible, as all domestic remedies had not been exhausted, but accepted the second for consideration of the merits under Articles 6 (1) and 8 of the Convention . ***529**

20. Golder was released from prison on parole on 12 July 1972.

21. In their report, the Commission expressed the opinion:

— unanimously, that Article 6 (1) guarantees a right of access to the courts;
— unanimously, that in Article 6 (1), whether read alone or together with other Articles of the Convention, there are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer; and that consequently the restrictions imposed by the present practice of the United Kingdom authorities are inconsistent with Article 6 (1);
— by seven votes to two, that Article 8 (1) is applicable to the facts of the present case;
— that the same facts which constitute a violation of Article 6 (1) constitute also a violation of Article 8 (by eight votes to one, as explained to the Court by the Principal Delegate on 12 October 1974).

The Commission furthermore expressed the opinion that the right of access to the courts guaranteed by Article 6 (1) is not qualified by the requirement 'within a reasonable time' . In the application bringing the case before the Court, the Government made objection to this opinion of the Commission but stated in their memorial that they no longer wished to argue the issue.

22. The following final submissions were made to the Court at the oral hearing on 12 October 1974 in the afternoon.

— *for the Government:*

The United Kingdom Government respectfully submit to the Court that Article 6 (1) of the Convention does not confer on the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of the paragraph. The Government submit that in consequence the refusal of the United Kingdom Government to allow the applicant in this case to consult a lawyer was not a violation of Article 6 . In the alternative, if the Court finds that the rights conferred by Article 6 include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited in the case of persons under detention, and that accordingly the imposing of a reasonable restraint on recourse to the courts by the applicant was permissible in the interest of prison order and discipline, and that the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted, and therefore did not constitute a violation of Article 6 of the Convention.

The United Kingdom Government further submit that control over the applicant's correspondence while he was in prison was a necessary consequence of the deprivation of his liberty, and that the action of the United Kingdom Government was therefore not a violation of Article 8 (1), and that the action of the United Kingdom Government in any event fell within the exceptions provided by Article 8 (2), since the restriction imposed was in accordance with law, and it was within the ***530** power of appreciation of the Government to judge that the restriction was necessary in a democratic society for the prevention of disorder or crime.

In the light of these submissions, Mr. President, I respectfully ask this honourable Court, on behalf of the United Kingdom Government, to hold that the United Kingdom Government have not in this case committed a breach of Article 6 or Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

— *for the Commission:*

The questions to which the Court is requested to reply are the following:

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

(2) If Article 6 (1) secures such a right of access, are there inherent limitations relating to this right, or its exercise, which apply to the facts of the present case?

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

(4) According to the answers given to the foregoing questions, do the facts of the present case disclose the existence of a violation of Article 6 and of Article 8 of the European Convention on Human Rights?

JUDGMENT

4

I. THE ALLEGED VIOLATION OF ARTICLE 6 (1)

23. Paragraphs 73, 99 and 110 of the Commission's report indicate that the Commission consider unanimously that there was a violation of Article 6 (1) . The Government disagree with this opinion.

24. Article 6 (1) 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.

25. In the present case the Court is called upon to decide two distinct questions arising on the text cited above:

(i) Is Article 6 (1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined? ***531**

(ii) In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?

A. The 'right of access'

26. The Court recalls that on 20 March 1970 Golder petitioned the Home Secretary for permission to consult a solicitor with a view to bringing a civil action for libel against prison officer Laird and that his petition was refused on 6 April.

While the refusal of the Home Secretary had the immediate effect of preventing Golder from contacting a solicitor, it does not at all follow from this that the only issue which can arise in the present case relates to correspondence, to the exclusion of all matters of access to the courts.

Clearly, no one knows whether Golder would have persisted in carrying out his intention to sue Laird if he had been permitted to consult a solicitor. Furthermore, the information supplied to the Court by the Government gives reason to think that a court in England would not dismiss an action brought by a convicted prisoner on the sole ground that he had managed to cause the writ to be issued—through an attorney for instance—without obtaining leave from the Home Secretary under Rules 33 (2) and 34 (8) of the Prison Rules 1964 , which in any event did not happen in the present case.

The fact nonetheless remains that Golder had made it most clear that he intended 'taking civil action for libel' ; it was for this purpose that he wished to contact a solicitor, which was a normal preliminary step in itself and in Golder's case probably essential on account of his imprisonment. By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action. Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time, 1970. Hindrance in fact can contravene the Convention just like a legal impediment.

It is true that—as the Government have emphasised—on obtaining his release Golder would have been in a position to have recourse to the courts at will, but in March and April 1970 this was still rather remote and hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character.

The Court accordingly has to examine whether the hindrance thus established violated a right guaranteed by the Convention and more particularly by Article 6 , on which Golder relied in this respect.

27. One point has not been put in issue and the Court takes it for granted: the 'right' which Golder wished, rightly or wrongly, ***532** to invoke against Laird before an English court was a 'civil right' within the meaning of Article 6 (1).

28. Again, Article 6 (1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.

29. The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 (1), should be interpreted. The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties . That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to 'any relevant rules of the organisation' —the Council of Europe—within which it has been adopted. [5]

30. In the way in which it is presented in the 'general rule' in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

31. The terms of Article 6 (1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.

32. The clearest indications are to be found in the French text, first sentence. In the field of contestations civiles (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way— ' équitablement ' (fairly), ' *publiquement* ' (publicly), ' dans un délai raisonnable ' (within a reasonable time), etc.—but also and primarily ' à ce que sa cause soit entendue ' (that his case be heard) not by any authority whatever but ' par un tribunal ' (by a court or tribunal) within the meaning of Article 6 (1). [6] The Government have emphasised rightly that in French ' *cause* ' may mean ' procès qui se plaide ' . [7] This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension ' *l'ensemble des intérêts à soutenir, à faire prévaloir* ' . [8] Similarly, the ' contestation ' (claim) generally exists prior to the legal proceedings and is a concept ***533** independent of them. As regards the phrase ' *tribunal indépendant et impartial, établi par la loi* ' (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather than of procedure.

The English text, for its part, speaks of an 'independent and impartial tribunal established by law' . Moreover, the phrase 'in the determination of his civil rights and obligations' , on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending: as the Commission have observed, it may be taken as synonymous with 'wherever his civil rights and obligations are being determined' . [9] It too would then imply the right to have the determination of disputes relating to civil rights and obligations made by a court or 'tribunal' .

The Government have submitted that the expressions 'fair and public hearing' and 'within a reasonable time' , the second sentence in Article 6 (1) ('judgment' , 'trial'), and Article 6 (3) clearly presuppose proceedings pending before a court.

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded; the Delegates of the Commission rightly underlined this at paragraph 21 of their memorial. Besides, in criminal matters, the 'reasonable time' may start to run from a date prior to the seisin of the trial court, of the 'tribunal' competent for the 'determination … of (the)

criminal charge' . [10] It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.

33. The Government have furthermore argued the necessity of relating Article 6 (1) to Articles 5 (4) and 13. They have observed that the latter provide expressly for a right of access to the courts; the omission of any corresponding clause in Article 6 (1) seems to them to be only the more striking. The Government have also submitted that if Article 6 (1) were interpreted as providing such a right of access, Articles 5 (4) and 13 would become superfluous.

The Commission's Delegates replied in substance that Articles 5 (4) and 13, as opposed to Article 6 (1), are 'accessory' to other provisions. Those Articles, they say, do not state a specific right but are designed to afford procedural guarantees, 'based on recourse' , the former for the 'right to liberty' , as stated in Article 5 (1) , the second for the whole of the 'rights and freedoms as set forth in this Convention' . Article 6 (1), they continue, is intended to protect 'in itself' *534 the 'right to a good administration of justice' , of which 'the right that justice should be administered' constitutes 'an essential and inherent element' . This would serve to explain the contrast between the wording of Article 6 (1) and that of Articles 5 (4) and 13.

This reasoning is not without force even though the expression 'right to a fair (or good) administration of justice' , which sometimes is used on account of its conciseness and convenience, [11] does not appear in the text of Article 6 (1), and can also be understood as referring only to the working and not to the organisation of justice.

The Court finds in particular that the interpretation which the Government have contested does not lead to confounding Article 6 (1) with Articles 5 (4) and 13, nor making these latter provisions superfluous. Article 13 speaks of an effective remedy before a 'national authority' (' instance nationale ') which may not be a 'tribunal' or 'court' within the meaning of Articles 6 (1) and 5 (4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 (1) and 5 (4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of 'civil rights and obligations' [12] is not co-extensive with that of 'rights and freedoms as set forth in this Convention' , [13] even if there may be some overlapping. As to the 'right to liberty' , [14] its 'civil' character is at any rate open to argument. [15] Besides, the requirements of Article 5 (4) in certain respects appear stricter than those of Article 6 (1), particularly as regards the element of 'time' .

34. As stated in Article 31 (2) of the Vienna Convention . the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the 'object' and 'purpose' of the instrument to be construed.

In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are—

> resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration

of 10 December 1948.

In the Government's view, that recital illustrates the 'selective process' adopted by the draftsmen: that the Convention does not *535 seek to protect Human Rights in general but merely 'certain of the Rights stated in the Universal Declaration' . Articles 1 and 19 are, in their submission, directed to the same end.

The Commission, for their part, attach great importance to the expression 'rule of law' which, in their view, elucidates Article 6 (1).

The 'selective' nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Prcamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one

of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely 'more or less rhetorical reference' , devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to 'take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration' was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith [16] to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 (1) according to their context and in the light of the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a member, [17] refers in two places to the rule of law: first in the Preamble. where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 which provides that 'every Member of the Council of Europe must accept the principle of the rule of law …' .

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

35. Article 31 (3) (*c*) of the Vienna Convention indicates that account is to be taken, together with the context, of 'any relevant rules of international law applicable in the relations between the parties' . Among those rules are general principles of law and especially 'general principles of law recognized by civilised nations' . [18] Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that 'the Commission and the Court must necessarily apply such principles' in the execution of their duties and thus considered it to be 'unnecessary' to insert a specific clause to this effect in the Convention. [19]

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' ***536** fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 (1) must read in the light of these principles.

Were Article 6 (1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook. [20]

It would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 (1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 (1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty, [21] and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to 'supplementary means of interpretation' as envisaged at Article 32 of the Vienna Convention , that Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court' , of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 (1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 (1) further requires a decision on the very substance of the dispute (English 'determination' , French ' décidera ').

B. The 'Implied Limitations'

37. Since the impediment to access to the courts, mentioned [22] above, affected a right guaranteed by Article 6 (1), it remains to *537 determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right.

38. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth [23] without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.

The first sentence of Article 2 of the Protocol of 20 March 1952 , which is limited to providing that 'no person shall be denied the right to education' , raises a comparable problem. In its judgment of 23 July 1968 on the merits of the case relating to certain aspects of the laws on the use of languages in education in Belgium, the Court ruled that: [24]

> The right to education … by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.

These considerations are all the more valid in regard to a right which, unlike the right to education, is not mentioned in express terms.

39. The Government and the Commission have cited examples of regulations, and especially of limitations, which are to be found in the national law of States in matters of access to the courts, for instance regulations relating to minors and persons of unsound mind. Although it is of less frequent occurrence and of a very different kind, the restriction complained of by Golder constitutes a further example of such a limitation.

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of Rules 33 (2), 34 (8) and 37 (2) of the Prison Rules 1964 with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder. [25]

40. In this connection, the Court confines itself to noting what follows.

In petitioning the Home Secretary for leave to consult a solicitor with a view to suing Laird for libel, Golder was seeking to exculpate himself of the charge made against him by that prison officer on 25 October 1969 and which had entailed for him unpleasant consequences, some of which still subsisted by 20 March 1970. [26] Furthermore, the *538 contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary's authority.

In these circumstances, Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 (1).

II. THE ALLEGED VIOLATION OF ARTICLE 8

41. In the opinion of the majority of the Commission [27] 'the same facts which constitute a violation of Article 6 (1) constitute also a violation of Article 8' . The Government disagree with this opinion.

42. 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.

43. The Home Secretary's refusal of the petition of 20 March 1970 had the direct and immediate effect of preventing Golder from contacting a solicitor by any means whatever, including that which in the ordinary way he would have used to begin with, correspondence. While there was certainly neither stopping nor censorship of any message, such as a letter, which Golder would have written to a solicitor—or vice-versa—and which would have been a piece of correspondence within the meaning of Article 8 (1), it would be wrong to conclude therefrom, as do the Government, that this text is inapplicable. Impeding someone from even initiating correspondence constitutes the most far-reaching form of 'interference' [28] with the exercise of the 'right to respect for correspondence' ; it is inconceivable that that should fall outside the scope of Article 8 while mere supervision indisputably falls within it. In any event, if Golder had attempted to write to a solicitor notwithstanding the Home Secretary's decision or without requesting the required permission, ***539** that correspondence would have been stopped and he could have invoked Article 8; one would arrive at a paradoxical and hardly equitable result, if it were considered that in complying with the requirements of the Prison Rules 1964 he lost the benefit of the protection of Article 8.

The Court accordingly finds itself called upon to ascertain whether or not the refusal of the applicant's petition violated Article 8.

44. In the submission of the Government, the right to respect for correspondence is subject, apart from interference covered by Article 8 (2), to implied limitations resulting, *inter alia* , from the terms of Article 5 (1) (*a*): a sentence of imprisonment passed after conviction by a competent court inevitably entails consequences affecting the operation of other Articles of the Convention, including Article 8.

As the Commission have emphasised, that submission is not in keeping with the manner in which the Court dealt with the issue raised under Article 8 in the ' *Vagrancy* ' cases. [29] In addition and more particularly, that submission conflicts with the explicit text of Article 8. The restrictive formulation used at Article 8 (2) ('There shall be no interference … except such as …') leaves no room for the concept of implied limitations. In this regard, the legal status of the right to respect for correspondence, which is defined by Article 8 with some precision, provides a clear contrast to that of the right to court. [30]

45. The Government have submitted in the alternative that the interference complained of satisfied the explicit conditions laid down in Article 8 (2).

It is beyond doubt that the interference was 'in accordance with the law' , that is Rules 33 (2) and 34 (8) of the Prison Rules 1964. [31]

The Court accepts, moreover, that the 'necessity' for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The 'prevention of disorder or crime' , for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 does not fail to impinge on the application of Article 8.

In its judgment cited above, [32] the Court held that 'even in cases of persons detained for vagrancy' [33] —and not imprisoned after conviction by a court—the competent national authorities may have—

> sufficient reason to believe that it [is] 'necessary' to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. ***540**

However, in those particular cases there was no question of preventing the applicants from even initiating correspondence; there was only supervision which in any event did not apply in a series of instances, including in particular correspondence between detained vagrants and the counsel of their choice. [34]

In order to show why the interference complained of by Golder was 'necessary' , the Government advanced the prevention of disorder or crime and, up to a certain point, the interests of public safety and the protection of the rights and freedoms of others. Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood 'in a democratic society' , could oblige the Home Secretary to prevent Golder from corresponding with a solicitor with a view to suing Laird for libel. The Court again lays stress on the fact that Golder was seeking to exculpate himself of a charge made against him by that prison officer acting in the course of his duties and relating to an incident in prison. In these circumstances, Golder could justifiably wish to write to a solicitor. It was not for the Home Secretary himself to appraise —no more than it is for the Court today—the prospects of the action contemplated; it was for a solicitor to advise the applicant on his rights and then for a court to rule on any action that might be brought.

The Home Secretary's decision proves to be all the less 'necessary in a democratic society' in that the applicant's correspondence with a solicitor would have been a preparatory step to the institution of civil legal proceedings and, therefore, to the exercise of a right embodied in another Article of the Convention, that is, Article 6.

The Court thus reaches the conclusion that there has been a violation of Article 8.

II. THE APPLICATION OF ARTICLE 50 OF THE CONVENTION

46. Article 50 of the Convention provides that if the Court finds, as in the present case, 'that a decision … taken' by some authority of a Contracting State—

> is completely or partially in conflict with the obligations arising from the … Convention, and if the internal law of (that State) allows only partial reparation to be made for the consequences of this decision

the Court 'shall, if necessary, afford just satisfaction to the injured party' .

The Rules of Court state that when the Court—

> finds that there is a breach of the Convention, it shall give in the same Judgment a decision on the application of Article 50 of the Convention if that question, after being raised under Rule 47 bis , is ready for decision; if the question is not ready for decision **541*

the Court 'shall reserve it in whole or in part and shall fix the further procedure' . [35]

At the hearing in the afternoon of 11 October 1974, the Court invited the representatives, under Rule 47 bis , to present their observations on the question of the application of Article 50 of the Convention in this case. Those observations were submitted at the hearing on the following day.

Furthermore, in reply to a question from the President of the Court immediately following the reading of the Commission's final submissions, the Principal Delegate confirmed that the Commission were not presenting, nor making any reservation as to the presentation of, a request for just satisfaction on the part of the applicant.

The Court considers accordingly that the above question, which was duly raised by the Court, is ready for decision and should therefore be decided without further delay. The Court is of opinion that in the circumstances of the case it is not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.

For these reasons, THE COURT *holds:*

1. by nine votes to three that there has been a breach of Article 6 (1);
2. unanimously that there has been a breach of Article 8;
3. unanimously that the preceding findings amount in themselves to adequate just satisfaction under Article 50.

Separate Opinion of Judge Verdross

[36]

I have voted in favour of the parts of the Judgment which relate to the violation of Article 8 and the application of Article 50 of the Convention, but much to my regret I am unable to join the majority in their interpretation of Article 6 (1) for the following reasons.

The Convention makes a clear distinction between the rights and freedoms it secures itself [37] and those which have their basis in the internal law of the Contracting States. [38] In the last recital in the Preamble, the Contracting States resolved to take steps for the collective enforcement of 'certain of the Rights stated in the Universal Declaration' (' *certains des droits énoncés dans la Déclaration Universelle* ') and, according to Article 1, the category of rights guaranteed comprises only 'the rights and freedoms defined in section I' of the Convention. It thus seems that the words 'stated' and 'defined' are synonymous. As 'to define' means to state precisely, it results, in my view, from Article 1 that among such rights and freedoms can only be numbered those which the Convention states in **542* express terms or which are included in one or other of them. But in neither of these cases does one find the alleged 'right of access to the courts' .

It is true that the majority of the Court go to great lengths to trace that right in an assortment of clues detected in Article 6 (1) and other provisions of the Convention.

However, such an interpretation runs counter, in my opinion, to the fact that the provisions of the Convention relating to the rights and freedoms guaranteed by that instrument constitute also limits on the jurisdiction of the Court. This is a special jurisdiction, for it confers on the Court power to decide disputes arising in the course of the internal life of the Contracting States. The norms delimiting the bounds of that jurisdiction must therefore be interpreted strictly. In consequence, I do not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms.

Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of 'certain' rights and freedoms 'defined' (' définis ') in the Convention ought to be sure that those bounds will be strictly observed.

The above conclusion is not upset by the argument, sound in itself, whereby the right to a fair hearing before an independent and impartial tribunal, secured to everyone by Article 6 (1), assumes the existence of a right of access to the courts. The Convention in fact appears to set out from the idea that such a right has, with some exceptions, been so well implanted for a long time in the national legal order of the civilised States that there is absolutely no need to guarantee it further by the procedures which the Convention has instituted. There can be no other reason to explain why the Convention has refrained from writing in this right formally. In my opinion, therefore, a distinction must be drawn between the legal institutions whose existence the Convention presupposes and the rights guaranteed by the Convention. Just as the Convention presupposes the existence of courts, as well as legislative and administrative bodies, so does it also presuppose, in principle, the existence of the right of access to the courts in civil matters; for without such a right no civil court could begin to operate.

Nor is my reasoning refuted by contending that, if the right of access had its basis solely in their national legal order, the member-States of the Council of Europe could, by abolishing the right, reduce to nothing all the Convention's provisions relating to judicial protection in civil matters. For if these States were really determined on destroying one of the foundations of Human Rights, they would be committing an act contrary to their own will to create a system based on 'a common understanding and observance of the Human Rights upon which they depend' . [39] ***543**

Separate Opinion of Judge Zekia

[1] I adopt, with respect, the introductory part of the judgment dealing with procedure and facts and also the concluding part dealing with the application of Article 50 of the Convention to the present case. I agree also with the conclusion reached regarding the violation of Article 8 of the Convention subject to some variation in the reasoning.

[2] I have felt unable, however, to agree with my eminent colleagues in the way Article 6 (1) of the Convention has been interpreted by them and with their conclusion that a right of access to the courts ought to be read into Article 6 (1) and that such right is to be considered as being embodied therein. The outcome of their interpretation is that the United Kingdom has committed a contravention of Article 6 (1) of the Convention by disallowing prisoner Golder to exercise his right of access to the courts.

[3] I proceed to give hereunder, as briefly as I can, the main reasons for my dissenting opinion on this part of the judgment.

[4] There is no doubt that the answer to the question whether right of access to courts is provided in Article 6 (1), depends on the construction of the said Article. We have been assisted immensely by the representatives of both sides in the fulfilment of our duties in this respect.

[5] There appears to be a virtual consensus of opinion that Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties, although with no retroactive effect, contain the guiding principles of interpretation of a treaty. There remains the application of the rules of interpretation formulated in the aforesaid Convention to Article 6 (1) of the European Convention.

[6] Article 31 (1) of the Vienna Convention reads—

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

No question arises as to good faith, therefore what remains for consideration is (a) text, (b) context, (c) object and purpose. The last two elements might very well overlap on one another.

A. Text

[7] Article 6 (1) of the European Convention on Human Rights reads:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly ***544*** necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[8] The above Article, read in its plain and ordinary meaning, refers to criminal charges brought against a person and to the civil rights and obligations of a person when such rights and obligations are *sub judice* in a court of law. The very fact that the words immediately following the opening words of the paragraph, that is, the words following the phrase 'In the determination of his civil rights and obligations or of any criminal charge against him' deal exclusively with the conduct of proceedings, *i.e.* public hearings within a reasonable time before an impartial court and pronouncement of judgment in public, plus the further fact that exceptions and/or limitations given in detail in the same paragraph again exclusively relate to the publicity of the court proceedings and to nothing else, strongly indicate that Article 6 (1) deals only with court proceedings already instituted before a court and not with a right of access to the courts. In other words Article 6 (1) is directed to the incidents and attributes of a just and fair trial only.

[9] Reference was made to the French version of Article 6 (1) and specifically to the words ' contestations sur ses droits ' in the said Article. It has been maintained that the above quoted words convey a wider meaning than the corresponding English words in the English text. The words in the French text embrace, it is argued, claims which have not reached the stage of trial.

[10] The English and French text are both equally authentic. If the words used in one text are capable only of a narrower meaning, the result is that both texts are reconcilable by attaching to them the less extensive meaning. Even if we apply Article 33 of the Vienna Convention in order to find which of the two texts is to prevail, we have to look to the preceding Articles 31 and 32 of the same Convention for guidance. Having done this I did not find sufficient reason to alter the view just expressed. So much for the reading of the text which no doubt constitutes 'the primary source of its own interpretation' .

B. Context

[11] I pass now to the contextual aspect of Article 6 (1). As I said earlier, the examination of this aspect is bound to overlap with considerations appertaining to the object and purpose of a treaty. There is no doubt, however, that interpretation is a *single. combined operation* which takes into account all relevant facts as a whole.

[12] Article 6 (1) occurs in section I of the European Convention on Human Rights and Fundamental Freedoms which section comprises Articles 2–18 defining rights and freedoms conferred on people within the jurisdiction of the Contracting States. Article 1 requires the Contracting Parties to 'secure to everyone within their jurisdiction ***545*** the rights and freedoms defined in section I of this Convention' . The obligations undertaken under this Convention by Contracting States relate to the rights and freedoms defined. It seems almost impossible for anyone to contend that Article 6 (1) defines a right of access to courts.

[13] A study of section I discloses: Article 5 (4) and (5) deals with proceedings to be taken before a court for deciding the lawfulness or otherwise of detention and gives to the victim of unlawful detention an enforceable right to compensation.

[14] Articles 9, 10 and 11 deal with rights or freedoms in respect of thought, expression, religion, peaceful assembly and association, etc. What is significant about these Articles is the fact that each Article prescribes in detail the restrictions and limitations attached to such right.

Article 13 reads:

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

[15] This Article indicates a right of access to the courts in respect of violations of rights and freedoms set forth in the Convention. In my view courts come within the ambit of 'national authority' mentioned in the Article.

[16] Article 17 provides, *inter alia* , that no limitation to a greater extent than is provided for in the Convention is allowed to the rights and freedoms set forth therein.

[17] The relevance of this Article lies in the fact that, if right of access is to be read into Article 6 (1), such right of access will have to be an absolute one because no restrictions or limitations are mentioned in regard to this right. No one can seriously argue that the Convention contemplates an absolute and unfettered right of access to courts.

[18] It is common knowledge and it may be taken for granted that right of access to the national courts, as a rule, does exist in all civilised democratic societies. Such right, and its exercise, usually is regulated by constitution, legislation, custom and by subsidiary laws such as orders and court rules.

[19] Article 60 of the Convention keeps intact such Human Rights as are provided by national legislation. Right of access being a Human Right is no doubt included in the Human Rights referred to in Article 60. This in a way fills up the gap for claims in respect of which no specific provision for right of access is made in the Convention.

[20] The competence of the courts, as well as the right of the persons entitled to initiate proceedings before a court, are regulated by laws and rules as above indicated. One commences proceedings by filing an action, petition or application in the registry of the court of first instance or of the superior court. One has to pay the prescribed ***546** fees (unless entitled to legal aid) and cause the issue of writs of summons or other notices. Persons might be debarred unconditionally or conditionally from instituting proceedings on account of age, mental condition, bankruptcy, frivolous and vexatious litigation. One may have to make provision for security of costs, and so on.

[21] After the institution of proceedings and before a case comes up for hearing there are many intervening procedural steps. A master, or a judge in chambers and not in open court, is empowered in a certain category of cases to deal summarily and finally with a claim in an action, petition or application. Such is the case for instance when a claim as endorsed on a writ, or as stated in the pleadings, does not disclose any cause of action or, in the case of a defendant or respondent, his reply or points of defence do not disclose a valid defence in law.

[22] All this digression is simply to emphasise the fact that if in the Convention it was intended to make the right of access an integral part of Article 6 (1), those responsible for drafting the Convention would, no doubt, have followed their invariable practice, after defining a Human Right and Freedom, to prescribe therein the restrictions and limitations attached to such right and freedom.

[23] Surely if a right of access, independently of those expressly referred to in the Convention, was to be recognised to everybody within the jurisdictions of the High Contracting Parties, unrestricted by laws and regulations imposed by national legislation, one would expect such right to be expressly provided in the Convention. The care and pains taken in defining Human Rights and Freedoms in the Convention and minutely prescribing the restrictions, indicate strongly that right of access is neither expressly nor by necessary implication or intendment embodied in Article 6 (1).

[24] One might also remark: if there is no right of access to courts, what is the use of making copious provisions for the conduct of proceedings before a court?

[25] If, indeed, provisions relating to the right of access were altogether lacking in the Convention—although this is not the case—I would concede that by necessary implication and intendment such a right is to be read as being incorporated in the Convention, though not necessarily in the Article in question. I would have acted on the assumption that the Contracting Parties took the existence of such right of access for granted.

C. Object and purpose

[26] Article 6 (1) could by no means be underestimated, when it is read with its ordinary meaning, without any right of access being integrated into it. Public hearing within reasonable time before an impartial tribunal, with delivery of judgment in open court—although one might describe them as procedural matters—nevertheless are ***547** fundamentals in the administration of justice, and therefore Article 6 (1) has and deserves its raison d'être in the Charter of Human Rights, without grafting the right of access onto it. Its scope of operation will still be very wide.

[27] The Preamble of the European Convention on Human Rights and Fundamental Freedoms in its concluding paragraph declares:

> Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.

I think the United Kingdom Government was not unjustified in drawing our attention to the words ' *to take the first steps* ' and to the words ' *enforcement of certain of the Rights* ' , occurring in that paragraph.

[28] As to the references made to the travaux préparatoires of the Convention, the Universal Declaration of Human Rights , the European Convention on Establishment, the International Covenant on Civil and Political Rights and other international instruments, I am content to make only very short observations. In the travaux préparatoires of the Declaration, the early drafts included expressly the words 'right of access' but these words were dropped before the text took its final form.

[29] Article 8 of the Universal Declaration contains a right of access to courts for violations of fundamental rights granted by constitution or by law.

[30] Article 10 of the Universal Declaration more or less corresponds to the main part of Article 6 (1) of the European Convention and it does not refer to a right of access. It seems the main part of Article 6 (1) followed the pattern of Article 10 of the Universal Declaration. And so too does Article 14 (1) of the International Covenant .

[31] Article 7 of the European Convention on Establishment provides expressly a 'right of access to the competent judicial and administrative authorities' . The same applies to Article 2 (3) of the International Covenant.

[32] The above supports the view that when right of access to courts was intended to be incorporated in a treaty, this was done in express terms.

[33] I have already endeavoured to touch the main elements of interpretation in some order. When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted.

Article 8

[34] The Home Secretary, by not allowing prisoner Golder to communicate with his solicitor with a view to bringing an action for ***548** libel against the prison officer, Mr. Laird, was depriving the former of obtaining independent legal advice.

[35] In the circumstances of the case I find that Golder was denied right of respect for his correspondence and such denial amounts to a breach of the Article in question.

[36] In an action for libel, Mr. Laird might succeed in a plea of privilege and prove non-existence of malice. The Home Secretary or the governor of the prison might reasonably believe that Golder had no chance of sustaining an action, but in principle I am inclined to the view that unless there are overriding considerations of security a prisoner should be allowed to communicate with, and consult, a solicitor or a lawyer and obtain independent legal advice.

Separate Opinion of Judge Sir Gerald Fitzmaurice

INTRODUCTION

1. For the reasons given in Part I of this Opinion, I have—though with some misgivings—participated in the unanimous affirmative vote of the Court on the question of Article 8 of the European Convention on Human Rights. To that extent therefore, I must hold the United Kingdom to have been in breach of the Convention in the present case.

2. On the other hand I am quite unable to agree with the Court on what has been the principal issue of law in these proceedings —namely that of the applicability, and interpretation, of Article 6 (1) of the Convention—the question of the alleged right of access to the courts—the point here being, not whether the Convention ought to provide for such a right, but whether it actually does. This is something that affects the whole question of what is legitimate by way of the interpretation of an international treaty while keeping within the confines of a genuinely interpretative process, and not trespassing on the area of what may border on judicial legislation. I deal with it in Part II below.

3. I need not set out what the facts in this case were as I agree with the statement of them contained in the Court's Judgment.

PART I. ARTICLE 8

4. The issue that arises on Article 8 of the Convention is whether the United Kingdom Home Secretary, by refusing Golder (then under penal detention in Parkhurst Prison) permission to consult a solicitor, infringed the provisions of that Article which read 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 ***549** the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

Two principal categories of questions—or doubts—arise with regard to this provision: is it applicable at all to the circumstances of the present case?—and secondly, if it is applicable in principle, does the case fall within any limitations on, or exceptions to, the rule it embodies?

A. The question of applicability

5. The doubts about applicability coalesce around the meaning of the term 'correspondence' , and the notion of what constitutes an 'interference' with 'exercise of the right to respect for … correspondence' . The term 'correspondence' , in this sort of context, denotes, according to its ordinarily received and virtually universal dictionary [40] meaning, something that is less wide than

'communication' —or rather, is one of several possible forms of communication. It denotes in fact *written* correspondence, possibly including telegrams or telex messages, but not communication by person to person by word of mouth, by telephone [41] or signs or signals. It would therefore be wrong to equate the notion of 'correspondence' with that of 'communication' . However, as there does not seem to have been any question of Golder telephoning to a solicitor, that point does not arise. What does arise is that, even as regards a letter, Golder never wrote at all to any solicitor. There was no letter, so none was stopped. In that sense therefore there was no interference with his correspondence because, as between himself and the solicitor he would have consulted, there was no correspondence to interfere with, such as there was in the case of his attempts to write to his Member of Parliament. [42] But the reason for this was that, having enquired whether he would be allowed to consult a solicitor 'with a view to taking civil action for libel' —which I think one must assume would have meant (at least initially) writing to him [43] — he was informed that he would not be—which meant, in effect, that any letter would be stopped—and so he did not write one. There was, accordingly, no literal or actual interference with his correspondence in this respect—but ***550*** in my view there was what amounted, in English terminology, to a 'constructive' stoppage or interference; and I consider that it would be placing an undue and formalistic restriction on the concept of interference with correspondence not to regard it as covering the case of correspondence that has not taken place only because the competent authority, with power to enforce its ruling, has ruled that it will not be allowed. One must similarly, I think, reject the equally restrictive view that even if permission had been given, Golder might not in practice have availed himself of it, which is beside the real point.

6. (The very important fact that this refusal would not in the long run have prevented Golder from bringing his claim, had he been advised to do so—because he would still have been in time for that after his release from prison—is not material on the question of Article 8. It is highly material on the question of the alleged right of access under Article 6 (1), and I shall deal with it in that connection.)

7. A point similar to those discussed above [44] arises over what exactly is the 'right' referred to in the phrase 'There shall be no interference by a public authority with the exercise of this right' , which appears at the beginning of Article 8 (2)—the right itself being stated in Article 8 (1) to be the right of the individual to 'respect for his private and family life, his home and his correspondence' . It would be easy to close the argument at once by saying that correspondence is not 'respected' if it is not allowed to take place at all. But the matter is not so simple as that. It could undoubtedly be contended that correspondence is respected so long as there is no physical interference with whatever correspondence there is, but that the words used neither convey nor imply any guarantee that there will *be* any correspondence; so that, for instance, a total prohibition of correspondence would not amount to an interference with the right. Some colour would be lent to this argument by the context in which the word 'correspondence' appears, *viz*. 'private and family life' , 'home and … correspondence' , which does suggest the notion of something domiciliary and, in consequence, the type of interference that might take place if someone's private papers in his home or hotel or on his person were searched, and actual letters were seized and removed. But is the notion confined to that sort of thing? This seems too narrow. The right which is not to be interfered with by the public authority, is the 'right to *respect* ' for correspondence, and it seems to me that, constructively at least, correspondence is not respected where, in order to avoid the seizure or stoppage of it that would otherwise take place, the public authority interdicts it *a priori* . [45] ***551*** Hence, the Judgment of the Court makes the essential point when it suggests that it would be inadmissible to consider that Article 8 would have been applicable if Golder had actually consulted his solicitor by letter, and the letter had been stopped, but inapplicable because he was merely told (in effect) that it would be stopped if he wrote it, and so he did not write it.

B. Limitations and exceptions

8. I cannot agree with the view expressed in the Judgment of the Court that the structure of Article 8 rules out even the possibility of any unexpressed but inherent limitations on the operation of the rule stated in Article 8 (1) and the first 15 words of Article 8 (2). Since 'respect' for correspondence—which is what (and also *all* that) Article 8 (1) enjoins—is not to be equated with the notion of complete freedom of correspondence, [46] it would follow, even without the exceptions listed in Article 8 (2), that Article 8 (1) could legitimately be read as conferring something less than complete freedom in all cases, and in all circumstances. It would in my view have to be read subject to the understanding that the degree of respect required must to some extent be a function of the situation in general and of that of the individual concerned in particular. Hence—and not to stray beyond the confines of the present case—control of a lawfully detained prisoner's correspondence is not incompatible with respect for it, even though control must, in order to be effective, carry the power in the last resort to prevent the correspondence, or particular pieces of it, from taking place. This must, in the true meaning of the term, be 'inherent' in the notion of control of correspondence which, otherwise, would be a dead letter in all senses of that expression. The crucial question naturally remains whether, in the particular circumstances and in the particular case, the degree of control exercised was justifiable—that is, strictly, was

compatible with the concept of 'respect' , as reasonably to be understood—more especially when it involved a prohibition or implied threat of a stoppage.

9. It was doubtless because the originators of the Convention realised that the rule embodied in Article 8 would have to be understood in a very qualified way, if it was to be practicable at all, that they subjected it to a number of specific exceptions; and although these do not in my opinion—for the reasons just given—necessarily exhaust all the possible limitations on the rule, they are sufficiently wide and general to cover most of the cases likely to arise. The drafting of these exceptions is unsatisfactory in one important respect: six heads, or categories, are mentioned, but they are placed in two ***552*** groups of three—and what is not clear is whether it is necessary for an alleged case of exception to fall under one of the three heads in *both* groups, or whether it suffices for it to fall under any one of the three heads in either the one or the other group. This ambiguity, which certainly exists in the English text of the Article, [47] I fortunately do not need to resolve, because I am satisfied that, considered on a *category* basis, control of a prisoner's correspondence is capable of coming under the heads both of 'public safety' and 'the prevention of disorder or crime' , thus ranking as an expected category whichever of the two above described methods of interpreting this provision might be adopted.

10. There is, however, a further element of ambiguity or failure of clarity. What Article 8 (2) requires is that there shall be 'no interference [in effect with correspondence] except such as is … necessary … for [*e.g.*] the prevention of disorder or crime' . The natural meaning of this would seem to be that, in order to justify interference in any particular case, the interference must be 'necessary' *in that case* 'for the prevention of … crime' , etc. On this basis, even though some control of correspondence might in *principle* be needed for the prevention, etc. (*e.g.* prisoners could otherwise arrange their own escapes, or plan further crimes), the particular interference (here constructive stoppage) would still require to be justified as necessary in the case itself 'for the prevention …' , etc. On behalf of the United Kingdom Government however, although at one point it seemed to be admitted that the necessity must be related to the particular case, a somewhat different view was also put forward—on the face of it a not at all unreasonable, and quite tenable, view—which came to this, namely that, provided the *type* of restriction involved could be justified in the light of, and as coming fairly within, one of the excepted categories specified in Article 8 (2), the application of the restriction in the particular case must be left to the discretion of the prison authorities, or at least they must be allowed a certain latitude of appreciation, so long as they appeared to be acting responsibly and in good faith—and of course there has never been any suggestion of anything else in the present case. If the matter is regarded in this way, so it was urged, the Court ought not to go behind the action of the prison authorities and sit in judgment upon the manner in which this discretion had been exercised. Another and more lapidary version of the same contention would be to say that it seeks to justify the act complained of by reference to the character of the restriction involved, rather than the character of what was done in the exercise of that restriction. Therefore, so long as the restriction belongs in *principle* to the class or category of exception ***553*** invoked, and has been imposed in good faith, the enquiry should stop there.

11. I regret that I cannot accept this argument, despite its considerable persuasiveness. The matter seems to me to turn on the effect of the word 'interference' in the phrase 'There shall be no interference … with … except such as is … necessary … for the prevention … etc.' I think the better view is that this contemplates the act itself that is carried out in the exercise of the restriction, rather than the restriction or type of control from which it derives. It is the act—in this case the refusal of permission—that constitutes the interference, rather than the taking of power to do so under a regulation which, theoretically, might never be made use of. In other words, it does not suffice to show that in general some control over the correspondence of prisoners—and even on occasion a stoppage of it—is 'necessary … in the interests of … public safety' or 'for the prevention of disorder or crime' . If that were all, it could be admitted at once that in principle such a necessity exists—subject to questions of degree and particular application. But it has to be shown in addition that the particular act of interference involved was as such 'necessary' on those grounds.

12. Accordingly, what has to be enquired into in the present case is the concrete refusal to allow Golder to consult a solicitor (regarding this, for reasons already given, as a constructive interference with his correspondence, or rather—to use the cumbrous verbiage of Article 8—with his 'right to respect' for his correspondence). The question then is, whether *this* refusal was 'necessary' on grounds of public safety, prevention of crime, etc. Put in that way, it seems to me that there can only be one answer: it was not—and in saying this I have not overlooked the United Kingdom argument to the effect that if Golder had been allowed access to a solicitor over what was considered (by the authorities) as an entirely unmeritorious claim, the same facilities could not in fairness have been refused to other prisoners because, in the application of any rule, there must be consistency and adherence to some well-defined and understood working principle. That is no doubt true, but it does not dispose of the need to show that refusing any one at all—that the practice itself of refusal on those particular groups—is justified as being 'necessary … in the interests of public safety' or 'for the prevention of disorder' , etc. This brings me to what has to be regarded as the crucial question: with whom does it properly lie to decide whether, as I have put it in recapitulation of the United Kingdom

argument, claims such as Golder's—in respect of which he wanted to consult a solicitor—was a 'wholly unmeritorious one' ? Is not such a matter one for judicial rather than executive determination?

13. Actually, the United Kingdom Home Secretary did not, in point of fact, make use of this form of words in replying to Golder, ***554*** or indeed express any opinion as to the merits or otherwise of his claim: the language employed was of the vaguest and most general kind. [48] However, the United Kingdom case has been argued throughout on the basis that the underlying reason for the refusal was the belief of the authorities that Golder had no good claim in law, and could not succeed in any libel action brought against the prison officer who had originally complained about him but had subsequently withdrawn the complaint. It must therefore be assumed that the rejection of Golder's request was *de facto* based on these grounds, and the alleged necessity of the rejection in the interests of public safety, prevention of disorder, etc., must be evaluated accordingly.

14. In the particular case of Golder, it is impossible to see how a refusal so based could be justified as necessary on any of the grounds specified in Article 8 (2), even if it was in accordance with normal prison practice, as doubtless it was—because then it would be the practice as such that was at fault. Even if the matter is looked at from the standpoint of the United Kingdom contention that the practice is justified because prisoners are, by definition as it were, litigious, and only too ready to start up frivolous, vexatious or unfounded actions if not prevented, the point remains that, however inconvenient this may be for the prison authorities, it is still difficult to see how any *necessity* in the interests of public safety or the prevention of disorder or crime can be involved. But even if, theoretically, it could be, none seems to have been satisfactorily established in Golder's case.

15. More important, however, is the fact that the real reason for the refusal in Golder's case does not seem to have been 'necessity' at all, but the character of his claim; and here the true underlying issue is reached. A practice whereby contact with a solicitor about possible legal proceedings is refused because the executive authority has determined that the prisoner has no good legal ground of claim, not only cannot be justified as 'necessary' , etc. (does not even pretend so to be)—it cannot be justified at all, because it involves the usurpation of what is essentially a judicial function. To say this is not, even for a moment, to throw any doubt on the perfect good faith of the authorities in taking the view they did about Golder's claims. But that is not the point. The point is that it was motivated by what was in effect a judicial finding—not, however, one emanating from any judicial authority, but from an executive one. Yet it is precisely one of the functions of a judicial system to provide, through judicial action, and after hearing argument if necessary, means for ***555*** doing what the prison authorities, acting executively, and without hearing any argument—at least from Golder himself or his representative—did in the present case. All normal legal systems—including most certainly the English one—have procedures whereby, at a very early stage of the proceedings, a case can (to use English terminology) be 'struck out' as frivolous or vexatious or as disclosing no cause of action (grounds roughly analogous to the 'abuse of the right of petition' , or 'manifestly illfounded' petition, in Human Rights terminology). [49] This can be done, and usually is, long before the case would otherwise have reached the trial judge, had it gone forward for trial; but nevertheless it is done by a judicial authority, or one acting judicially. It may be a minor or lesser authority, but the judicial character both of the authority and of the proceedings remains.

16. It is difficult to see why—or at least it is difficult to see why as a matter of necessity under Article 8 (2), prisoners, just because they have that status, should be liable to be deprived of the right to have these preliminary objections to their claims (whether good or bad) judicially determined, especially as they are objections of a kind which it is for the *defendant* in an action to take, not a third party stranger to it. But here, of course, a further underlying element is reached. The Home Secretary was not a stranger to Golder's potential claim, even if he was not directly a prospective party to it—for it was his own prison officer and the conduct of that officer which would be in issue in the claim, if it went forward. Again, there is, and can be, no suggestion that the Home Secretary was influenced by the fact that he was technically in interest. It is simply the principle of the thing that counts: nemo in re sua judex esse potest . Of course, both in logic and in law, this could not operate *per se* to cancel out any necessity that genuinely existed on the basis of one of the exceptions specified in Article 8 (2). If such necessity really did exist, then the interference would not be contrary to Article 8, as such. What the element of nemo in re sua does do, however, is to make it incumbent on the authorities to justify the interference by reference to very clear and cogent considerations of necessity indeed—and these were certainly not present in this case.

17. In concluding therefore, as I feel bound to do, that there has been a breach of Article 8, though clearly an involuntary one, I should like to add that having regard to the perplexing drafting of Article 8, of which I hope to have afforded some demonstration (nor is it unique in that respect in this Convention) it can cause no surprise if governments are uncertain as to what their obligations under it are. This applies *a fortiori* to the interpretation of Article 6 (1) of the Convention to which I now come. ***556***

PART II. ARTICLE 6 (1)

A. The applicability aspect

18. In the present case the chief issue that has arisen and been the subject of argument, is whether the Convention provides in favour of private persons and entities a right of access to the courts of law in the various countries parties to it. It is agreed —and admitted in the Court's Judgment [50] —that the only provision that could have any relevance for this purpose—Article 6 (1)—does not directly or in terms give expression to such a right. Nevertheless this right is read into the Convention on the basis partly of general considerations external to Article 6 (1) as such, partly of inferences said to be required by its provisions themselves. But before entering upon this matter there arises first an important preliminary issue upon which the question of the very applicability of this Article and of the relevance of the whole problem of access depends. There exists also another preliminary point of this order, consideration of which is however more conveniently postponed until later. [51]

19. Clearly, it would be futile to discuss whether or not Article 6 (1) of the Convention afforded a right of access to the English courts unless Golder had in fact been denied such access—and in my opinion he had not. He had, in the manner already described, been prevented from consulting a solicitor with a view—possibly—to having recourse to those courts; but this was not in itself a denial of access to them, and could not be since the Home Secretary and the prison authorities had no power de jure to forbid it. I might nevertheless be prepared to hold, as the Court evidently does, that there had been a 'constructive' denial if, *de facto* , the act of refusing to allow Golder to consult a solicitor had had the effect of permanently and finally cutting him off from all chances of recourse to the courts for the purpose of the proceedings he wanted to bring. But this was not the case: he would still have been in time to act even if he had served his full term, which he did not do, being soon released on parole.

20. I of course appreciate the force of the point that the lapse of time could have been prejudicial in certain ways—but it could not have amounted to a bar. The fact that the access might have been in less favourable circumstances does not amount to a denial of it. Access, provided it is allowed, or possible, does not mean access at precisely the litigant's own time or on his own terms. In the present case there was at the most a factual impediment of a temporary character to action then and there, but no denial of the right because there could not be, in law. The element of 'remoteness' , of which the English legal system takes considerable account, also enters into this. Some distance, conceptually, has to be travelled before it can be said that a refusal to allow communication with a solicitor 'now' , ***557** amounts to a denial of access to the courts—either 'now' , or still less 'then' . In no reasonable sense can it be regarded as a proximate cause or determining factor. Golder was not prevented from bringing proceedings: he was only delayed, and then, in the end, himself failed to do so. A charge of this character cannot be substantiated on the basis of a series of contingencies. Either the action of the authorities once and for all prevented Golder's recourse or it did not. In my opinion it did not.

21. Just as the Court's Judgment (so it will be seen later) completely fails to distinguish between the quite separate concept of access to the courts and a fair hearing after access has been had, so also does it fail to distinguish between the even more clearly separate notions of a refusal of access to the courts and a refusal of access to a solicitor, which may—or may not—result in an eventual seeking of access to the courts. To say that a thing cannot be done now, is not to say it cannot be done at all—especially when what is withheld 'now' does not even constitute that which (possibly) might be sought 'then' . The way in which these two distinct matters are run together, almost as if they were synonymous, in the Judgment, [52] constitutes a gratuitous piece of elliptical reasoning that distorts normal concepts.

22. In consequence, even assuming that Article 6 (1) of the Convention involves an obligation to afford access to the courts, the present case does not, in my view. fall under the head of a denial of access contrary to that provision. It is not an Article 6 (1) case at all, but a case of interference with correspondence contrary to Article 8; and the whole argument about the effect of Article 6 (1) is misconceived; for, access not having been denied, there is no room for the application of that Article. Logically therefore, this part of the case must. for me, and so far as its actual ratio decidendi is concerned, end at this point: but, because the question of whether Article 6 (1) is to be understood as comprising a right of access to the courts involves an issue of treaty interpretation that is of fundamental importance, not only in itself, but also as opening windows on wider vistas of principle, philosophy and attitude, I feel it incumbent on me to state my views about it.

B. The interpretational aspect

23. It was a former President of this Court, Sir Humphrey Waldock who, when appearing as Counsel in a case before the International Court of Justice at The Hague, [53] pointed out the difficulties that must arise over the interpretational process when what basically divides the parties is not so much a disagreement about the meaning of terms as a difference of attitude or frame of mind. The ***558** parties will then be working to different co-ordinates; they will be travelling along parallel tracks that never meet—at least in Euclidean space or outside the geometries of a Lobachevsky, a Riemann or a Bolyai; or again, as Sir Humphrey put it, they are speaking on different wavelengths—with the result that they do not so much fail to understand each other, as fail to hear each other at all. Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other There is no solution to the problem unless the correct—or rather acceptable—frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either.

24. These are the kind of considerations which, it seems to me, account for the almost total irreconcilability that has characterised the arguments of the participants about the interpretation of Article 6 (1); on the one side chiefly the Commission, on the other the United Kingdom Government. Their approaches have been made from opposite ends of the spectrum. One has only to read the views and contentions of the Commission as set forth in, for instance, its Report for transmission to the Committee of Ministers, [54] to find these seemingly convincing—given the premises on which they are based and the approach that underlies them. Equally convincing, however, are those advanced on behalf of the United Kingdom Government in its written memorial [55] and oral arguments [56] before the Court, on the basis of another approach and a quite different set of premises. The conclusion embodied in the Judgment of the Court, after taking into account the arguments of the United Kingdom, is to the same effect as that of the Commission. My own conclusion will be a different one, partly because I think a different approach is required, but partly also because I believe that the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle, and furthermore has given insufficient weight to certain features of the case that are very difficult to reconcile with the conclusion it reaches.

1. The question of approach

25. The significance of the question of approach or attitude in the present case lies in the fact that, as already mentioned, and as was generally admitted, neither in the Convention as a whole nor in Article 6 (1) in particular, is any provision expressly made for a ***559** specific general substantive right [57] of access to the courts. It is in fact common ground that if the principle of such a right is provided for, or even recognised at all by any Article of the Convention, this can only result from an inference drawn from the first sentence of Article 6 (1)—which reads as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It is evident on the face of it that the direct (and the only *direct* right) right conveyed by this provision is a right to (i) 'a fair and public hearing' , (ii) 'within a reasonable time' , and (iii) by a tribunal which is 'independent' , 'impartial' , and 'established by law' . Naturally the question of these several matters, *viz.* of a not unduly delayed fair and public hearing before an impartial tribunal, etc., can only arise if some proceedings, civil or criminal, have actually been commenced and are currently going through their normal course of development. But that is not the point. The point is that this says nothing whatever in terms as to whether there shall *be* any proceedings. The Article assumes the *factual* existence of proceedings, in the sense (but no further) that, if there were none, questions of fair trial, etc., would have no relevance because they could not arise. The Article can therefore only come into play if there are proceedings. It is framed on the basis that there is a litigation which, as my colleague Judge Zekia puts it, is *sub judice* . But that is as far as its actual language goes. It does not say that there must be proceedings whenever anyone wants to bring them. To put the matter in another way, the Article simply assumes the existence of a fact, *viz.* that there are proceedings, and then, on the basis of that fact, conveys a right which is to operate in the postulated event (of proceedings)—namely a right to a fair trial, etc. But it makes no direct provision for the happening of the event itself—

that is to say for any right to bring the event about. In short, so far as its actual terms go, it conveys no substantive right of access independently of and additional to the procedural guarantees for a fair trial, etc., which are clearly its primary object. The question is therefore, must it be regarded as doing so by a process of implication?

Digression: Article 1

26. However, before going on to consider the question of implication as it arises in connection with Article 6 (1), a parenthesis of some importance must be opened, concerning another factor that calls ***560** for a short-circuiting of the whole issue of Article 6 (1). This concerns the effect to be given to Article 1 of the Convention which runs as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention.' The operative word here, in the present context, is 'defined' ; and in consequence, the effect of this provision (since it is rights and freedoms 'defined' in the Convention that the States parties to it are to secure to everyone within their jurisdiction) is to exclude from that obligation anything not so defined. Therefore, even if, in order to avoid relying on what might be regarded as a technicality, one refrains from attempting a 'definition of defining' , as compared with, say, mentioning, indicating, or specifying, [58] the question necessarily arises whether a right or freedom that is not even mentioned, indicated or specified, but merely—at the most—implied, can be said to be one that is 'defined' in the Convention in any sense that can reasonably be attributed to the term 'defined' ? In my opinion, not; and on this question I am in entire agreement with the views expressed by my colleague Judge Verdross.

27. This conclusion does not turn on a mere technicality. In the first place, even if one accepts the view that, as has been said, [59] 'the word “defined” in this provision is not very apt' and that in the Convention 'none of the rights or freedoms are defined in the strict sense' , they are at least mentioned, indicated or specified—in short *named.* This is not so with the right of access which, as such, finds no mention in the Convention. Secondly, a large part of the proceedings in the case, and of the arguments of the participants—those relating to inherent or other limitations on the right of access, if considered to be implied by Article 6 (1)—was taken up, precisely, with the question of how that right was to be understood, what it amounted to—in short how it was to be defined—conclusively establishing the need for a definition, even if only by limitation or circumscription; and definitions must be expressed—they cannot rest on implication.

28. The necessary conclusion therefore seems to be that it is impossible—or would be inadmissible—to regard as falling under the obligation imposed by Article 1 of the Convention—an obligation that governs its whole application—a right or freedom which the Convention does not trouble to name, but at the most implies, and which cannot even usefully be implied without at the same time proceeding to a rather careful definition of it, or of the conditions subject to which it operates, and which, by circumscribing it, define it. [60] ***561**

29. In this connection it must also be noticed that the very notion of a right of access to the courts is itself an ambiguous one, unless defined. The need to define, or at least circumscribe, is indeed expressly recognised in the Court's Judgment. [61] For instance, does a right of access mean simply such right as the domestic law of the State concerned provides, or at any time may provide for? If so, would the Convention, in providing for a right of access, be doing anything more than would already be done if the Convention did not exist? If on the other hand the Convention, supposing it to provide for a right of access at all, must be deemed to impose an obligation to afford a degree of access that the domestic law of the Contracting States, or of some of them, might not necessarily contemplate, then what degree?—an absolute right, or one conditioned in various ways, and if so how? More specifically, does a right of access mean a right both to bring a claim and also to have it determined on its substantive merits regardless of any preliminary question affecting the character or admissibility of the claim, the status or capacity of the parties to it, etc.?—and if not, then, since the laws of different countries vary considerably in these respects, would not some definition of the degree of derogation from the absolute, considered to be acceptable from a human rights standpoint, be requisite in a Convention on human rights? The fact that the European Convention contains no such (nor any) definition could only mean that if a right of access is to be implied by virue of Article 6 (1). the right would need to be defined separately, *ad hoc* , by the Court for the purposes of each individual case. This would be inadmissible since governments would never know beforehand where they stood.

30. The foregoing questions may be rhetorical in their form: they are not rhetorical in substance. They serve to show the need for a definition of access to the courts as a right or freedom, and hence that, the Convention containing none, this particular right or freedom is not amongst those which its Article 1 obliges the Contracting States to secure to those within their respective jurisdictions. To put the matter in another way, the parties cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves—indeed is not

defined at all because (in so far as it exists) it rests on an ***562** implication that is never particularised or spelt out. The fleeting. and scarcely comprehensible, [62] references contained in the Court's Judgment [63] to the question of a definition, as it arises by virtue of Article 1 of the Convention, are in no way an adequate substitute for a considered discussion of the matter, which the Judgment wholly fails to provide.

31. In consequence, there is here a further point at which, as in the case of what was discussed earlier, [64] a term could, so far as I am concerned, logically be put to the question of the effect of Article 6 (1)—for since that provision does not define, then whatever is the right or freedom it might imply, that right or freedom would not come within the scope of Article 1 and its overall governing obligation. This is also precisely Judge Verdross's view. That this conclusion may legitimately suggest the deduction that Article 6 (1) does not, in fact, imply any such right or freedom, but deals only with the modalities of litigation, leads naturally to a resumption of the discussion broken off above [65] where, it having emerged quite clearly from the analysis previously made, that Article 6 (1), while assuming the existence of proceedings, did not in terms give expression to any positive right to bring them, the question was asked whether the Article must nevertheless be regarded as doing so by a process of implication or inference. Also raised was the further question of what it would be proper and legitimate to imply by means of such a process.

Resumption on the question of approach

i. *The Court's approach*

32. It is an understandable, reasonable and legitimate point of view that access to the courts of law is, or should be, regarded as an important human right. Yet it is an equally justifiable view to say that the very importance of the right requires (more especially in a convention based on inter-State agreement, not sovereign legislative power) that it should be given explicit expression, not left to be deduced as a matter of inference. This leads up to an essential point. There is a considerable difference between the case of 'law-giver's law' edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is *necessarily* to be ***563** inferred from what it contains. The whole balance tilts from (in the case of law-giver's law) the negatively orientated principle of an interpretation that seems reasonable and does not run counter to any definite contra-indication, and an interpretation that needs to have a positive foundation in the convention that alone represents what the parties have agreed to—a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these—and the word 'necessarily' is the decisive one.

33. That word is significant because the attitude of the Commission to this case and, though more guardedly, that of the Court, seems to me to have amounted to this—that it is inconceivable, or at least inadmissible, that a convention on Human Rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all *possible* from any of its terms. This attitude clearly underlies what is said in the Court's Judgment, [66] that it would, in the opinion of the Court

> be inconceivable … that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it … possible to benefit from such guarantees, that is, access to a court.

As a matter of logical reasoning however, this is a complete non-sequitur . It might perhaps seem natural that procedural guarantees of this kind should 'first' be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best a possible and in no way a necessary one; for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, *but that where it is afforded* there should be safeguards as to the character of the ensuing proceedings.

34. Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a 'necessary' one if the provision cannot operate, or will not function, without it. As has already been indicated, [67] in Article 6 (1) the necessary, and the only necessary inferential element lies in the assumption (without which the provision makes no sense but more than which it does not require in order to make sense) that legal proceedings of some kind have been started and are in progress. It is in no way necessary, either to the operation of this text, or to give it significant meaning and scope, that the further and quite gratuitous assumption should be made that the text implies not only the existence of proceedings but an *a priori* right to bring them—which is to enter upon a distinct order or category of concept, for doing which there is no warrant, since the Article has ample scope without that. To quote Judge Zekia, it 'has … its raison d'être … without grafting the right of access onto ***564*** it' . May I be permitted in the general context of the process of implication to refer to what I wrote more than a dozen years ago in an article on treaty interpretation having no specific connection with any case such as the present one. [68]

35. So compelling do these considerations seem to me to be that I am obliged to look to other factors in order to account for the line taken by the Court. A number of them, such as the rules of treaty interpretation embodied in the 1966 Vienna Convention on the Law of Treaties; the Statute of the Council of Europe—an instrument quite separate from the European Convention on Human Rights; the principle of the rule of law; and the 'general principles of law recognised by civilised nations' mentioned in Article 38 (1) (*c*), of the Statute of the International Court of Justice—all these are factors external to Article 6 (1) of the Human Rights Convention, and having little or no direct bearing on the precise point of interpretation involved. [69] They might be useful as straws to clutch at, or as confirmatory of a view arrived at *aliter* —they are in no way determining in themselves, even taken cumulatively. [70]

36. The really determining element in the conclusion arrived at by the Court seems to have been fear of the supposed consequences that might result from any failure to read a right of access into Article 6 (1). This can clearly be seen from the following passages, the first of which completes that already quoted [71] by stating that the 'fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings' . Still more significant is the second passage [72] which reads as follows:

> Were Article 6 (1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government.

37. These motivations, as embodying what is clearly the real *ratio decidendi* of this part of the Judgment, seem to me to call for comment under three heads—those of probability, the logic of the argument, and the nature of the operation they denote.

(a) The consequences foreshadowed are completely unrealistic or at the best highly exaggerated.

(b) The argument embodies a well-known logical fallacy, in so far ***565*** as it proceeds on the basis that without a right of access the safeguards for a fair trial provided for by Article 6 (1) would be rendered nugatory and objectless—so that the one must necessarily entail the other. This is merely to perpetuate the type of fallacy arising out of what is known to philosophers as the 'King of France' paradox—the paradox of a sentence which, linguistically, makes sense, but actually is absurd, namely the assertion 'the King of France is bald' . The paradox vanishes, however, when it is seen that the assertion in no way logically implies that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But *that* there is one must be independently established; and, as is well-known, there is in fact no King of France. Similarly, one could provide all the safeguards in the world for the well-being of the King of France, did he exist, yet the fact that these would all be rendered nugatory and objectless did he not do so, would in no way establish, or be a compelling ground for saying that he did, or must be assumed to. In the same way, the safeguards for a fair trial provided by Article 6 (1) will operate if there is a trial, and if not, not. They in no way entail that there must be one. or that a right of access must be postulated in order to bring one about. The Judgment also abounds in the type of logical fallacy that derives B from A because A does not in terms *exclude* B. But non-exclusion is not *ipso facto in* clusion. The latter still remains to be demonstrated.

(c) Finally, it must be said that the above quoted passages from the Judgment of the Court are typical of the cry of the judicial legislator all down the ages—a cry which, whatever justification it may have on the internal or national plane, [73] has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact. [74] It may, or it may not be true that a failure to see the Human Rights Convention as comprising a ***566** right of access to the courts would have untoward consequences—just as one can imagine such consequences possibly resulting from various other defects or *lacunae* in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, *and from which consent alone it derives its obligatory force,* to close the gap or put the defect right by an amendment—not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on *necessary* inferences drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired.

ii. *A different approach*

38. In my view, the correct approach to the interpretation of Article 6 (1) is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement—and indeed the *continuing* support—of governments, but also that it is an instrument of a very special kind, [75] emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly 20 years later. This was in considerable measure founded on the European one, particularly as regards its 'enforcement' machinery. But it has not been brought into force. Such machinery is not to be found in the United Nations Covenants on Human Rights, which in any case also do not seem to be in force. Speaking generally, the various conventions and covenants on Human Rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or domaine réservé . Most especially, and most strikingly, is this the case as regards what is often known as the 'right of individual petition' , whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal—something that, even as recently as 30 years ago, would have been regarded as internationally inconceivable. For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European ***567** Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force. Other governments, that have ratified the European Convention, have hesitated long before accepting the compulsory jurisdiction of the Court of Human Rights set up under it. Similar delays have occurred in subscribing to the right of individual petition which, like the jurisdiction of the Court, has to be separately accepted. This right moreover, may require not only an initial, but a continuing acceptance, since it may be, and in several instances has been given only for a fixed, though renewable, period. It is indeed solely by reason of an acceptance of this kind that it has been possible for the present (Golder) case to be brought before the European Commission and Court of Human Rights at all.

39. These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the Contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming. (In this connection the passage quoted in the footnote below from the oral argument of Counsel for the United Kingdom before the Commission should be carefully noted.) [76]

Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned—and if it were true, as the Judgment of the Court seeks to suggest, that there *is* no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!

iii. Intentions and drafting method

40. It is hardly possible to establish what really were the intentions of the Contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from ***568** reasonable doubt. The obligation now under discussion does not have that character. Moreover, speaking from a very long former experience as a practitioner in the field of treaty drafting, it is to me quite inconceivable that governments intending to assume an international [77] obligation to afford access to their courts, should have set about doing so in this roundabout way—that is to say should, without stating the right explicitly, have left it to be deduced by a side-wind

from a provision [78] the immediate and primary purpose of which (whatever its other possible implications might be)—no one who gives an objective reading can doubt—was something basically distinct as a matter of category, namely to secure that legal proceedings were fairly and expeditiously conducted. No competent draftsman would ever have handled such a matter in this way.

41. I do not therefore propose to go into the drafting history of Article 6 (1), which would be both tedious and unrewarding because, like so many drafting histories, the essential points are often obscure and inconclusive. But it is worth looking at the provisions comparable or parallel to Article 6 (1) that figure in other major Human Rights instruments. In the only previous one of a similar order, the Universal Declaration, [79] there was a provision which read:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. [80]

This, it will be seen, gave no general right of access, and was really a procedural article of the same basic type as Articles 5 (4) and 13 of the European Convention, to which I shall come later [81] —and which the Court's Judgment itself holds not to comprise the sort of right of access it professes to find in Article 6 (1). Article 8 of the Universal Declaration was followed almost immediately by another provision [82] which simply says:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, *in the determination of his rights and obligations and of any criminal charge against him* (*emphasis supplied*).

I have italicised the last phrase of this Article in the Universal Declaration because it makes it quite clear that, subject to the change of order, which has no effect on the meaning, this was the source from which the first sentence of Article 6 (1) of the European ****569*** Convention was derived. [83] It no more expresses in terms any substantive right of access to the courts independently of, and over and above the purely procedural guarantee of a fair trial, etc., which is all its actual terms specify, than does the parallel passage in Article 6 (1) of the European Convention.

42. These provisions [84] of the Universal Declaration deserve to be specially noted because, in the Preamble to the European Convention, what is recited is that the parties were resolved collectively to enforce 'certain of the Rights stated in the Universal Declaration' . They were not therefore purporting to provide for any rights not so stated— *i.e. stated in that Declaration.*

43. The next comparable instrument, the International Covenant on Civil and Political Rights, adopted in the United Nations in 1966, but not yet in force, has an Article 14 clearly founded on Article 10 of the Universal Declaration, and therefore on Article 6 (1) of the European Convention; but there is no need to quote its terms because, apart from an initial phrase about the equality of all before the courts, and a few minor and insubstantial changes of wording and order, plus the omission of the reference to a hearing 'within a reasonable time' , it is exactly to the same effect as Article 6 (1). Finally, the Inter-American Convention of San José [85] has a provision [86] which at first sight seems to get nearer to conveying an express right of access, but in fact does not do so. To begin with, it comes under the headed rubric ' *Right to a Fair Trial* ' (garanties judiciaires), which labels it as falling into the procedural guarantee category. Secondly, its language clearly shows it to be of the same family and origin as the other comparable clauses in earlier instruments. It reads:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

If, in this provision, a full stop occurred after the word 'hearing' in the opening line, and it then resumed separately with the rest of the text, it could be said that a general right of access was expressly formulated. It is quite clear, however (omitting as irrelevant for present purposes the parenthetical phrase 'with due guarantees and within a reasonable time'), that the word 'hearing' links up directly with (and is qualified by) the requirement of a hearing by a 'competent … tribunal' . The emphasis, as in Article 6 (1) of the European Convention, is on the *character* of the hearing rather than on an *a priori* and independent right to have a hearing. ***570**

44. But the significant fact is that all the provisions above reviewed seem to have had their origin in a proposal of a much stronger and more explicit character. The point is succinctly made in the following passage from the statement made by Counsel for the United Kingdom before the Commission when, speaking in particular of Article 8 of the Universal Declaration, he said [87] :

> The text of Article 8 was based upon an amendment introduced by the Mexican representative in the Third Committee of the General Assembly on 23 October 1948. The representative stated that his amendment only repeated the text of the Bogota Declaration which had recently been adopted unanimously by 21 Latin American Deputations. The relevant provision of the Bogota Declaration was Article XVIII. This says: 'Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights'.
>
> The source of Article 8 of the Universal Declaration in Article XVIII of the Bogota Declaration is very interesting because Article XVIII of the Bogota Declaration is in the first sentence talking about the right of every person to resort to the courts to ensure respect for his legal rights, and in Article 8 of the Universal Declaration this has been inverted and narrowed to read: 'Everyone has a right to an effective remedy by the competent national tribunals'.

Counsel then subsequently [88] drew the following conclusion, which is also mine, namely that—

> if one looks at this history as a whole, what it amounts to is this: that what started in the Declaration of Bogota as a broad right of access has been narrowed down to a right of access related to the rights secured by the Convention.

45. Thus, over a period of some 20 years, there seems to have been what it would not be unfair to call a deliberate policy on the part of governments of avoiding coming to grips with the question of access, purely as such. This view is strengthened by the existence of evidence [89] that Article 6 (1) of the European Convention did at one stage of its drafting contain terms that might have been regarded as making provision for a right of access as such, but these subsequently disappeared—the clearest possible indication of an intention not to proceed on those lines, especially as the concept equally never figured in terms in any of the human rights instruments drawn up subsequent to the European Convention. [90] In the technique of treaty interpretation there can never be a better demonstration of an intention *not* to provide for something than first including, and then dropping it.

46. The conclusion I draw from the nature of the successive texts, ***571** combined with the considerations to which I have drawn attention [91] is that the Contracting States were content to rely *de facto* on the situation whereby, in practice, in all European countries a very wide measure of access to the courts was afforded; but without any definite intention on their part to convert this into, or commit themselves to the extent of, a binding international obligation on the matter [92] —and more especially an obligation of the character which the Court, in the present case, has found to exist—an obligation which, as the present case equally shows, is of a far more rigorous and far-reaching kind than the United Kingdom Government (obviously [93]) and a number of other governments parties to the Convention (most probably) had ever anticipated as being mandatory. [94] This type of obligation cannot, for reasons already stated, be *internationally* acceptable unless it is defined and particularised, and its incidence and modalities specified. The Convention does not do this; and the Court, with good reason, does not compound the misconceptions of the Judgment by attempting a task that lies primarily within the competence of governments. As the Judgment itself in terms recognises [95] —

> It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of … [the United Kingdom] Prison Rules … with the Convention.

But if it is not the function of the Court to elaborate restrictions on the right, then *a fortiori* can it not be its function to postulate the right itself which is one that cannot operate in practice without the very restrictions the Court declines to elaborate.

2. Particular texts and terms

47. On the basis of the foregoing approach, the various relevant provisions of the Convention give rise to no difficulties of interpretation or necessity for vindicatory explanations, as they certainly do on the basis of the Court's approach. I will list and comment on these provisions, broadly in the order in which they occur.

(a) *The Preamble* —this (as has already been mentioned [96]) recites specifically that the signatory Governments are resolved 'to take the first steps' for the collective enforcement of 'certain of the Rights' ***572** stated in the Universal Declaration of Human Rights which, as has been seen [97] makes no provision for any independent right of access as such, so that such a right does not even enter into the category of those that the European Convention *might* cover. But even if it figured in that category as a right possibly to be covered—as, so to speak, a 'qualifying right' —it would be a compelling implication of the language used in the Preamble, that it would not *necessarily* be included. Only 'certain' of the qualifying rights were to figure, and a *general* right of access was not, on the basis of the Universal Declaration, even a qualifying right. In addition, the Parties were only proposing to take 'the first steps' , and to cover only 'certain' of the rights. Thus, so far from it being 'inconceivable' that provision for a right of access should not be found in the European Convention, that result becomes a fully conceivable one that need cause no surprises nor seizures.

(b) *Article 1 of the Convention* [98] has the effect of requiring that before it becomes incumbent on the Contracting States to 'secure to everyone within their jurisdiction' the rights and freedoms figuring in that part of the Convention that comprises Article 6 (1), such rights and freedoms shall be 'defined' . No right of access however is there even mentioned, let alone 'defined' .

Definitions must necessarily be express. No undefined right of access can therefore result by simple inference or implication from Article 6 (1). The effect of Article 17 of the Convention [99] confirms and fortifies this view.

(c) *Articles 5 (4) and 13* —(i) The Court's Judgment is correct in taking the view of these provisions described above [100] ; but it is a view that, though correct, is incomplete, and misses an important part of what the United Kingdom was seeking to contend. (ii) What these two Articles provide is that the Contracting States must furnish a remedy in their courts for contraventions of substantive rights or freedoms embodied in the Convention (this description is somewhat of a paraphrase of Art. 5 (4), but basically true, and literally true of Art. 13). I agree with the Court that these provisions do not themselves embody any substantive rights or freedoms, or any general right of access, and therefore would not render any provision that did have that effect superfluous, as the United Kingdom Government contended. However, that Government also put forward what might be called the complement of this proposition, namely, that if a general right of access must, as the Court held, be deemed to be implied by Article 6 (1), then Articles 5 (4) and 13, would in their turn be rendered superfluous because the right of access under Article 6 (1) would provide all that was needed. Hence the existence of these other ***573** two provisions tended to show that no right of access was comprised by Article 6 (1). This argument is logically correct, but is not completely watertight since Articles 5 (4) and 13 speak of affording a *remedy;* and mere access does not necessarily entail a remedy: there can be access but no remedy available upon access. Nevertheless, if one were prepared to take a leaf out of the Court's book and employ the kind, or order, of argument the Court employs, one might say that since access without a remedy is of no avail, a right of access implies a right to a remedy—which is patently absurd. This would however precisely parallel the Court's conclusion that because right to a fair trial is of no avail without a trial, therefore a right to bring proceedings *resulting* in a trial must be implied. It would be difficult to make the *non-sequitur* clearer.

(d) *The provisions of Article 6* (*1*)—the vital first sentence of this paragraph has already been quoted in the present Opinion, [101] and the remaining sentence will be found set out in the Court's Judgment. [102] It need not be quoted here because all it does, with obvious reference to the requirement of a 'public hearing' stated in the first sentence, is to specify that judgment also must be 'pronounced publicly' , but that the press and the public may be excluded from all or part of the trial in certain circumstances which are then particularised in some detail. This sentence is therefore irrelevant for present purposes except that it is entirely of the same order as the first, and is linked to it, ejusdem generis , as an essentially procedural provision concerned solely with the incidents and modalities of trial in court. On the *first* sentence, and generally, the following comments are supplementary to those already made [103] :

(i) The 'ejusdem generis' rule —the previous paragraphs of this Opinion just referred to, were directed to showing that Article 6 (1) is a self-contained provision, complete in itself and needing no importations, supplements or elucidations in order to make its effect clear; and belonging to a particular order or category of clause, procedural in character and concerned exclusively with the modalities of trial in court. Its whole tenor is to that effect, and that effect only, as was eloquently pointed out in argument. [104] The ejusdem generis rule therefore requires that, if any implications are to be drawn from the text for the purpose of importing into it, or supplementing it by, something that is not actually expressed there (and it is common ground that the right of access does not find expression in this text), these implications should be, or should relate to, something of the same order, or be in the same category of concept, as figures in the text itself. This would not be the case here. Any right of access as ***574** such, while it has a procedural aspect, is basically a substantive right of a fundamental character. Even in its procedural aspects it is quite distinct from matters relating to the modalities of trial. As has already been pointed out, the concept of the incidents of a trial has only one necessary implication, *viz.* that a trial is taking place—that proceedings are in progress. It implies nothing in itself about the right to initiate them, which belongs to a different order of concept. Consequently it is not a legitimate process, and it contravenes accepted canons of interpretation, to imply the one from the other.

(ii) *The rule* ' expressio unius est exclusio alterius ' —this rule also is infringed by the conclusion arrived at in the Court's Judgment. This occurs more than once, but is best illustrated by the manner in which Article 6 (1) is dealt with in the Judgment, [105] where it is said that although the Article 'does not state a right of access … in express terms' , it 'enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term' (actually, not defined at all [106]). What is conveniently overlooked here is that the only rights in fact 'enunciated' in Article 6 (1) (and ex hypothesi 'enunciation' means expressed in terms) are not 'distinct' rights, but rights all of the same order or category, *viz.* rights relating to the timing, conduct and course of a trial. There is nothing in this with which to constitute the pretended 'single right' that is said to include a right of access in addition to the actually specified procedural rights. The latter, on the other hand, are explicitly stated in such a way as to call for the application of the expressio unius rule—and since, for the reasons already given, [107] there is nothing in the Article that necessitates a right of access apart from the fact of access already had, this rule should be applied. At the risk of repetition,

let the true position be stated once more, namely that the provisions of Article 6 (1) will operate perfectly well as they are, whenever proceedings are in fact brought, without postulating any inherent right to bring them. The Article will operate automatically when, *and if,* there *are* proceedings. If for whatever reason—absence of right or other—they are not brought, then cadit quaestio : the occasion that would have brought the Article into play has simply not arisen. In consequence, there is no justification in this case for the failure to apply the expressio unius rule.

(iii) *Equal treatment of civil and criminal proceedings* —there is a further compelling, and perhaps more concrete, reason why no right of access, as opposed to a right to a fair trial, etc., can be implied in Article 6 (1). This Article manifestly places civil and criminal ***575*** proceedings on the same footing—it deals with the matter of a fair trial in both contexts. Yet the question of a right of access as such must arise chiefly in connection with civil proceedings where it is the plaintiff or claimant who initiates the action. Apart from the very limited and special class of case in which the private citizen can originate proceedings of a penal character, it is the authorities who start criminal proceedings; and in that context it would be manifestly absurd to speak of a right of access. It is no real answer to this to say that the right inheres only when it is needed and it is needed in the one case but not the other (or in any event the authorities can look after themselves). This is not the point. The point is that the Article is as much concerned with the criminal as with the civil field—indeed its importance probably lies chiefly in the former field—yet this, the criminal field, is one in relation to which it is totally inapt in the vast majority of cases to speak of a right of access for the authorities who will be initiating the proceedings. This is a strong pointer to, or confirmation of, the conclusion that the Article is concerned solely with the proceedings themselves, not the right to bring them.

(iv) *A public hearing 'within a reasonable time'* —there are other pointers in the same direction, which also involve the principle of maintaining a due congruity between the civil and criminal aspects of Article 6 (1). One such pointer is afforded by the United Kingdom argument (only referred to in the Judgment [108]) in a manner that fails to bring out its relevance—indeed seems wholly to misunderstand it [109]) concerning the implications of the requirement in the Article that trial shall take place within a reasonable time. 'Within a reasonable time' of what? The Article does not say. In the case of criminal proceedings there can be no room for doubt that the starting point must be the time of arrest or of formal charge. It is only common sense to suppose that it could not lie in an indeterminate preceding period when the authorities were perhaps considering whether they would make a charge, and were taking legal advice about that—or were trying to find the accused in order to arrest him. In my view exactly the same principle must apply *mutatis mutandis* to civil proceedings, not only because otherwise a serious degree of incommensurate treatment would be introduced between the two types of proceedings, but for practical reasons also. In civil proceedings, the period of reasonable time must begin to run from the moment the complaint is formalised by the issue of a writ, summons or other official instrument under, or in accordance with, which the defendant is notified of the action. This again is only common sense. Any period previous to that, while the plaintiff is considering whether to act, is taking legal advice, or is gathering evidence, is irrelevant or too ***576*** indeterminate to serve, since no fixed moment could be found within it to act as a starting point for the lapse of a 'reasonable time' . If this were not so, the starting point could be 'related back' for months or even, in some cases, years, thus making nonsense of the whole requirement of trial 'within a reasonable time' , the sole real object of which is to prevent undue delay in bringing causes to trial. But the effect of the Court's view is that since Article 6 (1) itself does not specify any starting point, the Court would have to determine this *ad hoc* for, and in, each particular case. In consequence, governments could never know in advance within what precise period causes must be brought to trial in order to satisfy the requirements of the Article—a wholly unacceptable situation.

(v) The significance of all this is of course that anything relating to a *right* of access must concern the period *prior* to the formal initiation of proceedings, *for once these have been started, access to the courts has been had,* and therefore cadit quaestio . In consequence, any occurrences relating to the right of access as such—in particular any alleged interference with or denial of it—must relate exclusively to the period before access is actually had by the initiation of proceedings—*i.e.* before the period of a fair and public hearing within a reasonable time *to which alone Article 6 (1) refers* —and this again points directly to the conclusion that the Article does not purport to deal with access at all, since that matter relates to an antecedent period or stage.

(vi) The term 'public hearing' also gives rise to difficulties if Article 6 (1) is to be understood as providing for a right of access. Confining myself here to the case of civil proceedings, the term 'public' suggests a hearing on the merits in open court such as will ordinarily occur if the proceedings run their normal course. But, as has been seen, [110] they may not do so, they may be stopped on various grounds at an earlier stage. The point is that if they are, this will very often not be at any public hearing, but before a minor judicial officer or a judge sitting in private (anglice 'in chambers'), at which, usually, only the parties and their legal advisers will be present. If therefore a right of access were held to be implied by Article 6 (1), this might, on the language of the Article have to be held to involve a sort of indefeasible right to a *public* hearing in all circumstances, anything less not being 'access' . This view is strongly confirmed by the tenor of the second sentence of Article 6 (1). [111] Here therefore is one of the connections in which the correct meaning and scope of a right of access has

not been thought out [112] —failing which the concept lacks both clarity and certainty. It is also the connection in which Article 17 of the Convention is relevant. [113] **577*

48. *Conclusion on the question of right of access* —I omit other points in order not further to overload this Opinion. But I have to conclude that—like it or not, so to speak—a right of access is not to be implied as being comprehended by Article 6 (1) of the Convention, except by a process of interpretation that I do not regard as sound or as being in the best interests of international treaty law. If the right does not find a place in Article 6 (1), it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the Contracting States to accomplish, and for the Court to refer to them, not seek to carry out itself. **578*

Footnotes

1 For the pleadings, oral arguments and documents, see Series B, No. 16.
2 S.I. 1964 No. 388.
3 See para. 13, *supra.*
4 Drawn up in French and English, the former text being authentic.
5 Vienna Convention, Art. 5.
6 *Ringeisen v. Austria* (1971), para. 95, *1 E.H.R.R. 490* .
7 Littré, *Dictionnaire de la langue française, tome 1,* p. 509, 5°.
8 Paul Robert, *Dictionnaire alphabétique et analogique de la langue française, tome 1,* p. 666, II-2°.
9 Para. 52 of the report.
10 *Wemhof v. Germany* (1968), *1 E.H.R.R. 55* , 78, para. 19; *Neumeister v. Austria* (*No.* 1) (1968), *1 E.H.R.R. 91* , 130, para. 18; *Ringeisen v. Austria, supra* note 5, para. 110.
11 For example, *Delcourt v. Belgium* (1970), *1 E.H.R.R. 355* , 365, para. 25.
12 Art. 6 (1) .
13 Art. 13 .
14 Art. 5 .
15 *Neumeister v. Germany, supra* note 10, p. 132, para. 23; *Matznetter v. Austria* (1969), *1 E.H.R.R. 198* , 228, para. 13; *De Wilde, Ooms and Versyp v. Belgium* (*No.* 1) (1971), *1 E.H.R.R. 373* , 410, para. 86.
16 Vienna Convention, Art. 31 (1) .
17 Art. 66 of the Convention .
18 Statute of International Court of Justice. Art. 38 (1) (*c*).
19 Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, No. 93, p. 982, para. 5.
20 *Lawless v. Ireland* (*No.* 3) (1961), *1 E.H.R.R. 15* ; *Delcourt v. Belgium* (1970), *1 E.H.R.R. 355* .
21 *Wemhoff v. Germany, supra* note 9, p. 75, para. 8.
22 At para. 26, *supra.*
23 See Arts. 13, 14, 17 and 25 .
24 *Belgian Linguistic Case* (*No.* 2) (1968), *1 E.H.R.R. 252* , 281, para. 5.
25 *De Becker v. Belgium* (1962), *1 E.H.R.R. 43* .
26 Paras. 12, 15 and 16, *supra.*
27 Para. 123 of the report.
28 Art. 8 (2) .
29 *De Wilde, Ooms and Versyp v. Belgium* (*No.* 1) (1971), *1 E.H.R.R. 373* , 412, para. 93.
30 Para. 38, *supra.*
31 Para. 17, *supra.*
32 See note 28, *supra.*
33 Art. 5 (1) (*e*).
34 *De Wilde, Ooms and Versyp v. Belgium* (*No.* 1), *supra* note 28, pp. 393 and 412, paras. 39 and 93.
35 R. 50 (3) , first sentence, read together with r. 48 (3) .

36 Translated by the Court.
37 Art. 1.
38 Art. 60 .
39 Preamble, fourth recital.
40 Significantly the Oxford English Dictionary does admit an older meaning, in the sense of 'intercourse, communication' or (the verb) 'to hold communication or intercourse [with]', but pronounces these usages to be obsolete now *except* in the context of letters or other written communications.
41 In his masterly work *The Application of the European Convention on Human Rights,* Mr. J. E. S. Fawcett draws attention to the practice of the German courts of treating 'conversation, whether direct or by telephone, as being part of private life' (p. 194), respect for private life being another of the categories protected by Art. 8 of the Convention.
42 See paras. 13 and 19 of the Judgment, *supra.* Golder's claim under this head was found inadmissible by the European Commission of Human Rights because he had a right of appeal in the United Kingdom which he had failed to exercise. Thus he had not exhausted his local legal remedies.
43 It would seem to be a matter of common sense to suppose that any attempt by Golder to telephone a solicitor from prison (of which there is no evidence) would have proved abortive, though no interference with his correspondence, contrary to Art. 8 , would have been involved—but see the private life theory, note 39, *supra.*
44 Para. 5 of this Opinion, *supra.*
45 This is perhaps not quite fair to the prison authorities, who acted entirely correctly within the scope of the Prison Rules. There was no general interdiction of correspondence. But when Golder asked for permission to consult a solicitor it was refused. It must therefore be assumed that had he attempted to effect a consultation in the only way practicable for him—at least initially— *viz.* by letter, the letter would have been stopped—and see note 41, *supra.*
46 I am glad to be fortified in this view by no less an authority than that of the President of the European Commission of Human Rights, who says (*op. cit.* in note 39, *supra,* p. 196) that "“respect” for correspondence in Art. 8 (1) does not, quite apart from Art. 8 (2), involve an unlimited freedom in the matter'.
47 See para. 4 of this Opinon, *supra.* The point arises because it is not clear whether the categories beginning with the words 'for the prevention of', etc., are governed by and relate directly back to the words 'is necessary', or whether they relate only to the words 'in the interests of'.
48 Golder had made two requests: to be transferred to another prison, and to be allowed either to consult a solicitor about the possibility of taking legal action or alternatively to obtain the advice of a certain named magistrate, in whose views he would have confidence. In reply, he was told that the Secretary of State had fully considered his petition 'but is not prepared to grant your request for a transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition'.
49 These are amongst the grounds, specified in Art. 27 of the European Convention, on which the Commission of Human Rights must refuse to deal with a petition.
50 Para. 28, *supra.*
51 See paras. 26–31 of this Opinion, *infra.*
52 For example, in the last part of the fourth section of para. 26, *supra.*
53 This was either in the first (jurisdictional) phase of the *Barcelona Traction Company* case (1964), or in the *North Sea Continental Shelf* case; but I have lost track of the reference.
54 Dated 1 June 1973: Art. 31 (1) and (2) of the Convention.
55 Document CDH (74) 6 of 26 March 1974, *q.v.* Series B, No. 16.
56 Documents CDH/Misc (74) 63 and 64 of 12 October 1974, *q.v.* Series B, No. 16.
57 Although I agree with the Judgment (para. 33, *supra*) that provisions such as those in Arts. 5 (4) and 13 only confer procedural rights to a remedy in case a substantive right under the Convention is infringed, and not any substantive rights themselves, this finding, though correct *in se,* does not exhaust the point of the United Kingdom argument based on those Articles. I shall return to this matter later.
58 Clearly anything defined must *ipso facto* be mentioned, indicated. specified or at least named, etc. The reverse does not follow. A definition involves more than any of these, and *a fortiori* much more than something not specified at all, but merely inferred.
59 Fawcett, *op. cit.,* note 39, *supra,* p. 33.
60 It was common ground in the proceedings that a right of access cannot mean that the courts must have unlimited jurisdiction (*e.g.* the case of diplomatic or parliamentary immunity); or that the right must be

wholly uncontrolled (*e.g.* the case of lunatics, minors, etc.). Or again that lawful imprisonment does not have some effect on rights of access. But there was more than enough argument about the precise nature or extent of such curbs to make it abundantly clear that an implied right of access without specification or definition could not be viable, in the sense that its character and incidence would be the subject of continual controversy. Here. my colleague Judge Zekia makes an excellent point when he draws attention to the effect of Article 17 of the Convention, which prohibits the Contracting States from engaging in anything aimed at limiting any rights or freedoms 'to a greater extent than is provided for in the Convention'—the significance being that if any right of access were to be implied by Art. 6 (1) , it would have to be an absolute one, since that Article provides for no restrictions.

61 Para. 38, *supra;* and. again, by implication at the end of para. 44, *supra.*

62 For instance, what is meant by the allusions to a definition 'in the narrower sense of the term'? Narrower than what?—and what would be the 'broader' sense? Such vagueness can only give rise to 'confusion worse confounded': Milton, *Paradise Lost,* Book I, 1, 995 (lost indeed!).

63 Paras. 28 and 38, first section, *supra.*

64 Paras. 19–22 of this Opinion, *supra.*

65 At the end of para. 25 of this Opinion, *supra.*

66 Para. 35, last section, *supra.*

67 Para. 25 of this Opinion, *supra.*

68 See a footnote entitled ' *The philosophy of the inference* ' in [1963] B.Y.B.I.L. 154.

69 *i.e.* as discussed in paras. 25 and 33–34 of this Opinion, *supra.*

70 The importance attributed to the factor of the 'rule of law' in para. 34 of the Court's Judgment, *supra,* is much exaggerated. That element, weighty though it is, is mentioned only incidentally in the Preamble to the Convention. What chiefly actuated the Contracting States was not concern for the rule of law but humanitarian considerations.

71 In para. 33 of this Opinion. *supra.*

72 Para. 35, first sentence of the penultimate section. of the Judgment, *supra.*

73 It is one thing for a national constitution to allow part of its legislative processes to be effected by means of judge-made 'case-law': quite another for this method to be imposed *ab extra* on States parties to an international convention supposed to be based on agreement. It so happens however, that even in England, a country in which 'case-law', and hence—though to a diminishing extent—a certain element of judicial legislation has always been part of the legal system, a recent case led to severe criticism of this element, and another decision given by the highest appellate tribunal went far to endorse this criticism in the course of which it had been pointed out that the role of the judge is *jus dicere* not *jus dare.* and that the correct course for the judge faced with defective law was to draw the attention of the legislature to that fact, and not deal with it by judicial action. It was also pointed out that no good answer lay in saying that a big step in the right direction had been taken,—for when judges took big steps that meant that they were making new law. Such remarks as these are peculiarly applicable to the present case in my opinion.

74 That is to say unless it can be shown that the treaty or convention itself concedes some legislative role to the tribunal called upon to apply it, or that the parties to it intended to delegate in some degree the function (otherwise exclusively to them pertaining) of changing or enhancing its effects—or again that they must be held to have agreed *a priori* to an extensive interpretation of its terms, possibly exceeding the original intention In the present context none of these elements, but the reverse rather, are present, as I shall show later.

75 The European Convention signed in 1950 and in force since 1953, is unique as being the only one that both is operative and provides for the judicial determination of disputes arising under it. In any event it is the oldest, having been preceded (by two years) only by the UN Universal Declaration of Human Rights which was not, and is not, a binding instrument. There are only three others of the same general order as the European Convention, and only one that is comparable in respect of 'enforoement machinery'—the American Convention of San José—which was signed only in 1969 and is not in force.

76 'As regards the question of access to the courts, this is not a case of a Government trying to repudiate obligations freely undertaken. That much is quite clear. If one thing has emerged from all the discussion in the case of Mr. Knechtl and the pleadings so far in the case of Mr. Golder, it is that the Government of the United Kingdom had no idea when it was accepting Art. 6 of the Convention that it was accepting an obligation to accord a right of access to the courts without qualification. Whether we are right on the interpretation or whether we are wrong, I submit that that much is absolutely clear. I am not going to review in detail all the evidence or the views of the United Kingdom in this respect which have been

placed before the Commission. But I submit that it is perfectly clear from all the constitutional material that has been submitted, from its part in the drafting of the European Establishment Convention, that the United Kingdom had no intention of assuming, and did not know that it was expected to assume, any such obligation.' See the verbatim record of the oral hearing on the merits held in Strasbourg before the Commission on 16–17 December 1971: (CDH (73) 33, at p. 36: Document No. 5 communicated by the Commission to the Court).

77 A right of access under domestic law such as, at least in a general way, the legal systems of most countries doubtless do in fact provide, is one thing. It is quite another matter to assume an international treaty obligation to do so—especially without the smallest attempt to define or condition it (see paras. 27–30 of this Opinion, *supra.*

78 Art. 6 (1) .

79 See note 73, *supra.*

80 Art. 8 .

81 See note 55, *supra.*

82 *i.e.,* Art. 10; the intervening provision (Art. 9) is irrelevant here, forbidding arbitrary arrest, detention or exile.

83 For the text of the first sentence of Art. 6 (1), see para. 25 of this Opinion, *supra.*

84 *i.e.,* Arts. 8 and 10.

85 1969; also not in force.

86 *i.e.,* Art. 8 (1).

87 *Loc. cit.* (note 74, *supra*) at p. 47.

88 *Ibid.* at p. 50.

89 See the verbatim record of the oral hearing on the merits held in Strasbourg before the Commission on 16–17 December 1971: CDH (73) 33, at p. 45.

90 *Vide supra.*

91 In para. 38 of this Opinion, *supra.*

92 See note 75, *supra.*

93 See note 74, *supra.*

94 The United Kingdom argument based on the purely *national* treatment in the matter of access to the courts afforded by ordinary commercial treaties and by such multilateral conventions as the modern European Convention on Establishment, points to the probability that, squarely faced with having to do something about the question of access, governments would not have been willing to go beyond providing for national treatment in the matter; and of course Golder, a United Kingdom national, did receive treatment which was correct under the local national law and regulauons.

95 Para. 39, second section, *supra.*

96 See para. 42 of this Opinion, *supra.*

97 Para. 41 of this Opinion, *supra.*

98 Paras. 26–31 of this Opinion, *supra.*

99 See note 58, *supra.*

100 In note 55, *supra.*

101 Para. 25, *supra.*

102 Para. 24, *supra.*

103 See paras. 25 and 33–34 of this Opinion, *supra;* and see also para. 40 *in fine, supra.*

104 See the verbatim record of the oral hearing on the merits held in Strasbourg before the Commission on 16–17 December 1971: CDH (73) 33, at p. 51.

105 At the beginning of para. 28, *supra.*

106 This is one of the places where the Court recognises the undefined character of the right—see paras. 26–31 of this Opinion, *supra,* especially paras. 29 and 30 and appurtenant notes.

107 Paras. 25 and 34 of this Opinion, *supra.*

108 At para. 32, *supra.*

109 It is of course the *trial* that has to take place within a reasonable time *after* access has been had, not the *access* that has to be *afforded* within a reasonable time.

110 Para. 15 of this Opinion, *supra.*

111 See sub-paragraph (*d*) of this paragraph, *supra.*

112 See paras. 28 and 29 of this Opinion, *supra.*

113 See note 58, *supra;* and see also sub-paragraph (*b*) of this paragraph, *supra.*

