



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

**CASES OF DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (MERITS)**

(Application no. 2832/66; 2835/66; 2899/66)

JUDGMENT

STRASBOURG

18 June 1971

In the De Wilde, Ooms and Versyp cases,

The European Court of Human Rights, taking its decision in plenary session in accordance with Rule 48 of its Rules and composed of the following Judges:

Sir Humphrey WALDOCK, *President*,
MM. H. ROLIN,
R. CASSIN,
Å.E.V. HOLMBÄCK,
A. VERDROSS,
E. RODENBOURG,
A.N.C. ROSS,
T. WOLD,
G. BALLADORE PALLIERI,
H. MOSLER,
M. ZEKIA,
A. FAVRE,
J. CREMONA,
S. BILGE,
G. WIARDA,
S. SIGURJÓNSSON,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. J.F. SMYTH, *Deputy Registrar*,

Decides as follows:

PROCEDURE

1. The De Wilde, Ooms and Versyp cases were referred to the Court by the Government of the Kingdom of Belgium ("the Government"). The cases have their origin in applications lodged in 1966 with the European Commission of Human Rights ("the Commission"), under Article 25 (art. 25) of the Convention, by Belgian nationals - Jacques De Wilde, Franz Ooms and Edgard Versyp - and concerning certain aspects of Belgian legislation on vagrancy and its application to these three persons. In 1967 the Commission ordered the joinder of the said applications insofar as they had been declared admissible and, on 19th July 1969, it adopted in their respect the report provided for in Article 31 (art. 31) of the Convention. The report was transmitted to the Committee of Ministers of the Council of Europe on 24th September 1969.

The Government's application, which referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48) of the Convention, was lodged with the Registry of

the Court on 24th October 1969 within the period of three months laid down in Articles 32 (1) and 47 (art. 32-1, art. 47).

2. On 28th October 1969, the Registrar obtained from the Secretary of the Commission twenty-five copies of its report.

3. On 10th November 1969, the President of the Court drew by lot, in the presence of the Registrar, the names of six of the seven Judges called upon to sit as members of the Chamber, Mr. Henri Rolin, the elected Judge of Belgian nationality, being an ex officio member under Article 43 (art. 43) of the Convention. The six Judges so chosen were MM. Å. Holmbäck, A. Verdross, G. Balladore Pallieri, A. Favre, J. Cremona and S. Sigurjónsson. The President also drew by lot the names of three substitute Judges, namely MM. A. Bilge, E. Rodenbourg and G. Maridakis in this order.

Mr. Å. Holmbäck assumed the office of President of the Chamber in accordance with Rule 21, paragraph 7, of the Rules of Court.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and of the President of the Commission on the procedure to be followed. By an Order of 23rd November 1969, he decided that the Government should file a memorial within a time-limit expiring on 15th February 1970 and that the Delegates of the Commission should have the right to reply in writing by 9th April 1970 as fixed by an Order of 12th February 1970. The respective memorials of the Government and the Commission reached the Registry on 9th February and 9th April 1970.

5. As authorised by the President of the Chamber in an Order of 18th April 1970, the Government filed a second memorial on 10th June 1970. On 1st July 1970, the Secretary of the Commission informed the Registrar that the Delegates did not wish to file a rejoinder.

6. On 10th January and 3rd March 1970, the President of the Chamber had instructed the Registrar to invite the Commission and the Government to produce a number of documents, which were placed on the file in February, April and May 1970.

7. At a meeting in Strasbourg on 28th May 1970, the Chamber decided, by virtue of Rule 48, "to relinquish jurisdiction forthwith in favour of the plenary Court" for the reason that the Commission had raised in the submissions of its memorial "certain questions on which it (was) desirable that the Court should be able to rule in plenary session".

Sir Humphrey Waldock assumed the office of President of the Court for the consideration of the present cases under Rule 21, paragraph 7, taken in conjunction with Rule 48, paragraph 3.

8. On 28th and 29th September 1970, the Court held a meeting in Paris to prepare the oral part of the procedure. On this occasion it decided to request the Commission and the Government to provide it with further documents and information which were received on 30th October and 16th November 1970, respectively.

Some other documents were filed by the Agent of the Government on 15th and 17th March 1971.

9. After having consulted the Agent of the Government and the Delegates of the Commission, the President decided, by Order of 1st October 1970, that the oral hearings should open on 16th November 1970.

10. The oral hearings began on the morning of 16th November 1970 in the Human Rights Building at Strasbourg. They continued during the two following days.

There appeared before the Court:

- for the Government:

Mr. J. DE MEYER, Professor

at Louvain University, Assessor to the Council of State,
Agent and Counsel;

- for the Commission:

Mr. M. SØRENSEN,

Principal Delegate, and

Mr. W.F. DE GAAY FORTMAN,

Delegate.

On the afternoon of 17th November, Mr. Sørensen informed the Court that the Delegates of the Commission intended to be assisted on a particular point by Me X. Magnée, avocat at the Brussels Bar. The Agent of the Belgian Government having expressed objections, the Court took note, by a judgment of 18th November, of the intention of the Delegates to avail themselves of the right conferred on them by Rule 29, paragraph 1, in fine.

The Court heard the addresses and submissions of Mr. Sørensen and Mr. De Meyer as well as their replies to the questions put by several Judges. It also heard, on the afternoon of 18th November, a short statement by Me Magnée of the point mentioned by the Principal Delegate.

The hearings were declared provisionally closed on 18th November.

11. Judge G. Maridakis, who had attended the oral hearings, could not take part in the consideration of the present cases after 31st December 1970, as the withdrawal of Greece from the Council of Europe became effective from that date.

12. After having made final the closure of the proceedings and deliberated in private, the Court gives the present judgment.

AS TO THE FACTS

13. The purpose of the Government's application is to submit the De Wilde, Ooms and Versyp cases for judgment by the Court. On several points the Government therein expresses its disagreement with the opinion stated by the Commission in its report.

14. The facts of the three cases, as they appear from the said report, the memorials of the Government and of the Commission, the other documents

produced and the addresses of the representatives appearing before the Court, may be summarised as follows:

A. De Wilde case

15. Jacques De Wilde, a Belgian citizen, born on 11th December 1928 at Charleroi, spent a large part of his childhood in orphanages. On coming of age, he enlisted in the French army (Foreign Legion) in which he served for seven and a half years. As a holder of books for a fifty per cent war disablement pension and a military retirement pension, he draws from the French authorities a sum which in 1966 amounted to 3,217 BF every quarter. He has work, from time to time at any rate, as an agricultural labourer.

16. The applicant reported on 18th April 1966 at 11.00 a.m. to the police station at Charleroi and declared that he had unsuccessfully looked for work and that he had neither a roof over his head nor money as the French Consulate at Charleroi had refused him an advance on the next instalment of his pension due on 6th May. He also stated that he had "never" up to then "been dealt with as a vagrant". On the same day at 12 noon, Mr. Meyskens, deputy superintendent of police, considered that De Wilde was in a state of vagrancy and put him at the disposal of the public prosecutor at Charleroi; at the same time, he asked the competent authorities to supply him with information about De Wilde. A few hours later, after being deprived of his liberty since 11.45 a.m., De Wilde attempted to escape. He was immediately caught by a policeman and he disputed the right of the police to "keep him under arrest for twenty four hours". He threatened to commit suicide.

The information note, dated 19th April 1966, showed that between 17th April 1951 and 19th November 1965 the applicant had had thirteen convictions by courts of summary jurisdiction or police courts and that, contrary to his allegations, he had been placed at the Government's disposal five times as a vagrant.

17. On April 19th, at about 10 a.m., the police court at Charleroi, after satisfying itself as to "the identity, age, physical and mental state and manner of life" of De Wilde, decided, at a public hearing and after giving him an opportunity to reply, that the circumstances which caused De Wilde to be brought before the court had been established. In pursuance of Section 13 of the Act of 27th November 1891 "for the suppression of vagrancy and begging" ("the 1891 Act") the court placed the applicant "at the disposal of the Government to be detained in a vagrancy centre for two years" and directed "the public prosecution to execute the order".

18. After being first detained at the institution at Wortel and then from 22nd April 1966 at that of Merksplas, De Wilde was sent on 17th May 1966 to the medico-surgical centre at St. Gilles-Brussels from where he was returned to Merksplas on 9th June 1966. On 28th June 1966, he was

transferred to the disciplinary prison at Turnhout for refusal to work (Section 7, sub-section 2, of the 1891 Act), and on 2nd August 1966 to that of Huy to appear before the criminal court which, on 19th August, sentenced him to three months' imprisonment for theft from a dwelling house. He was returned to Turnhout shortly afterwards.

19. On 31st May and 6th June 1966, that is, about a month and a half after his arrest and four weeks after sending his first letter to the Commission (3rd May 1966), the applicant wrote to the Minister of Justice invoking Articles 3 and 4 (art. 3, art. 4) of the Convention. He underlined the fact that on 6th May he had received 3,217 BF in respect of his pension and showed surprise that he had not yet been released. He also complained of being forced to work for the hourly wage of 1.75 BF. He added that he had refused to work in protest against the behaviour of the head of the block at Merksplas who had wrongfully claimed to be entitled to "take" from him 5% of his pension. Finally, he complained of the disciplinary measures taken on such refusal - punishment in a cell and confinement without privileges - and of hindrance to correspondence. On 7th June 1966, the Ministry of Justice requested the governor of the prison at St. Gilles to inform De Wilde "that his request for release" of 31st May would "be examined in due course".

The applicant took up his complaints again on 13th June and later on 12th July 1966. In this last letter, he enquired of the Minister why he had been transferred to the prison at Turnhout. He also pointed out that there was no work available at this institution which would enable him to earn his "release savings". On 15th July, the Ministry had him notified that his release before the prescribed period had expired could "be considered" "provided that his conduct at work (was) satisfactory" and "adequate arrangements for rehabilitation (had) been made".

De Wilde wrote again to the Minister on 8th August 1966. Due to his pension, he argued, he had "sufficient money"; in any case, "the results of (his) work" already amounted to more than 4,000 BF. As regards his rehabilitation, he stated that his detention made it "impossible"; it prevented him from corresponding freely with employers and the welfare officer had failed to help him. Nevertheless, on 12th August 1966, the Ministry considered that his application "(could) not at present be granted".

On 13th August 1966, the applicant wrote once again to the Minister claiming he could find board and lodging and work on a farm.

20. On 25th and 26th October 1966, the Ministry of Justice decided that, at the expiry of the sentence he had received on 19th August, the applicant could be released once his rehabilitation seemed ensured by the Social Rehabilitation Office of Charleroi (Section 15 of the 1891 Act).

De Wilde regained his freedom at Charleroi on 16th November 1966. His detention had lasted a little less than seven months, of which three months were spent serving the prison sentence.

21. According to a report of the Prisons' Administration, the applicant received only one disciplinary punishment between the beginning of his detention (19th April 1966) and the date of his application to the Commission (17th June 1966): for refusal to work at Merksplas, he was not permitted to go to the cinema or receive visits in the general visiting room until his transfer to Turnhout.

22. In his application lodged with the Commission on 17th June 1966 (No. 2832/66) De Wilde invoked Articles 3 and 4 (art. 3, art. 4) of the Convention. He complained in the first place of his "arbitrary detention" ordered in the absence of any offence on his part, without a conviction and in spite of his having financial resources. He also protested against the "slavery" and "servitude" which, in his view, resulted from being obliged to work in return for an absurdly low wage and under pain of disciplinary sanctions.

The Commission declared the application admissible on 7th April 1967; prior to this, the Commission had ordered the joinder of the case with the applications of Franz Ooms and Edgard Versyp.

B. Ooms case

23. On 21st December 1965 at 6.15 a.m., Franz Ooms, a Belgian citizen born on 12th April 1934 at Gilly, reported to Mr. Renier, deputy superintendent of police at Namur, in order "to be treated as a vagrant unless one of the social services (could find him) employment where (he could) be provided with board and lodging while waiting for regular work". He explained that of late he had been living with his mother at Jumet but that she could no longer provide for his upkeep; that he had lost a job as a scaffolding fitter at Marcinelle and, in spite of his efforts, had failed to find another job for over a month; that he no longer had any means of subsistence and that he had been "convicted" in 1959 for vagrancy by the police court at Jumet.

24. On the same day at about 10 a.m., the police court at Namur, after satisfying itself as to "the identity, age, physical and mental state and manner of life" of Franz Ooms, considered at a public hearing and after giving him an opportunity to reply that the circumstances which had caused him to be brought before the court had been established. In pursuance of Section 16 of the 1891 Act, the court placed him "at the disposal of the Government to be detained in an assistance home" and directed "the public prosecution to execute this order".

25. Ooms was detained partly at Wortel and partly at Merksplas. He also spent some weeks at the prison medico-surgical centre at St. Gilles-Brussels (June 1966).

26. On 12th April 1966, that is less than four months after his arrest and about five weeks before applying to the Commission (20th May 1966), the

applicant petitioned the Minister of Justice for his release. He alleged he was suffering from tuberculosis and that his family had agreed to take him back with them and place him in a sanatorium. On 5th May, the Ministry, after receiving the unfavourable opinion of the doctor and of the director of the institution at Merksplas, considered the request to be premature.

Franz Ooms again made a petition for release on 6th June, this time to the Prime Minister. He pleaded that as "he had been ill since his detention" he had been unable to earn by his own work the 2,000 BF needed to make up his release savings, and repeated that his mother was willing to have him with her and to take care of him. The Ministry of Justice, to whom the Prime Minister's office had transmitted the request, also considered it to be premature; on 14th June, it requested the governor of St. Gilles prison to inform the applicant accordingly.

On 25th June 1966, the welfare department of the Salvation Army at Brussels certified that Franz Ooms would "be given work and lodging in (their) establishments immediately on his release". The applicant sent this declaration to the director of the welfare settlement at Wortel on 1st July, but without result.

His mother, Mme. Ooms, confirmed her son's declarations by letter of 15th July 1966 to the same director. In his reply of 22nd July, the director asked her to produce a certificate of employment, pointing out that "at the time of his possible discharge", the applicant had to have, besides a resting place, "a definite job by which he (could) ensure his upkeep".

Mme. Ooms also wrote to the Minister of Justice on 16th July, asking for a "pardon for (her) son". On 3rd August 1966, the Ministry informed her that he would be freed when "he (had) earned, by his prison work, the sum of money prescribed in the regulations as the release savings of vagrants interned for an indefinite period at the disposal of the Government".

In a report of 31st August 1966 drawn up for the Ministry of Justice, the director of the Wortel settlement pointed out that Franz Ooms had already received several criminal convictions, that this was his fourth detention for vagrancy, that his conduct could not be described as exemplary, and that his earnings amounted to only 400 BF. According to a medical certificate appended to the report, physical examinations of the applicant had revealed nothing wrong. As a result, on 6th September 1966, the Ministry instructed the director to inform the detainee "that his complaints had been found groundless".

On 26th September 1966, Ooms again petitioned the Prime Minister. To justify this step, he cited the negative attitude of the Department of Justice. He stated that he was the victim of "monstrous injustices" which he attributed to his being a Walloon. He alleged, in particular, that on 23rd March 1966, at Merksplas, he had been punished with three days in the cells and a month's confinement without privileges for refusing to sleep in a foul-smelling dormitory where the light was kept on all night, that he had been

locked up naked and later "lightly clad" in a freezing cell which had brought on an attack of pneumonia and of tuberculosis for which he had had to spend three months in the sanatorium at the Merksplas institution. He also protested against the dismissal of the many petitions for release presented both by himself and by his mother. He finally declared his agreement to the opening of an enquiry for the purpose of verifying the truth of his allegations and he stated that he was ready to take action, if necessary, before a "national authority" within the meaning of Article 13 (art. 13) of the Convention.

Two days later, the Prime Minister's office informed the applicant that his letter had been transmitted to the Department of Justice.

Ooms was released ex officio at Charleroi on 21st December 1966, one year to the day after being put at the disposal of the Government (Section 18, first sentence, of the 1891 Act).

27. In his application lodged with the Commission on 20th May 1966 (No. 2835/66), the applicant mentioned that he was in the sanatorium of the Merksplas institution but that his mother had agreed to have him hospitalised in a "civil" clinic. He added that his illness completely prevented him from working and thereby earning the 2,000 BF for his release savings; in any case, he would need at least a year to earn such a sum, at the rate of 1.75 BF per hour. He was therefore surprised that the Ministry of Justice had considered his request for release to be premature.

Ooms, who had meanwhile been transferred to the prison at St. Gilles-Brussels, supplemented his original application on 15th June 1966. He declared that he had for the moment been cured of his pulmonary disease caused by ill-treatment and undernourishment, but his illness had left "traces" which made it impossible for him to perform "any heavy work". He also stressed that his mother, who was in receipt of a pension, wanted him home with her. In these circumstances he considered he was entitled to be released, and he complained of the Belgian authorities' refusal to recognise this right. Invoking Article 6, paragraph (3) (b) and (c) (art. 6-3-b, art. 6-3-c), of the Convention he further maintained that on his arrest he had asked in vain for free legal aid; this fact was contested before the Court by the Government's Agent.

That part of the application where Franz Ooms complained – apparently in subsequent letters - of ill-treatment and of a violation of his liberty of conscience and religion (Articles 3 and 9 of the Convention) (art. 3, art. 9) was declared inadmissible on 11th February 1967 as manifestly ill-founded (Appendix II to the Commission's report). On 7th April 1967, the Commission declared the remaining part of his application admissible, after having ordered its joinder with the applications of Jacques De Wilde and Edgard Versyp.

C. Versyp case

28. Edgard Versyp, a Belgian citizen born in Bruges on 26th April 1911, works, at least from time to time, as a draughtsman; he seems to have had his residence at Schaarbeek.

On 3rd November 1965, at 9 p.m., he appeared before Mr. Meura, deputy superintendent of police at Brussels; he carried a letter from the Social Rehabilitation Office requesting that he be given a night's shelter. He stated he had no fixed abode, no work or resources, and "(begged) to be sent to a welfare settlement"; he pointed out that he had "previously (been) in Merksplas" and did not wish for "any other solution". After spending the night in the municipal lock-up, where he had already been the night before, he was taken in charge by the Social Rehabilitation Office on 4th November at 9 a.m. On the same day, this office certified that so far as its services were concerned there was no objection to Versyp "being but in the charge of the prosecuting officer with a view to his possible placement in a state welfare settlement": he was "well-known to both (the) after-prison care and vagrancy sections" at the office and attempts so far to rehabilitate him had failed due to "his apathy, idleness and weakness for drink"; in any case, he refused "any other welfare action", except his detention. As a result, Versyp was immediately put at the disposal of the public prosecutor's office.

29. A few hours later, the police court in Brussels, having satisfied itself as to "the identity, age, physical and mental state and manner of life" of the applicant, considered, at a public hearing and after giving Edgard Versyp an opportunity to reply, that the circumstances which had caused him to be brought before the court had been established. In pursuance of Section 13 of the 1891 Act, the court placed him "at the disposal of the Government to be detained in a vagrancy centre for two years". It entrusted the execution of this order to the public prosecutor, who on that same day, 4th November 1965, required the director of the vagrancy centre of Merksplas to receive Versyp into his institution.

30. Versyp was detained at different times at Wortel, Merksplas and Turnhout.

31. On 7th February 1966, that is more than three months after his arrest and more than six months before applying to the Commission (16th August 1966), he wrote from Wortel to the Minister of Justice requesting his transfer to the solitary confinement division in Merksplas. His request was not transmitted to Brussels due to the imminent visit of the inspector-general who granted his request the next day.

On 10th May 1966, the applicant requested his transfer from Merksplas to the prison at St. Gilles-Brussels where, he thought, the Head of the Social Rehabilitation Service could succeed in getting him "work outside" to allow him "to live as an honest citizen". He stated that living "with other vagrants in Wortel and Merksplas" had "shattered" his morale and that he had neglected his work as he had had to receive treatment in hospital twice; he promised, however, to attend to "(his) business outside more efficiently in

order to avoid a similar situation recurring". In a report of 16th May, the director of the Merksplas institution pointed out that Versyp, who had nine criminal convictions and had been detained four times for vagrancy, had spent the greater part of his detention in solitary confinement and could not adapt himself to communal life; the director therefore suggested his transfer to a solitary confinement prison (op zijn vraag naar een celgevangenis), in accordance with his request. As a result, he was sent on 23rd May to Turnhout Prison and not to that of St. Gilles; on 6th June, he complained of this to the Ministry of Justice, which ordered his return to Wortel.

On 22nd August 1966, Versyp begged the Ministry to grant him the opportunity of rehabilitating himself "in society according to (his) aptitudes through the good offices of the Brussels' Social Service". On 6th September, the authorities of the Wortel settlement informed him, on the instructions of the Ministry, that his case would be examined when the amount of his release savings showed that he was capable of doing a suitable job of work.

On 26th September, the applicant protested to the Ministry against this reply. According to him, he had been prevented "by devious means" from earning anything both at Wortel and Turnhout in order "that (he) could then be held for an even longer period". Thus, at Wortel they wanted to make him do work for which he was not fit - potato picking - and refused to give him other work which he was able to do. Furthermore, they had purported to forbid him to correspond with the Commission but without success as he had invoked the regulations and informed the public prosecutor's office. In short, he felt himself exposed to hostility which made him want to leave Wortel for Merksplas, or better still, for St. Gilles prison where, he claimed, the Social Rehabilitation Service would find him a suitable job and accommodation "in a hostel in Brussels".

The Ministry of Justice filed this letter without further action; on 28th September 1966, the director of the state welfare settlement at Wortel was requested so to inform the applicant.

Versyp was released on 10th August 1967, by virtue of a ministerial decision of 3rd August (Section 15 of the 1891 Act) and after one year, nine months and six days of detention. On 1st August the authorities of the Wortel settlement had given a favourable opinion on the new request for release which he had made some time before; they noted, amongst other things, that he would more easily find a job at that time than at the expiry of the term fixed in 1965 by the Brussels magistrate, that is in the month of November.

32. In the application which he lodged with the Commission on 16th August 1966 (No. 2899/66) and supplemented on 6th September 1966, the applicant invoked Articles 4, 5 and 6 (3) (c) (art. 4, art. 5, art. 6-3-c) of the Convention. He complained in the first place of his detention: he emphasised that he had a fixed abode at Brussels-Schaarbeek and had never

begged and so he was surprised at having been placed in a vagrancy centre. He further alleged that he had had no opportunity of defending himself before the Brussels police court on 4th November 1965 as the hearing had lasted "scarcely two minutes" and he had not been granted free legal aid. He also complained of various features of the regime to which he was subjected. In order to prevent him accumulating the 2,000 BF required to constitute release savings, he had been left, he alleged, for several months without sufficient work. In a general way, he added, the directors of the various institutions acted in concert in order to prolong the detention of vagrants as much as possible; the Government, for its part, "encouraged" vagrancy which gave it a labour force almost without cost (1.75 BF per hour at manual work) and huge profits. Finally, Versyp maintained that his numerous letters addressed to the competent authorities, such as, for example, the inspector of prisons, the public prosecutor's office (July 1966) and the Minister of Justice (June and August 1966), invariably returned "to the director" who filed them without further action; these letters were not the object of any decision or, like his request for a transfer to Brussels, met with a refusal. One of them, that addressed on 7th February 1966 to the Minister of Justice by registered post, had even been opened by the director of the Wortel settlement who had not sent it.

On 7th April 1967, the Commission declared the application admissible; it had previously ordered its joinder with the applications of Jacques De Wilde and Franz Ooms.

D. Factors common to the three cases

33. According to Article 347 of the Belgian Criminal Code of 1867 "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession". These three conditions are cumulative: they must be fulfilled at the same time with regard to the same person.

34. Vagrancy was formerly a misdemeanour (Criminal Code of 1810) or a petty offence (Act of 6th March 1866), but no longer of itself constitutes a criminal offence since the entry into force of the 1891 Act: only "aggravated" vagrancy as defined in Articles 342 to 345 of the present Criminal Code is a criminal offence and these articles were not applied in respect of any of the three applicants. "Simple" vagrancy is dealt with under the 1891 Act.

35. According to Section 8 of the said Act "every person picked up as a vagrant shall be arrested and brought before the police court" - composed of one judge, a magistrate. The public prosecutor or the court may nonetheless decide that he be provisionally released (Section 11).

"The person arrested shall be brought before the magistrate within twenty-four hours and in his ordinary court, or at a hearing applied for by the public prosecutor for the following day". If that person so requests "he

(shall be) granted a three days' adjournment in order to prepare his defence" (Section 3 of the Act of 1st May 1849); neither De Wilde, nor Ooms nor Versyp made use of this right.

36. Where, after having ascertained "the identity, age, physical and mental state and manner of life" of the person brought before him (Section 12), the magistrate considers that such person is a vagrant, Section 13 or Section 16 of the 1891 Act becomes applicable.

Section 13 deals with "able-bodied persons who, instead of working for their livelihood, exploit charity as professional beggars", and with "persons who through idleness, drunkenness or immorality live in a state of vagrancy"; Section 16 with "persons found begging or picked up as vagrants when none of the circumstances specified in Section 13 ... apply".

In the first case the court shall place the vagrant "at the disposal of the Government to be detained in a vagrancy centre, for not less than two and not more than seven years"; in the second case, the court may "place (him) at the disposal of the Government to be detained in an assistance home" for an indeterminate period which in no case can exceed a year (see paragraph 40 below).

Section 13 was applied to Jacques De Wilde and Edgard Versyp and Section 16 to Franz Ooms.

The distinction between the "reformatory institutions" referred to as "vagrancy centres" and "assistance homes" or "welfare settlements" (Sections 1 and 2 of the Act) has become a purely theoretical one; it has been replaced by a system of individual treatment of the persons detained.

Detention in a vagrancy centre is entered on a person's criminal record; furthermore, vagrants "placed at the disposal of the Government" suffer certain electoral incapacities (Articles 7 and 9 of the Electoral Code).

37. Magistrates form part of the judiciary and have the status of an officer vested with judicial power, with the guarantees of independence which this status implies (Articles 99 and 100 of the Constitution). The Court of Cassation, however, considers that the decisions given by them in accordance with Sections 13 and 16 of the 1891 Act are administrative acts and not judgments within the meaning of Section 15, sub-section 1, of the Act of 4th August 1832. They are not therefore subject to challenge or to appeal nor - except when they are *ultra vires* (see paragraph 159 of the Commission's report) - to cassation proceedings. The decisions of the highest court in Belgium are uniform on this point.

As to the Conseil d'État, it has so far had to deal with only two appeals for the annulment of detention orders for vagrancy. In a judgment of 21st December 1951 in the Vleminckx case, the Conseil d'État did not find it necessary to examine whether the Brussels police court's decision taken on 14th July 1950 in pursuance of Section 13 of the 1891 Act emanated from an authority which was "acting as an administrative authority within the

meaning of Section 9 of the Act of 23rd December 1946"; the appeal lodged by Mr. Vleminckx on 31st July 1950 had been dismissed because:

"the decision appealed against (was) a preliminary decision which (had been) followed by the Government's decision to detain the appellant in a vagrancy centre ...; the appellant (could) not establish that he (had) any interest in the annulment of a decision which merely (allowed) the Government to detain him, while the actual decision by which he was interned (had not) been appealed against".

As against this, on 7th June 1967, that is two months after the Commission had declared admissible the applications of Jacques De Wilde, Franz Ooms and Edgard Versyp, the Conseil d'État gave a judgment annulling the decision by which on 16th February 1965 the Ghent police court had placed a Mr. Du Bois at the disposal of the Government in pursuance of Section 16 of the 1891 Act. Before examining the merits, the Conseil d'État examined the admissibility - contested by the Minister of Justice - of the appeal lodged by Mr. Du Bois on 14th April 1965. In the light of the legislative texts in force, of the preparatory work thereto and of "the consistent case-law of the ordinary courts", the Conseil d'État considered that the placing of a vagrant at the disposal of the Government does not result from "the finding of a criminal offence" but amounts to "an administrative security measure" and that the decision ordering it is therefore "of a purely administrative nature" "so that no form of appeal is open to the person concerned ... before the ordinary courts". It added that "such an administrative decision by the magistrate" could not be considered as "a preliminary measure enabling the Government to take the effective decision on the matter of detention but is itself the effective decision placing the person concerned in a different legal position and is therefore of itself capable of constituting a grievance"; in any event, "the person concerned is immediately deprived of his liberty without any further decision by the Government".

Section 20, sub-section 2, of the Act of 23rd December 1946 constituting the Conseil d'État provides that where both this body and "an ordinary court rule that they are either competent or incompetent to entertain the same proceedings, the conflict of jurisdiction is settled, on the motion of the most diligent party, by the Court of Cassation" in plenary session. No such conflict appears to have come before the highest court of Belgium in vagrancy matters up to the present time.

The Belgian Government has had the reform of the 1891 Act under consideration for some time. According to the information given to the Court on 17th November 1970, the Bill which it is preparing to submit to Parliament provides in particular that an appeal against the magistrates' decisions may be made to the court of first instance.

38. "Able-bodied persons detained in a vagrancy centre or assistance home" are "required to perform the work prescribed in the institution" (Section 6 of the 1891 Act). Persons who, like Jacques De Wilde, and

Edgard Versyp, refuse to comply with this requirement without good reason, in the opinion of the authorities, are liable to disciplinary measures. "Infirmity, illness or punishment may lead to a suspension, termination or stopping of work" (Articles 64 and 95, read in conjunction, of the Royal Decree of 21st May 1965 laying down general prison regulations).

"Unless stopped for disciplinary reasons", detained vagrants are entitled to "a daily wage" known as "allowances". Sums are retained "for administrative expenses" - "for the benefit of the State" - and "to form the release savings" which shall be "granted ... partly in cash and partly in clothing and tools". The Minister of Justice fixes the amount of the said release savings and, having regard to the various categories of detained persons and of work, the wages and the sums to be retained (Sections 6 and 17 of the 1891 Act; Articles 66 and 95, read in conjunction, of the Royal Decree of 21st May 1965).

At the time of the detention of the three applicants, the amount of the release savings which had to be thus accumulated - sums of money which a vagrant may receive from other sources not being taken into account - was fixed at 2,000 BF, at least for the "inmates" of welfare settlements (ministerial circular of 24th April 1964).

The minimum hourly allowance "actually paid" to detainees - save any deductions made for "wastage and poor work" - was 1,75 BF up to 1st November 1966, on which date it was increased by 25 centimes (ministerial circulars of 17th March 1964 and 10th October 1966). The allowance was not capable of assignment or liable to seizure in execution and was divided into two equal parts: "the reserved portion" which was credited to the person concerned and enabled him to form his release savings and the free portion which he received immediately (Articles 67 and 95, read in conjunction, of the Royal Decree of 21st May 1965).

39. According to Articles 20 to 24 and 95 of the Royal Decree of 21st May 1965, the correspondence of detained vagrants - who, in this as well as in other respects, are assimilated to convicted persons - may be subjected to censorship except any correspondence with the counsel of their own choice, the director of the institution, the inspector-general and the director-general of the prison administration, the secretary-general of the Ministry of Justice, the judicial authorities, the ministers, the chairmen of the legislative Chambers, the King, etc. Their correspondence with the Commission is not mentioned in this Decree but the Minister of Justice informed the governors of prisons and Social Protection Institutions, including those at Merksplas and Wortel, that "a letter addressed to this organ by a detainee is not to be censored but should be forwarded, duly stamped for abroad by the sender ..., to the Legal Department ... which shall undertake to transmit it to its destination" (circular of 7th September 1957 as it was in force at the time of the detention of the applicants; see also paragraph 31 above).

40. "Persons detained in an assistance home" - as Franz Ooms - may not "in any case be kept against their will for more than one year" (Section 18, first sentence, of the 1891 Act). They regain their freedom, as of right, before the expiry of this period "when their release savings (have reached) the amount ... fixed by the Minister of Justice", who shall, moreover, release them if he considers their detention "to be no longer necessary" (Sections 17 and 18, second sentence, of the 1891 Act).

As regards vagrants detained in a vagrancy centre - such as Jacques De Wilde and Edgard Versyp - they leave the centre either at the expiry of the period varying from two to seven years "fixed by the court" or at an earlier date if the Minister of Justice considers "that there is no reason to continue their detention" (Section 15 of the 1891 Act); the accumulation of the release savings and any other means which the detainee might have do not suffice for this purpose.

It seems that no detained vagrant has to date lodged an appeal with the Conseil d'État, under Article 9 of the Act of 23rd December 1946, for the annulment of a ministerial decision which had rejected his application for release.

41. Before the Commission and Sub-Commission, the three applicants invoked Articles 4, 5 (1), 5 (3), 5 (4), 6 (1), 6 (3) (b) and (c), 7, 8 and 13 (art. 4, art. 5-1, art. 5-3, art. 5-4, art. 6-1, art. 6-3-b, art. 6-3-c, art. 7, art. 8, art. 13) of the Convention. Two of them, De Wilde and Versyp, also alleged that Article 3 (art. 3) had not been observed.

42. In its report of 19th July 1969, the Commission expressed the opinion:

- that there was a violation of Articles 4 (art. 4) (nine votes to two), 5 (4) (art. 5-4) (nine votes to two) and 8 (art. 8) (ten votes to one);
- that there was no violation of Articles 3 (art. 3) (unanimous) and 5 (1) (art. 5-1) (ten votes to one);
- that Articles 5 (3) (art. 5-3) (unanimous), 6 (1) (art. 6-1) (ten votes to one), 6 (3) (art. 6-3) (ten votes to one) and 7 (art. 7) (unanimous) were inapplicable.

The Commission was further of the opinion that "it (was) no longer necessary to consider Article 13 (art. 13)" (unanimous).

The report contains several individual opinions, some concurring, others dissenting.

43. After the cases were brought before the Court the applicants repeated, and sometimes developed, in a memorandum which the Commission appended to its memorial, the greater part of their earlier arguments. They indicated their agreement or otherwise, according to the case, with the opinion of the Commission, to which De Wilde and Versyp "bowed" as regards Article 3 (art. 3) of the Convention.

AS TO THE LAW

I. ON THE QUESTIONS OF JURISDICTION AND ADMISSIBILITY
RAISED IN THE PRESENT CASES

44. In its memorials of February and June 1970, the Government requested the Court, principally,

"to declare that the applications introduced against Belgium by Jacques De Wilde on 17th June 1966, Franz Ooms on 20th May 1966 and Edgard Versyp on 16th August 1966, were not admissible as the applicants had failed to exhaust the domestic remedies and that therefore they should have been rejected by the European Commission of Human Rights under Article 26 and Article 27 (3) (art. 26, art. 27-3) of the Convention".

The Commission, for its part, requested the Court in its memorial of April 1970:

"(1) In the first place:

- to hold inadmissible the Belgian Government's request that it be declared that the Commission should have rejected the three applications under Articles 26 and 27, paragraph (3) (art. 26, art. 27-3), of the Convention, on the ground that the Court has no jurisdiction to pronounce on decisions by the Commission concerning the admissibility of applications;

(2) alternatively:

- to declare the said request inadmissible on the ground that the Belgian Government is debarred from making such a request to the Court since it did not raise the objection of non-exhaustion of domestic remedies before the Commission at the stage where the admissibility of the applications was under consideration;

(3) in the further alternative:

- to declare the said request ill-founded since, at the time when the three applications were submitted to the Commission, there was no effective remedy in Belgian law against decisions by magistrates in vagrancy cases".

45. At the oral hearings, the Agent of the Government submitted that it should please the Court:

- "to find that it is fully competent to decide on the admissibility of the applications in the cases now before it and in particular to verify whether the applicants have or have not exhausted the domestic remedies";

- "to find that the applications ... are inadmissible since the applicants failed to observe the provisions of Article 26 (art. 26) of the Convention".

The failure to observe Article 26 (art. 26) is alleged to have consisted not only in the non-exhaustion of domestic remedies but also, in the case of Edgard Versyp, in a failure to observe the six-month time-limit.

The Delegates of the Commission maintained without change the submissions on this point contained in their memorial of April 1970.

46. The Court is thus asked to consider, before any examination of the merits:

(1) whether it has jurisdiction to examine the contentions of the Government based on the alleged failure to comply with Article 26 (art. 26) of the Convention, either as regards the exhaustion of domestic remedies or as regards the six-month time-limit;

(2) if so, whether the Government must be held to be precluded from raising the inadmissibility of the applications, either on the ground of non-exhaustion of domestic remedies or, alternatively, in the case of Versyp, on the ground of his being out of time;

(3) if the Government is not held to be precluded, whether its contentions in regard to inadmissibility are well-founded.

A. As to the jurisdiction of the court to examine the submissions of non-exhaustion of domestic remedies and of delay made by the government against the applications accepted by the commission

47. In order to judge whether it has jurisdiction to examine the submissions of the Government objecting to the examination of the present applications, the Court refers to the text of the Convention and especially to Article 45 (art. 45) which determines its jurisdiction *ratione materiae*. This Article (art. 45) specifies that "the jurisdiction of the Court shall extend to all cases ("toutes les affaires") concerning the interpretation and application of the ... Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)". Under this provision, as the Court pointed out in its judgment of 9th February 1967 ("Linguistic" case, Series A, p. 18), "the basis of the jurisdiction *ratione materiae* of the Court is established once the case raises a question of the interpretation or application of the Convention".

48. The phrase "cases concerning the interpretation and application of the ... Convention", which is found in Article 45 (art. 45), is remarkable for its width. The very general meaning which has to be attributed to it is confirmed by the English text of paragraph (1) of Article 46 (art. 46-1) which is drafted in even wider terms ("all matters") than Article 45 (art. 45) ("all cases").

49. True, it follows from Article 45 (art. 45) that the Court may exercise its jurisdiction only in regard to cases which have been duly brought before it and its supervision must necessarily be directed first to the observance of the conditions laid down in Articles 47 and 48 (art. 47, art. 48). Once a case

is duly referred to it, however, the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case.

50. It is therefore impossible to see how questions concerning the interpretation and application of Article 26 (art. 26) raised before the Court during the hearing of a case should fall outside its jurisdiction. That possibility is all the less conceivable in that the rule on the exhaustion of domestic remedies delimits the area within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention, and the Court has to ensure the observance of the provisions relating thereto just as of the individual rights and freedoms guaranteed by the Convention and its Protocols.

The rule of exhaustion of domestic remedies, which dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, is also one of the generally recognised principles of international law to which Article 26 (art. 26) makes specific reference.

As for the six months' rule, it results from a special provision in the Convention and constitutes an element of legal stability.

51. This conclusion is in no way invalidated by the powers conferred on the Commission under Article 27 (art. 27) of the Convention as regards the admissibility of applications. The task which this Article (art. 27) assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence (see *mutatis mutandis*, the *Lawless* judgment of 14th November 1960, Series A, p. 11). The decision to accept an application has the effect of leading the Commission to perform the functions laid down in Articles 28 to 31 (art. 28, art. 29, art. 30, art. 31) of the Convention and of opening up the possibility that the case may be brought before the Court; but it is not binding on the Court any more than the Court is bound by the opinion expressed by the Commission in its final report "as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention" (Article 31) (art. 31).

52. For the foregoing reasons, the Court considers it has jurisdiction to examine the questions of non-exhaustion and of delay raised in the present cases.

B. As to estoppels (French "forclusion")

53. The jurisdiction of the Court to rule on the submissions made by a respondent Government based on Article 26 (art. 26) as a bar to claims directed against it, does not in any way mean that the Court should disregard the attitude adopted by the Government in this connection in the course of the proceedings before the Commission.

54. It is in fact usual practice in international and national courts that objections to admissibility should as a general rule be raised in *limine litis*. This, if not always mandatory, is at least a requirement of the proper administration of justice and of legal stability. The Court itself has specified in Rule 46, paragraph 1, of its Rules, that "a preliminary objection must be filed by a Party at the latest before the expiry of the time-limit fixed for the delivery of the first pleading".

Doubtless, proceedings before the Court are not the same as those which took place before the Commission and usually the parties are not even the same; but they concern the same case and it results clearly from the general economy of the Convention that objections to jurisdiction and admissibility must, in principle, be raised first before the Commission to the extent that their character and the circumstances permit (compare the *Stögmüller* judgment of 10th November 1969, Series A, pp. 41-42, paragraph 8, and the *Matznetter* judgment of the same date, Series A, p. 32, paragraph 6).

55. Furthermore, there is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies, the essential aim of which is to protect their national legal order. There exists on this subject a long established international practice from which the Convention has definitely not departed as it refers, in Article 26 (art. 26), to "the generally recognised rules of international law". If there is such a waiver in the course of proceedings before the Commission (see, for example, *Yearbook of the Convention*, Vol. 7, pp. 258-260), it can scarcely be imagined that the Government concerned is entitled to withdraw the waiver at will after the case has been referred to the Court.

56. In examining the proceedings which took place before the Commission, the Court finds that the Government had, in its first observations on the admissibility of the applications, raised against one of the complaints of Franz Ooms grounds of inadmissibility based on non-exhaustion of domestic remedies. As the Commission considered that complaint to be manifestly ill-founded, it did not find it necessary to rule on this objection. The partial decision which it gave on this point in the Ooms case is dated 11th February 1967.

At the oral hearings which followed that partial decision and the decisions of the same date in the two related cases, a member of the Commission put a question, on 6th April 1967, to the Agent of the Government about the possibility of challenging before the *Conseil d'État* magistrates' decisions in vagrancy matters (Sections 13 and 16 of the 1891 Act) and the Minister of Justice's decisions refusing to release a detained

vagrant (Sections 15 and 18 of the same Act). The Agent of the Government replied that that superior administrative court considered it had no jurisdiction to hear an appeal against a magistrate's order (Vleminckx judgment of 21st December 1951, cf. paragraph 37 above); he underlined, however, that there was "at least one case" - Du Bois - "pending before the Conseil d'État in which the problem of the right to appeal against a magistrate's decision had again been raised"; he further expressed his personal opinion that "a decision of the Minister refusing" to release a detained vagrant could doubtless be set aside if need be by the Conseil d'État "on a pure point of law". He did not, however, use this as an argument to request the Commission either to reject the applications for non-exhaustion of domestic remedies or to adjourn its decision on their admissibility.

The Commission thus felt itself able to conclude that there were no domestic remedies and consequently to find in its decision of 7th April 1967, declaring the applications admissible, "that the applicants (had) observed the conditions laid down in Article 26 (art. 26) of the Convention".

57. Two months later, however, on 7th June 1967, the Conseil d'État delivered a judgment in which it reversed its former case-law; it declared admissible and allowed Mr. Du Bois' appeal for annulment of the magistrate's order (see paragraph 37 above). The Government informed the Commission of this judgment in its memorial of 31st July 1967 and formally requested that the three applications be rejected as inadmissible for non-exhaustion of domestic remedies. Counsel for the applicants expressed the view that the respondent Government "could not at this stage dispute the admissibility of the applications as this had been finally determined by the Commission's decision of 7th April 1967" (paragraph 59 of the report). On 8th February 1968, the Agent of the Belgian Government repeated the request at the hearing before the Commission (paragraphs 124 and 125 of the report): he invited the Commission to give "a second decision on admissibility to the effect that the wording of the Belgian Conseil d'État's judgment clearly establishes that (the) applicants had available to them a remedy which they did not make use of, although they could have done so".

Finally, the Commission refused this request in its report adopted on 19th July 1969 (paragraph 177). The Commission recalled that "in accordance with the principles of international law referred to by Article 26 (art. 26) of the Convention an applicant is not required to exhaust a domestic remedy if, in view of the consistent case-law of the national courts, this remedy has no reasonable chance of success"; it pointed out that this was the case prior to the Du Bois judgment of 7th June 1967 as regards recourse against magistrates' decisions in vagrancy matters and concluded that it had been right in declaring the three applications admissible and that the above-mentioned judgment did "not constitute a new factor justifying the reopening of the decision on the admissibility of the applications".

In these circumstances, the Court cannot consider that the Government is precluded from raising before it the objection of non-exhaustion of domestic remedies as regards the orders of the magistrates at Charleroi, Namur and Brussels.

58. The same is not true of the Government's alternative submission that the applicant Versyp was out of time.

Versyp applied to the Commission on 16th August 1966 that is more than six months after the decision of the Brussels police court of 4th November 1965, ordering his detention for vagrancy (see paragraphs 29 and 31 above). The Government argues from this that, if the Court considered that the decision was not at the time subject to any form of appeal, Versyp's application to the Commission should be held to be inadmissible for failure to observe the time-limit laid down by Article 26 (art. 26) in fine of the Convention.

The Court observes that this submission was never made before the Commission nor even before the Court during the written procedure: the Agent of the Government presented it for the first time in his address of 16th November 1970, that is more than three years after the Commission's decision on admissibility and more than one year after the case had been brought before the Court.

In these circumstances, the Court finds that the Government is precluded from submitting that Versyp's application was out of time.

59. The same finding holds good for the submission of non-exhaustion of remedies made by the Government before the Court as regards the decisions of the Minister of Justice rejecting the three applicants' petitions for release.

The applicants argued that their being kept in detention by the Minister had violated Article 5 (1) (art. 5-1) of the Convention. The Government contends that it would have been open to them to contest the said decisions before the Conseil d'État alleging a violation of Article 5 (art. 5), which is directly applicable in Belgian law, and that they failed to take this course. But the Government never relied, before the Commission, on Article 26 (art. 26) of the Convention on this point (cf. paragraphs 56 and 57 above); for the reasons already mentioned, it cannot do so for the first time before the Court.

C. As to the substance of the contention of the government regarding the exhaustion of domestic remedies

60. The Court recalls that under international law, to which Article 26 (art. 26) makes express reference, the rule of exhaustion of domestic remedies demands the use only of such remedies as are available to the persons concerned and are sufficient, that is to say capable of providing redress for their complaints (Stögmüller judgment of 10th November 1969, Series A, p. 42, paragraph 11).

It is also recognised that it is for the Government which raises the contention to indicate the remedies which, in its view, were available to the persons concerned and which ought to have been used by them until they had been exhausted.

The information provided by the Belgian Government in this connection partly concerns the orders for detention, partly relates to the subsequent detention of the applicants. As the Court has found that the Government is precluded from making submissions based on the latter information (see paragraph 59 above), only the former part is relevant in connection with Article 26 (art. 26) of the Convention. The Government's line of argument on this point underwent a clear change in the course of the proceedings.

61. It was never contested that the decisions taken by the magistrates in regard to Jacques De Wilde, Franz Ooms and Edgard Versyp were of an administrative nature and so were not subject to appeal or to proceedings in cassation (see paragraph 37 above).

The Agent of the Government acknowledged too, at the first hearings before the Commission and apparently basing himself on the Vleminckx judgment of 21st December 1951, that the Conseil d'État would not either have allowed an appeal against the said orders for detention.

After the Du Bois judgment of 7th June 1967, the Government's Agent acknowledged that the former case-law was "a little out of touch with the facts in the sense that there was in fact no further administrative decision after the magistrate's decision" (paragraph 120 of the Commission's report). Before the Court he expressed the same view, noting that the alleged ministerial decision referred to in the Vleminckx judgment was "simply an administrative measure of execution" of the magistrate's order or in other words "a purely physical operation". This point of view appears to be correct: the examination of the files of the proceedings before the magistrates shows that what actually happened was that the competent officers of the public prosecutor's department were instructed by the magistrates at Charleroi, Namur and Brussels to execute their orders and to this end they "required" the directors of the institutions at Wortel and Merksplas "to receive" De Wilde, Ooms and Versyp "into (the) institution" without there being any further "decision" in the matter (see paragraphs 17, 24 and 29 above). The Minister may doubtless intervene under the 1891 Act to stop the execution of the orders for detention. In practice, however, the Minister does not as a rule use this power and he did not do so in the present cases.

Yet the Agent of the Government argued before the Commission and then before the Court that it followed from the same Du Bois judgment that the magistrates' orders for detention for vagrancy were in fact open to challenge before the Conseil d'État. He added that the Du Bois case was already pending before that superior administrative court at the time when the detention of the applicants was ordered, that there existed therefore at

that time a possibility of a reversal of the rule stated in the Vleminckx case and that, for this reason, the applicants were not entitled to be excused from attempting to use such a remedy.

62. The Court is unable to accept this point of view. The Court finds - without it even being necessary to examine here whether recourse to the Conseil d'État would have been of such a nature as to satisfy the complaints - that according to the settled legal opinion which existed in Belgium up to 7th June 1967 recourse to the Conseil d'État against the orders of a magistrate was thought to be inadmissible.

This was the submission of the Government itself before the Conseil d'État in the Du Bois case. One cannot reproach the applicants that their conduct in 1965 and 1966 conformed with the view which the Government's Agent continued to express at the beginning of 1967 at the hearings on admissibility before the Commission and which was prevalent in Belgium at the time.

Furthermore, once the Du Bois judgment of 7th June 1967 was known, the applicants were not in a position to benefit from the possible remedy it seemed to open up because, well before that judgment was pronounced, the time-limit of sixty days prescribed by Article 4 of the Regent's Decree of 23rd August 1948 on the procedure before the administrative division of the Conseil d'État had expired.

The Court is therefore of the opinion that, as regards the complaints concerning the detention orders, the Government's submission of inadmissibility on the ground of failure to observe the rule on the exhaustion of domestic remedies is not well-founded.

II. AS TO THE MERITS

63. In regard to the merits of the present cases the Government and the Commission in substance reiterated at the oral hearings the submissions contained in their respective memorials.

The Government requested the Court:

"to find that the decisions and measures which are the subject of the applications brought against Belgium by Jacques De Wilde on 17th June 1966, by Franz Ooms on 20th May 1966 and by Edgard Versyp on 16th August 1966 are not in conflict with Belgium's obligations under the European Convention of Human Rights."

For its part, the Commission asked the Court to "decide:

(1) whether or not the jurisdiction exercised by the magistrate in deciding to place the applicants at the Government's disposal on the ground of vagrancy is such as to fulfil the requirements of the Convention, particularly of Article 5, paragraph (4) (art. 5-4);

(2) whether or not the Convention, particularly Article 5, paragraph (4) (art. 5-4), was violated by the fact that the applicants did not have at their disposal a remedy before a court which, at reasonable intervals, after the initial decision on detention,

could have investigated whether their detention was still lawful and order their release if such was no longer the case;

(3) whether or not the Convention, particularly Article 7 and Article 6, paragraph (1) and paragraph (3) (b) and (c) (art. 7, art. 6-1, art. 6-3-b, art. 6-3-c), was violated by the fact that the reformative measures taken vis-à-vis vagrants under Belgian law are in practice, as alleged, of a penal nature;

(4) whether or not the Convention, particularly Article 4 (art. 4), was violated by the fact that the applicants were subjected to forced labour during a period of detention which allegedly did not meet the requirements of Article 5 (art. 5);

(5) whether or not the Convention, particularly Article 8 (art. 8), was violated by the fact that the applicants' correspondence was censored during their detention."

It appears from the cases before the Court that questions on the merits arise also in connection with Article 5, paragraphs (1) and (3), Article 3 and Article 13 (art. 5-1, art. 5-3, art. 3, art. 13).

A. As to the "general and preliminary observation" of the government

64. In its memorials and oral pleadings, the Government recalled that the Court's function is to rule on three specific cases where the legislation in issue was applied and not on an abstract problem relating to the compatibility of the legislation with the Convention; on this point the Government cited the De Becker judgment of 27th March 1962 (Series A, p. 26 in fine). Starting from that premise, the Government stressed that the applicants had reported voluntarily to the police and that their admission to Wortel and Merksplas had been the result "of an express or implicit request" on their part, express for Versyp and Ooms, implicit for De Wilde. According to the Government, such a "voluntary reporting" can scarcely amount to being "deprived of liberty" within the meaning of Article 5 (art. 5). From this it concluded that the Court ought to rule out forthwith any idea of a failure to comply with the requirements of the Convention, as regards both "the detention itself" and "the conditions of detention".

65. The Court is not persuaded by this line of argument. Temporary distress or misery may drive a person to give himself up to the police to be detained. This does not necessarily mean that the person so asking is in a state of vagrancy and even less that he is a professional beggar or that his state of vagrancy results from one of the circumstances - idleness, drunkenness or immorality - which, under Section 13 of the Belgian Act of 1891, may entail a more severe measure of detention.

Insofar as the wishes of the applicants were taken into account, they cannot in any event remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of; this mandatory

character comes out unambiguously in the legal texts (Sections 8, 13, 15, 16 and 18 of the 1891 Act) and in the documents before the Court.

Finally and above all, the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention might violate Article 5 (art. 5) even although the person concerned might have agreed to it. When the matter is one which concerns ordre public within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees is necessary in every case. Furthermore, Section 12 of the 1891 Act acknowledges the need for such supervision at national level: it obliges the magistrates to "ascertain the identity, age, physical and mental state and manner of life of persons brought before the police court for vagrancy". Nor does the fact that the applicants "reported voluntarily" in any way relieve the Court of its duty to see whether there has been a violation of the Convention.

B. As to the alleged violation of paragraph (1) of article 5 (art. 5-1)

66. It appears from the record that the applicants alleged, inter alia, a violation of the first paragraph of Article 5 (art. 5-1) of the Convention; the Government contested this submission and the Commission itself rejected it in its report.

Insofar as it applies to the present cases, Article 5 (1) (art. 5-1) provides as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention ... of vagrants;

...."

67. The applicants were provisionally deprived of their freedom by the police superintendent to whom they presented themselves and they were brought by him within twenty-four hours, as provided by Section 3 of the Act of 1st May 1849, before the magistrate who placed them at the disposal of the Government (see paragraphs 16, 17, 23, 24, 28 and 29 above).

The lawfulness of the action of the police superintendents has not been challenged; as the persons concerned reported voluntarily and indicated that they were in a state of vagrancy it was only normal that they should be

brought before the magistrate for a decision. This action, moreover, was of a purely preliminary nature.

It was by virtue of the magistrates' orders that the detention took place. It is therefore by reference to these orders that the lawfulness of the detention of the three applicants must be assessed.

68. The Convention does not contain a definition of the term "vagrant". The definition of Article 347 of the Belgian Criminal Code reads: "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession". Where these three conditions are fulfilled, they may lead the competent authorities to order that the persons concerned be placed at the disposal of the Government as vagrants. The definition quoted does not appear to be in any way irreconcilable with the usual meaning of the term "vagrant", and the Court considers that a person who is a vagrant under the terms of Article 347 in principle falls within the exception provided for in Article 5 (1) (e) (art. 5-1-e) of the Convention.

In the present cases the want of a fixed abode and of means of subsistence resulted not merely from the action of the persons concerned in reporting voluntarily to the police but from their own declarations made at the time: all three stated that they were without any employment (see paragraphs 16, 23 and 28 above). As to the habitual character of this lack of employment the magistrates at Charleroi, Namur and Brussels were in a position to deduce this from the information available to them concerning the respective applicants. This would, moreover, also be indicated by the fact that, although they purported to be workers, the three applicants were apparently not in a position to claim the minimum number of working days required to be effected within a given period which, in accordance with the Royal Decree of 20th December 1963 (Articles 118 et seqq.), would have qualified them for unemployment benefits.

69. Having thus the character of a "vagrant", the applicants could, under Article 5 (1) (e) (art. 5-1-e) of the Convention, be made the subject of a detention provided that it was ordered by the competent authorities and in accordance with the procedure prescribed by Belgian law.

In this connection the Court observes that the applicants did not receive the same treatment: De Wilde was placed at the disposal of the Government on 19th April 1966 for two years but was released on 16th November 1966; Ooms was placed at the disposal of the Government on 21st December 1965 for an indefinite period and was released after one year, that is on the expiry of the statutory term; Versyp was placed at the disposal of the Government on 4th November 1965 for two years and was released on 10th August 1967, that is after one year, nine months and six days (see paragraphs 17, 20, 24, 26, 29 and 31 above).

As the Court has already noted, the placing of a person at the disposal of the Government for a fixed period differs from that for an indefinite period not solely by the fact that it is pronounced for a minimum period of two

years (Section 13 of the 1891 Act) while the other may not last longer than one year (Sections 16 and 18): the first is also more severe in that it is entered on the criminal record (see paragraph 36 above), and in regard to electoral disabilities (see paragraph 158 of the Commission's report).

In the present cases, the orders concerning De Wilde and Versyp do not disclose which of the four conditions mentioned in Section 13 may have led the magistrates to apply this section rather than Section 16, but they refer to the administrative file of the persons concerned. The file on Jacques De Wilde contained an information note dated 19th April 1966 - the day he appeared before the magistrate at Charleroi - which listed various convictions and orders placing him at the disposal of the Government (see paragraph 16 above). Furthermore, the Brussels police court had before it, when Versyp appeared there, a document from the Social Rehabilitation Office in which his state of vagrancy was attributed to idleness and to weakness for drink (see paragraph 28 above).

70. The Court has, therefore, not found either irregularity or arbitrariness in the placing of the three applicants at the disposal of the Government and it has no reason to find the resulting detention incompatible with Article 5 (1) (e) (art. 5-1-e) of the Convention.

C. As to the alleged violation of paragraph (3) of article 5 (art. 5-3)

71. Before the Commission, the applicants also alleged that there had been a violation of paragraph (3) of Article 5 (art. 5-3) which provides that:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) (art. 5-1-c) ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial ...".

Paragraph (1) (c) of Article 5 (art. 5-1-c), to which the text quoted refers, is solely concerned with "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"; as simple vagrancy does not amount to an offence in Belgian law (see paragraph 34 above), the applicants were arrested and detained not under sub-paragraph (c) of the first paragraph of Article 5 (art. 5-1-c) - nor, it may be added, under sub-paragraph (a) (art. 5-1-a) ("after conviction by a competent court") - but in fact under sub-paragraph (e) (art. 5-1-e). From this the Court must conclude - as did the Commission - that paragraph (3) (art. 5-3) was not applicable to them.

D. As to the alleged violation of paragraph (4) of article 5 (art. 5-4)

72. The Commission accepted to a certain extent the arguments of the applicants and expressed the opinion that the system in issue fails to comply with Article 5 (4) (art. 5-4) of the Convention.

According to paragraph (4) of Article 5 (art. 5-4), which is applicable *inter alia* to vagrants detained under sub-paragraph (e) of paragraph (1) (art. 5-1-e), "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

73. Although the Court has not found in the present cases any incompatibility with paragraph (1) of Article 5 (art. 5-1) (see paragraphs 67 to 70 above), this finding does not dispense it from now proceeding to examine whether there has been any violation of paragraph (4) (art. 5-4). The latter is, in effect, a separate provision, and its observance does not result *eo ipso* from the observance of the former: "everyone who is deprived of his liberty", lawfully or not, is entitled to a supervision of lawfulness by a court; a violation can therefore result either from a detention incompatible with paragraph (1) (art. 5-1) or from the absence of any proceedings satisfying paragraph (4) (art. 5-4), or even from both at the same time.

1. As to the decisions ordering detention

74. The Court began by investigating whether the conditions in which De Wilde, Ooms and Versyp appeared before the magistrates satisfied their right to take proceedings before a court to question the lawfulness of their detention.

75. The applicants were detained in execution of the magistrates' orders: their arrest by the police was merely a provisional act and no other authority intervened in the three cases (see paragraph 67 above).

A first question consequently arises. Does Article 5 (4) (art. 5-4) require that two authorities should deal with the cases falling under it, that is, one which orders the detention and a second, having the attributes of a court, which examines the lawfulness of this measure on the application of the person concerned? Or, as against this, is it sufficient that the detention should be ordered by an authority which had the elements inherent in the concept of a "court" within the meaning of Article 5 (4) (art. 5-4)?

76. At first sight, the wording of Article 5 (4) (art. 5-4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of "proceedings" and not of "appeal", "recourse" or "remedy" (compare Articles 13 and 26 (art. 13, art. 26)). Besides, it is clear that the purpose of Article 5 (4) (art. 5-4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected; the word "court"

("tribunal") is there found in the singular and not in the plural. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) (art. 5-4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 (4) (art. 5-4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Article 5 (1) (a) of the Convention) (art. 5-1-a). It may therefore be concluded that Article 5 (4) (art. 5-4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1) (e) (art. 5-1-e), is ordered by a "court" within the meaning of paragraph (4) (art. 5-4).

It results, however, from the purpose and object of Article 5 (art. 5), as well as from the very terms of paragraph (4) (art. 5-4) ("proceedings", "recours"), that in order to constitute such a "court" an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure.

In sum, the Court considers that the intervention of one organ satisfies Article 5 (4) (art. 5-4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.

77. The Court has therefore enquired whether in the present cases the magistrate possessed the character of a "court" within the meaning of Article 5 (4) (art. 5-4), and especially whether the applicants enjoyed, when appearing before him, the guarantees mentioned above.

There is no doubt that from an organisational point of view the magistrate is a "court"; the Commission has, in fact, accepted this. The magistrate is independent both of the executive and of the parties to the case and he enjoys the benefit of the guarantees afforded to the judges by Articles 99 and 100 of the Constitution of Belgium.

The task the magistrate has to discharge in the matters under consideration consists in finding whether in law the statutory conditions required for the "placing at the disposal of the Government" are fulfilled in respect of the person brought before him. By this very finding, the police court necessarily decides "the lawfulness" of the detention which the prosecuting authority requests it to sanction.

The Commission has, however, emphasised that in vagrancy matters the magistrate exercises "an administrative function" and does not therefore carry out the "judicial supervision" required by Article 5 (4) (art. 5-4). This opinion is grounded on the case-law of the Court of Cassation and of the

Conseil d'État (see paragraph 37 above). The Commission had concluded from this that the provision of a judicial proceeding was essential.

78. It is true that the Convention uses the word "court" (French "tribunal") in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question (see, in addition to Article 5 (4), Articles 2 (1), 5 (1) (a) and (b), and 6 (1) (tribunal) (art. 5-4, art. 2-1, art. 5-1-a, art. 5-1-b, art. 6-1). In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case (see Neumeister judgment of 27th June 1968, Series A, p. 44, paragraph 24), but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. Thus, in the Neumeister case, the Court considered that the competent courts remained "courts" in spite of the lack of "equality of arms" between the prosecution and an individual who requested provisional release (*ibidem*); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5 (4) (art. 5-4).

79. It is therefore the duty of the Court to determine whether the proceedings before the police courts of Charleroi, Namur and Brussels satisfied the requirements of Article 5 (4) (art. 5-4) which follow from the interpretation adopted above. The deprivation of liberty complained of by De Wilde, Ooms and Versyp resembles that imposed by a criminal court. Therefore, the procedure applicable should not have provided guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe.

According to Belgian law, every individual found in a state of vagrancy is arrested and then brought - within twenty-four hours as a rule - before the police court (Section 8 of the 1891 Act and Section 3 of the Act of 1st May 1849). Regarding the interrogation of this individual, the 1891 Act limits itself to specifying in Section 12 that the magistrate ascertains the identity, age, physical and mental state and manner of life of the person brought before him. Regarding the right of defence, the only relevant provision is found in Section 3 of the Act of 1st May 1849, which provides that the person concerned is granted a three-day adjournment if he so requests. According to information provided by the Government, the Code of Criminal Procedure does not apply to the detention of vagrants.

The procedure in question is affected by the administrative nature of the decision to be given. It does not ensure guarantees comparable to those which exist as regards detention in criminal cases, notwithstanding the fact

that the detention of vagrants is very similar in many respects. It is hard to understand why persons arrested for simple vagrancy have to be content with such a summary procedure: individuals liable to sentences shorter than the terms provided for by Section 13, and even Section 16, of the 1891 Act - including those prosecuted for an offence under Articles 342 to 344 of the Criminal Code (aggravated vagrancy) - have the benefit of the extensive guarantees provided under the Code of Criminal Procedure. This procedure undoubtedly presents certain judicial features, such as the hearing taking place and the decision being given in public, but they are not sufficient to give the magistrate the character of a "court" within the meaning of Article 5 (4) (art. 5-4) when due account is taken of the seriousness of what is at stake, namely a long deprivation of liberty attended by various shameful consequences. Therefore it does not by itself satisfy the requirements of Article 5 (4) (art. 5-4) and the Commission was quite correct in considering that a remedy should have been open to the applicants. The Court, however, has already held that De Wilde, Ooms and Versyp had no access either to a superior court or, at least in practice, to the Conseil d'État (see paragraphs 37 and 62 above).

80. The Court therefore reaches the conclusion that on the point now under consideration there has been a violation of Article 5 (4) (art. 5-4) in that the three applicants did not enjoy the guarantees contained in that paragraph.

2. As to the rejection of the requests for release addressed by the applicants to the administrative authorities

81. In the applicants' view there was a violation of Article 5 (4) (art. 5-4) not only because of the conditions in which their detention was ordered by the magistrate, but also because of the refusal of their requests for release.

82. The Court finds that the applicants could without doubt have appealed to the Conseil d'État and that this appeal would have been effective if the Minister of Justice had violated the 1891 Act in refusing their requests for release. None of them, however, claims to have been in one of those situations where the Act requires that detention should end. De Wilde and Versyp were in fact released before the expiry of the period of two years fixed by the magistrate (Section 13 of the 1891 Act; paragraphs 17, 20, 29, 31 in fine and 40 above); Ooms was released on the expiry of the statutory period of one year and his release savings had not before that time reached the prescribed amount (Sections 16, 17 and 18, first paragraph, of the 1891 Act; paragraphs 24, 26 in fine and 40 above).

The applicants could also have contended before the Conseil d'État

- as they did before the Commission, though not very precisely (see paragraph 48 of the report) - that their detention had in any event violated Article 5 (1) (art. 5-1) of the Convention, particularly because, due to supervening circumstances, they had lost their character of vagrants. In fact

Article 5 (art. 5) of the Convention is directly applicable in the Belgian legal system, such that its violation could have been complained of before the Conseil d'État and it cannot be affirmed a priori that it would not have decided speedily.

83. On the other hand, the requests looked to the Minister of Justice to use the discretionary power conferred upon him by the 1891 Act (Sections 15 and 18) to decide, in the light of the circumstances relied on by the interested party or of other pertinent information, whether a detained vagrant should be released before the statutory period or the term fixed by the magistrate's decision. To that extent, whatever action was taken thereafter falls completely outside the application of the provision of Article 5 (4) (art. 5-4) of the Convention. This latter provision, in fact, requires supervision only of the lawfulness of the placing in detention or of its continuation.

84. The Court does not therefore find any violation of Article 5 (4) (art. 5-4) on the point at issue.

E. As to the alleged violation of articles 6 and 7 (art. 6, art. 7)

85. The Commission and the Government both submit that Articles 6 and 7 (art. 6, art. 7), relied upon by the applicants, are inapplicable.

86. The Court has come to the conclusion that, during the hearing before the magistrates, the applicants were not dealt with in accordance with the requirements of Article 5 (4) (art. 5-4) (see paragraphs 74 to 80 above). This conclusion makes it superfluous to examine whether Article 6 (art. 6) was applicable in this case, and if so, whether it was observed.

87. As to Article 7 (art. 7), it is clear that it is not relevant. Simple vagrancy is not an "offence" under Belgian law and the magistrate did not find the applicants "guilty" nor impose a "penalty" on them (see, *mutatis mutandis*, the Lawless judgment of 1st July 1961, Series A, p. 54, paragraph 19).

F. As to the alleged violation of article 4 (art. 4)

88. According to Article 4 (art. 4) of the Convention,

"(1) ...

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 (art. 5) (...);

..."

In the Commission's view the work which the applicants were compelled to perform was not justified under Article 4 (art. 4) as, in its opinion, there had been a breach of paragraph (4) of Article 5 (art. 5-4).

89. The Court too has, in these cases, found a violation of the rights guaranteed by Article 5 (4) (art. 5-4) (see paragraphs 74 to 80 above), but it does not think that it must deduce therefrom a violation of Article 4 (art. 4). It in fact considers that paragraph (3) (a) of Article 4 (art. 4-3-a) authorises work ordinarily required of individuals deprived of their liberty under Article 5 (1) (e) (art. 5-1-e). The Court has found moreover, on the basis of information before it, that no violation of Article 5 (1) (e) (art. 5-1-e) has been established in respect of De Wilde, Ooms and Versyp (see paragraphs 67 to 70 above).

90. Furthermore, the duty to work imposed on the three applicants has not exceeded the "ordinary" limits, within the meaning of Article 4 (3) (a) (art. 4-3-a) of the Convention, because it aimed at their rehabilitation and was based on a general standard, Section 6 of the 1891 Act, which finds its equivalent in several member States of the Council of Europe (see paragraph 38 above and Appendices IV and V to the Commission's report).

The Belgian authorities did not therefore fail to comply with the requirements of Article 4 (art. 4).

G. As to the alleged violation of article 8 (art. 8)

91. During their detention, the applicants' correspondence was supervised to a certain extent. In the Commission's view this led to a violation of Article 8 (art. 8), on the one hand because the detention of the applicants was unlawful in that Article 5 (4) (art. 5-4) had not been complied with and on the other hand because, even if it was lawful, ordinary detention for vagrancy cannot entail the restrictions on the freedom of correspondence which are permissible in criminal matters.

92. On the first argument, the Court recalls *mutatis mutandis* the reasons given in paragraph 89 above on compulsory labour.

93. On the second argument, the Court recalls that Article 8 (art. 8) of the Convention provides that:

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

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

The Court finds that the supervision in question, which constitutes unquestionably an "interference by a public authority with the exercise of (the) right" enshrined in paragraph (1) of Article 8 (art. 8-1), was "in accordance with the law" - within the meaning of paragraph (2) (art. 8-2) - as it is provided for in Articles 20 to 23 of the Royal Decree of 21st May 1965 taken in conjunction with Article 95. It then observes, in the light of the information given to it, that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) (art. 8-2) of the Convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was "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. These restrictions did not in any event apply in a long series of instances enumerated in Article 24 of the Royal Decree of 21st May 1965 nor in connection with the applicants' correspondence with the Commission (see paragraph 39 above). Finally, there is nothing to indicate that there was any discrimination or abuse of power to the prejudice of the applicants (Articles 14 and 18 of the Convention) (art. 14, art. 18).

H. As to the alleged violation of article 3 (art. 3)

94. De Wilde and Versyp complained of disciplinary punishments inflicted on them for refusing to work but the Commission did not consider that these punishments violated Article 3 (art. 3).

Having regard to the facts before it, the Court also does not find, even *ex officio*, any suggestion of a violation of this text.

I. As to the alleged violation of article 13 (art. 13)

95. The applicants invoked Article 13 (art. 13) of the Convention, alleging that they did not have "an effective remedy before a national authority" in order to obtain the protection of the rights guaranteed by Articles 5, 3, 4, 6, 7 and 8 (art. 5, art. 3, art. 4, art. 6, art. 7, art. 8).

The Court has already ruled that the applicants were not dealt with in a manner compatible with the requirements of Article 5 (4) (art. 5-4) (see paragraphs 74 to 80 above); to this extent, it does not think it has to enquire whether there has been a violation of Article 13 (art. 13).

As to the applicants' other complaints, the Court limits itself to finding that Articles 3 to 8 (art. 3, art. 4, art. 5, art. 6, art. 7, art. 8) of the Convention are directly applicable in Belgian law. If, therefore, the applicants considered that the administrative decisions put in issue had violated the rights guaranteed by these articles, they could have challenged them before the Conseil d'État.

FOR THESE REASONS, THE COURT,

I. AS TO THE QUESTIONS OF JURISDICTION AND ADMISSIBILITY
RAISED IN THESE CASES

1. Holds by twelve votes to four that the Court has jurisdiction to deal with the questions of non-exhaustion of domestic remedies and of delay raised in these cases;
2. Holds unanimously that the Government is not precluded from relying on the rule of exhaustion of domestic remedies as regards the orders of the magistrates at Charleroi, Namur and Brussels;
3. Holds unanimously that the Government is precluded from submitting that the application of Edgard Versyp was made out of time;
4. Holds unanimously that the Government is precluded from relying on the rule of exhaustion of domestic remedies as regards the decisions of the Minister of Justice rejecting the three applicants' requests for release;
5. Declares ill-founded, unanimously, the Government's submission that there was non-exhaustion of domestic remedies as regards the complaints relating to the detention orders;
6. Finds, therefore, unanimously, that the Court has jurisdiction to rule on the merits of the present cases.

II. AS TO THE MERITS

1. Holds unanimously that the "voluntary reporting" by the applicants does not suffice to establish the absence of any violation of the Convention;
2. Holds unanimously that there has been no breach of Article 5 (1) (art. 5-1);
3. Holds unanimously that Article 5 (3) (art. 5-3) is not applicable in the present cases;
4. Holds by nine votes to seven that there has been a breach of Article 5 (4) (art. 5-4) in that the applicants had no remedy open to them before a court against the decisions ordering their detention;

5. Holds by fifteen votes to one that there has been no violation of Article 5 (4) (art. 5-4) by reason of the rejection of the requests for release addressed by the applicants to the administrative authorities;
6. Holds unanimously that it is not called upon to pronounce on the alleged breach of Article 6 (art. 6);
7. Holds unanimously that Article 7 (art. 7) is not applicable in the present cases;
8. Holds unanimously that there has been no breach of Article 4 (art. 4);
9. Holds by fifteen votes to one that there has been no breach of Article 8 (art. 8);
10. Holds unanimously that there has been no breach of Article 3 (art. 3);
11. Holds unanimously that it is not called upon to pronounce on the alleged violation of Article 13 (art. 13) as regards the point referred to at II-4 above;
12. Holds unanimously that there has been no breach of Article 13 (art. 13) as regards the other complaints of the applicants;
13. Reserves for the applicants the right, should the occasion arise, to apply for just satisfaction on the issue referred to at point II-4 above.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this eighteenth day of June one thousand nine hundred and seventy-one.

Sir Humphrey WALDOCK
President

M.-A. EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 (2) (art. 51-2) of the Convention and Rule 50 (2) of the Rules of Court:

- opinion of Judges Ross and Sigurjónsson;
- opinion of Judge Bilge;

- opinion of Judge Wold;
- opinion of Judge Zekia;
- opinion of Judges Balladore Pallieri and Verdross,
- opinion of Judges Holmbäck, Rodenbourg, Ross, Favre and Bilge.

H. W.
M.-A.

DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (MERITS) JUDGMENT
JOINT SEPARATE OPINION OF JUDGES ROSS AND SIGURJÓNSSON
**JOINT SEPARATE OPINION OF JUDGES ROSS AND
SIGURJÓNSSON**

(Translation)

According to Article 26 (art. 26) of the Convention, the Commission may not deal with the petition addressed to the Secretary General of the Council of Europe (Article 25) (art. 25) until all domestic remedies have been exhausted.

According to Article 27 (3) (art. 27-3), the Commission shall reject any petition referred to it which it considers inadmissible under Article 26 (art. 26).

According to Article 28 (art. 28), in the event of the Commission accepting a petition referred to it, it shall undertake an examination of the petition with a view to ascertaining the facts and place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights.

According to Article 31 (art. 31), if a solution is not reached the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention, and this report shall be transmitted to the Committee of Ministers.

According to Article 32 (art. 32), if the question is not referred to the Court in accordance with Article 48 (art. 48) within a period of three months from the date of the transmission of the Commission's report to the Committee of Ministers, the Committee of Ministers shall decide by a two-thirds majority whether there has been a violation of the Convention.

According to Article 45 (art. 45), "The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)".

The expression "case" means the facts found by the Commission in its report. A "case" does not exist until the Commission's report has been transmitted to the Committee of Ministers. The Commission, in its report which is transmitted to the Committee of Ministers, finds the facts and states an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. If the case is not referred to the Court in accordance with Article 48 (art. 48), the Committee of Ministers decides whether there has been a violation of the Convention.

If the "case" is referred to the Court, its jurisdiction consists in interpreting and applying the Convention to all the "matters", i.e. to all the facts found by the Commission in its report, and in rendering a final judgment (Article 52) (art. 52) as to whether those facts disclose a breach by the State concerned of its obligations (engagements: Article 19 (art. 19))

JOINT SEPARATE OPINION OF JUDGES ROSS AND SIGURJÓNSSON

under the Convention. A final judgment can only be a judgment that deals with the merits of the "case", that is to say, whether the facts found by the Commission disclose a violation of the Convention.

The admissibility or inadmissibility of the petition is a preliminary (procedural) question which is left to the "powers" of the Commission (Article 25 (4)) (art. 25-4). As against this, the question whether the facts found in the Commission's report disclose a breach by the State concerned of its obligations under the Convention is a matter for the jurisdiction of the Court, and if the case is not brought before the Court it is a matter for the jurisdiction of the Committee of Ministers.

The question of the admissibility or inadmissibility of the petition is, from the standpoint of pure logic, one and indivisible. The Commission either has jurisdiction or it has not. It would be illogical if the Commission had exclusive jurisdiction when it rejected a petition but did not have exclusive jurisdiction when it accepted one, so that the Court's jurisdiction (or that of the Committee of Ministers if the case is not referred to the Court) also covers the preliminary (procedural) question whether the Commission, in accepting the petition, has rightly or wrongly interpreted and applied Article 27 (art. 27) of the Convention.

Under Protocol No. 3 (P3) to the Convention, Article 29 (art. 29) is deleted from the Convention and the following provision is inserted:

"After it has accepted a petition submitted under Article 25 (art. 25), the Commission may nevertheless decide unanimously to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 27 (art. 27) has been established.

In such a case, the decision shall be communicated to the parties."

Under this provision, the Commission may at any time return to the preliminary (procedural) question of the admissibility or inadmissibility of the petition accepted and reject the petition, by a unanimous decision, if it finds that the existence of one of the grounds for inadmissibility provided for in Article 27 (art. 27) has been established.

The Commission's power to resume at any time its consideration of the admissibility proves that it has sole jurisdiction on this point and that, unless there is a unanimous decision to reject a petition accepted, the Court has no jurisdiction to consider this preliminary question. Thus, there is a saving of time and, at the same time, the prestige of the Court remains intact as the Court is rid of questions which do not relate to the facts found in the Commission's report.

The Contracting Parties inserted Article 26 (art. 26) in order to have it solemnly declared that the Convention does not depart from the generally recognised principle that there can be no access to an international authority until all domestic remedies have been exhausted.

One might have expected the sanction to be included in the same Article 26 (art. 26). One might even have expected that nothing be said. On the contrary, the sanction was included in Article 27 (art. 27) as one of the grounds for inadmissibility. The words "the Commission shall reject" have the same meaning as "the Commission feels, the Commission considers".

SEPARATE OPINION OF JUDGE BILGE

(Translation)

I do not share the opinion expressed in the judgment as regards the jurisdiction of the Court to entertain submissions on the non-exhaustion of domestic remedies. In paragraphs 47-49, the judgment, referring to Article 45 (art. 45), gives the Court's jurisdiction a wide scope which corresponds neither to the texts nor to the aim and purpose of the Convention.

It is true that, according to Article 45 (art. 45), "The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)", but the Court has interpreted the text broadly. One of the three elements of the basis of the Court's jurisdiction provided for in this article (art. 48) is the word "affaires" ("cases"). Relying on the English version of paragraph (1) of Article 46 (art. 46-1), the Court interprets this word as "all matters". But in interpreting a text which is authentic in two languages, one cannot, in my opinion, give preference to one language: one must find the meaning which best reconciles the two texts, taking into account the aim and purpose of the Convention. In the different articles of the Convention, the French text constantly uses the word "affaire" while the English text expresses the same concept by the words "question", "cases" and "matters". The English version is not, from this point of view, a text which has a uniform terminology on which one can rely. The text of Article 45 (art. 45) does not provide sure indications to clarify the meaning of the word "affaires". One must therefore go to the source of the Court's jurisdiction to harmonise the words quoted and find a common meaning. According to Articles 31 and 32 (art. 31, art. 32) what is referred as an "affaire" ("case") by the Commission to the Committee of Ministers or to the Court is the question whether there has or has not been a violation of the Convention. The word "affaire" must therefore be interpreted in this sense.

This meaning of the word "affaire" is also confirmed by the general plan of the Convention. By Article 19 (art. 19), the Convention set up two organs, the Commission and the Court, to ensure the observance of Human Rights. To this aim, the Commission and the Court have defined powers. Competence to accept an application and to check its admissibility belongs to the Commission. Jurisdiction to decide whether there has been a violation of the Convention belongs to the Court. It is within this field that the Court enjoys full jurisdiction.

The purpose of the Convention is to ensure the observance of Human Rights. To achieve this end the Court must reach a decision as quickly as possible without letting the case drag on unreasonably. Through a broad interpretation of Article 45 (art. 45), the judgment has set up a system of

supervision by the Court of the Commission's decisions on admissibility. An enormous waste of time and effort would result in cases where the Court should find, generally four or five years after the admissibility of the applications, that Article 26 (art. 26) has not been observed. If there is jurisdiction to supervise decisions of admissibility, it must be exercised at the first stage of the proceedings. Such supervision is not provided for by the Convention, because it is left to the competence of the Commission.

I agree with the judgment when it states, in paragraph 50, that "the rule of exhaustion of domestic remedies, which dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, is also one of the generally recognised principles of international law to which Article 26 (art. 26) makes specific reference". However, I do not agree with the judgment in deducing therefrom a supervisory jurisdiction of the Court. In effect, the rule of exhaustion of domestic remedies is not concerned with the internal organisation of a given international jurisdictional body. As stated above, the Convention set up two organs to ensure the observance of Human Rights. The aim of the rule in question is achieved if the rule is observed by one of these organs and, above all, by the organ entrusted with the task of checking the observance of the conditions of admissibility. This is all the more true since, according to paragraph (3) of Article 27 (art. 27-3), the condition of exhaustion of domestic remedies is a preliminary question which concerns essentially the admissibility of the application. It is for the Commission to decide whether this condition is fulfilled. If the question of exhaustion of domestic remedies is raised before the Commission and the latter has decided the issue, the requirements of the rule in question are completely satisfied from the point of view of international law.

Moreover, the judgment states in paragraph 51 that "the task which this Article [27] (art. 27) assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence". The judgment adds, however, that the decision of the Commission to accept a case "is not binding on the Court any more than the Court is bound by the opinion expressed by the Commission". I cannot accept this reasoning. First of all, the decision of admissibility taken by the Commission and the opinion expressed by it on the merits are of a different nature. An opinion, by its very nature, does not bind anyone. There is no need to cite it alongside the decision of admissibility for the purpose of making an argument against the latter.

According to Articles 25 and 27 (art. 25, art. 27), the decision on the admissibility of an application falls within the competence of the Commission. In the exercise of this jurisdiction, the Commission checks the

observance of the conditions of admissibility. In the course of this examination it takes into consideration the condition laid down in Article 26 (art. 26). This article (art. 26) is addressed, as the text itself bears witness, to the Commission and not to the Court. It is part of the Commission's field of activity. On the other hand, it is not reasonable to declare that the decision of refusal binds the Court while that of admissibility does not, for the two aspects of the same jurisdiction cannot be separated. In adopting another solution, the judgment has opened a way of proceeding, which, in my view, does not conform to the principles of good administration of justice.

For the reasons set out above, I think that the Court has no jurisdiction to entertain submissions of non-exhaustion of domestic remedies.

SEPARATE OPINION OF JUDGE WOLD

As to the jurisdiction

I have come to the conclusion that the Court has no jurisdiction regarding admissibility. In regard to individual petitions, the task of the Commission is one of sifting and screening. One feared to get too many unjustified petitions. It was necessary at an early stage to select the applications which the European supervisory organs should deal with. The preparatory works show that all conditions for admissibility - exhaustion of remedies, compatibility with the provisions of the Convention and not manifestly ill-founded - were considered from the same angle, namely to prevent a flood of cases. The whole responsibility with regard to admissibility - also including exhaustion of local remedies - was laid upon the Commission. The member States seemed to be fully satisfied that this function should be the task of the Commission and the Commission alone.

The Court is not a court of appeal in relation to the Commission. The Commission shall, according to Article 19 (art. 19), ensure observance of the engagements undertaken by the Contracting States. The Court has the same duty. But the task is divided between these two organs. The majority of the Court admits that "... the Commission either does or does not accept the applications. Its decisions to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence ...". But if this is so, how can then the Court through "interpretation or application" of Article 26 (art. 26) set aside the Commission's final decision laying down that all internal remedies are exhausted? The majority contend that as the Court's jurisdiction according to Article 45 (art. 45) shall extend to "all cases concerning the interpretation and application ... which the High Contracting Parties or the Commission shall refer to it", it is "impossible to see how questions concerning the interpretation and application of Article 26 (art. 26) ... should fall outside its jurisdiction". But the Court's jurisdiction is limited to cases referred to it by the Commission or a State. The question of exhaustion of internal remedies is not part of the case as this question is already finally decided by the Commission, exercising a judicial function against which no appeal lies. The interpretation and application of Article 26 (art. 26) do not therefore fall within the jurisdiction of the Court.

The Court has competence to decide its own jurisdiction, but it is not competent to make decisions regarding the jurisdiction of the Commission.

A decision of non-admissibility on the ground that the local remedies have not been exhausted is a final judicial decision. The application of the individual cannot go further. In this respect the Commission's jurisdiction is absolute without any interference by the Court, although the decision will always depend on an interpretation and application of Article 26 (art. 26). But exactly the same is the fact when the Commission finds that the

application is admissible on the ground that the internal remedies have been exhausted. That is also a final judicial decision.

The Contracting States must accept the negative decision by the Commission: why should they have a right to challenge the positive one? It is an identical jurisdiction which the Commission exercises in both cases. The individual has to abide by a decision of non-admissibility. The opposite decision gives him a justified expectation that his claim will now be dealt with by the European international organs. If the Court nevertheless exercises its own jurisdiction in regard to admissibility and decides against the Commission's decision, the inequality between the applicant and the State in proceedings before the Court will be more aggravated, which can only harm the cause of Human Rights. The provisions in Articles 28 to 31 (art. 28, art. 29, art. 30, art. 31) clearly show that the meaning of the Convention is that the Contracting States shall also abide by a decision of admissibility. The Commission acts immediately upon its finding that the application, in whole or in part, is admissible. There is no means by which the decision laying down that all internal remedies have been exhausted can be controlled or tried by any other organ. The Commission's further dealing with the application is consequently in full compliance with the Convention when the Commission accepts the petition (Article 28) (art. 28), and undertakes to ascertain the facts, to examine the petition and carry out - if need be - an investigation. It shall try to secure a friendly settlement and if a friendly settlement is not reached, the Commission shall draw up its report on the facts and state its opinion "as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention". The Commission performs a conscientious, strenuous and very extensive work - and we are confronted with a report which is prepared in full legal compliance with the provisions of the Convention and consequently according to Article 44 (art. 44), the Commission - as well as a State - has "the right to bring a case before the Court". When the Commission, or a State, exercises this right and decides to bring a case before the Court, the Court cannot decline to deal with it or decide that it will not go into the merits of the case.

As regards especially the exhaustion of internal remedies, it should be noted that the Commission, regularly and in several meetings, discusses thoroughly the question of admissibility in default of which it is not possible to bring the case duly before the Court. A State may easily waive any objections regarding exhaustion of remedies. Furthermore, a State will have every opportunity to remedy a decision during the time the application has been under consideration by the Commission, and the question of exhaustion discussed at length. This is usually the situation in every application which is dealt with by the Commission. It seems unreasonable that, under these circumstances, a State shall have the right to pursue this question of local remedies further and take it up before the Court. In this

connection to speak about the rule of exhaustion as marking out the limits "within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention", and that "the Court has to ensure (its) observance ... just as of the individual rights and freedoms ...", carries really no weight. As to the interests of a State in regard to exhaustion of remedies, the State itself has every opportunity to look after them before the Commission, which also protects these interests.

Articles 44, 45 and 48 (art. 44, art. 45, art. 48) speak about "a case" or "cases" brought before the Court by the Commission or by a State. The Court's jurisdiction, as mentioned above, is laid down in Article 45 (art. 45) as extending to all cases the Commission - or a State - has referred to the Court. One may ask what the Convention means by using the denomination case. The answer is simple. The case is the "report on the facts" and the Commission's opinion "whether the facts found disclose a breach by the State concerned of its obligations under the Convention" (Article 31) (art. 31). It is in respect of this report that the Court has jurisdiction to interpret and apply the Convention. In other words it is the merits which the Court shall try. Nothing less, nothing more!

The report shall be transmitted to the Committee of Ministers (Article 31 (2)) (art. 31-2) and, if the case is not referred to the Court, the Ministers shall make the decision. The Committee of Ministers is competent to "decide ... whether there has been a violation of the Convention" (Article 32 (1)) (art. 32-1), the Court has jurisdiction to examine "cases concerning the interpretation and application of the Convention" (Article 45) (art. 45). But there is in actual fact no difference between the competence of the Committee of Ministers and the competence of the Court. It is generally understood that the Ministers shall not deal with the question of admissibility, they shall only decide whether there has been a violation. But is it not just the same competence the Court exercises? The Ministers shall of course also "interpret and apply" the Convention in the same way as the Court. The fact that the Ministers do not deal with the question of admissibility bears out the contention that the Court has not this competence either. The Ministers and the Court stand in a supplementary position to each other. There is no reason to believe that their jurisdiction in regard to exhaustion of internal remedies should not be the same.

Finally, if the Court takes upon itself jurisdiction in regard to admissibility, the consequence will be that the Commission's report may not be dealt with by any responsible organ, and no final decision taken whether a violation has taken place or not. And that in spite of the fact that the report may very well contain the considered opinion of the members of the Commission that grave violations of the Convention have taken place! This result is really detrimental to the cause of Human Rights and it does not seem consistent with sound common sense.

Regarding the alleged violation of paragraph (1) of Article 5 (art. 5-1)

In this regard I concur with the conclusions of the Court. I find it, however, sufficient to state that I am in full agreement with the opinion of the Commission in regard to paragraph (1) (e) of Article 5 (art. 5-1-e) (paragraph 186 of the Commission's report). It is not for the Court or the Commission to decide whether a municipal law was correctly applied, it is sufficient that the procedure prescribed by the municipal law is applied correctly.

As to the alleged violation of paragraph (4) of Article 5 (art. 5-4)

Here I concur with the conclusion of the Court but I cannot adhere to the Court's reasoning in regard to the question whether Article 5 (4) (art. 5-4) requires that two authorities should deal with a case. The Court's reasoning in respect to the text of the Convention and also the Court's statement that the supervision required by Article 5 (4) (art. 5-4) is incorporated in the magistrate's decision are, in my view, not adequate on this point regarding the question of a person deprived of his liberty being entitled, even at a later stage, to bring proceedings before a court. The opinion of the Commission was divided. The European Court does not, however, in my view, need to decide this question. With this reservation I concur with the Court's conclusion on this point.

As regards the alleged violation of Article 4 (art. 4)

In this respect I also concur with the conclusions of the Court but in my view the work imposed upon the vagrants, De Wilde, Ooms and Versyp, was an incorporated consequence of the magistrate's decision of detention and cannot be considered an independent separate violation of the Convention. On these grounds I vote for the conclusion that no violation of Article 4 (art. 4) has taken place.

As to the alleged violation of Article 8 (art. 8)

Here I have a dissenting opinion. I cannot see that it was necessary for the public authorities to interfere with the correspondence of the detained vagrants. The authorities had no reason to believe that they had to censor the correspondence, either for the purpose of preventing disorder or crime, or for the protection of health and morals, or for the protection of the rights and freedoms of others. The vagrants had committed no crime and even if the authorities, in their interference with the vagrants' private correspondence, were within their jurisdiction according to Belgian law they were most certainly overstepping Article 8 (art. 8) of the Convention.

In regard to Article 8 (art. 8) of the Convention I therefore find that a violation has taken place.

SEPARATE OPINION OF JUDGE ZEKIA

The main issues involved in the present case may be summarised as follows:

1. Has this Court jurisdiction to examine, after the ruling made by the Commission in favour of the admissibility of the petitions lodged by the applicants, submissions relating to (a) the non-exhaustion of domestic remedies, (b) the non-observance of the six months' time-limit, occurring in Article 26 (art. 26) of the Convention?

2. If this Court possesses such jurisdiction, to decide:
(a) whether domestic remedies had been exhausted, and
(b) whether the six months' limit was observed with the object and meaning of Article 26 (art. 26) of the Convention.

3. Whether the Belgian State has failed to meet its obligation under Article 5 (4) (art. 5-4) of the Convention by not providing the judicial machinery envisaged by the said Article for the benefit and protection of persons detained under the Belgian Vagrancy Act of 1891 in conjunction with Article 5 (1) (e) (art. 5-1-e) of the Convention.

4. Whether as a consequence of the alleged failure to provide an appropriate judicial machinery as per Article 5 (4) (art. 5-4) or for other reasons, Belgium violated Articles 3, 4 (2) and (3), 5 (1), 6 (1) (3b) (3c), 7 and 13 (art. 3, art. 4-2, art. 4-3, art. 5-1, art. 6-1, art. 6-3-b, art. 6-3-c, art. 7, art. 13) of the said Convention.

Although I respectfully agree with the majority decision and the conclusions arrived at in respect of the major issues, yet as my line of reasoning differs to some extent in a number of points from that of the majority, I thought it appropriate to give very briefly a concurrent opinion.

I am not dealing with the factual aspect of the case. I am content for this purpose to refer to the part of the main judgment dealing with the facts of the case.

As to issue No. 1

My answer to the questions framed in issue No. 1 is in the affirmative. The Court has jurisdiction to examine (a) whether the domestic remedies have been exhausted and (b) whether the six months' time-limit has been observed. Both (a) and (b) are preconditions laid down under Articles 26 and 27 (art. 26, art. 27) for the exercise of jurisdiction by the Commission and as they constitute component parts of the Convention both fall within the ambit of Article 45 (art. 45) shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)". Article 49 (art. 49) leaves the last word to the Court in deciding its own jurisdiction.

I do not consider, however, that the holding of this view in any way amounts to a transgression of the domain of the Commission, admittedly an

independent body within the structure of the European Convention. A ruling on the inadmissibility of an application by the Commission is final for all intents and purposes with all its implications. On the other hand, a ruling on the admissibility of such application does not and ought not to have the far-reaching effect and result that all matters touching the prerequisites for the acceptance of a petition have been decided upon once and for all and can not be questioned by any authority whatsoever including the Committee of Ministers and the Court. Had the case been so, the Court would have been handicapped in the exercise of its jurisdiction and precluded from arriving at conclusions which might appear to be inconsistent with the way in which the Commission dealt with one or more of the preconditions attached to the admissibility of a petition under Articles 26 and 27 (art. 26, art. 27).

This could not have been the intention of the Parties to the Convention. Moreover, the exhaustion of domestic remedies, prior to any right of a recourse to an international tribunal, is a vital precondition recognised by international law and governments are as a rule particularly jealous for the observance of such conditions.

The ruling on the admissibility of a petition by the Commission, strictly speaking, is not in issue before the Court. Such a ruling in the affirmative was made and as a result it set in motion the Commission who investigated the applicants' complaints under Articles 28 and 29 (art. 28, art. 29), and made its report under Article 31 (art. 31). In other words the ruling in question fulfilled the object it was intended to achieve.

As to issue No. 2

I agree with the Commission's decision that domestic remedies in the accompanying circumstances of the case were exhausted. The same applies as to whether Versyp's petition was made in time. I am of the opinion that all these applicants, throughout the material time, could not reasonably anticipate any remedy for which they could institute proceedings prior to the "Du Bois" judgment.

As to issue No. 3 relating to the alleged violation of Article 5 (4) (art. 5-4) of the Convention

The Belgian Government strongly argued that the requirement of the Convention under Article 5 (4) (art. 5-4) has been satisfied by the fact that the detention of the applicants in a vagrancy centre or assistance home was ordered by a magistrate. Article 5 (4) (art. 5-4) reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

Article 5 (4) (art. 5-4) postulates the detention of a person effected by some authority and that such person disputes the lawfulness of his detention and wishes to take proceedings in a court in order to obtain a judicial decision on the lawfulness or otherwise of his detention with a view to his release from such detention if he succeeds in his recourse or appeal.

Could the functions of the magistrate whose primary duty is to implement the Vagrancy Act of 1891, and in pursuance of that Act, to investigate "the identity, age, physical and mental state and manner of life" of the person involved and if satisfied to send such person suspected as vagrant in pursuance of Sections 13 and 16 of the said Act to a vagrancy centre or to an assistance home, conform or correspond with the functions of a court whose primary duty would be to ascertain, according to Article 5 (4) (art. 5-4), whether the vagrant in question is lawfully detained or not.

Even if we admit that the magistrate constitutes a court for deciding the lawfulness of the detention, he has not before him a case of detention the lawfulness of which is sub judice. Detention originates from his own order. He cannot be the judge of his own act. He is not there to decide either as to the lawfulness of the arrest and detention by the policemen who brought the applicant before him with a view to investigating whether a state of vagrancy existed and if it did which of the courses under Sections 13 and 16 of the Vagrancy Act of 1891 is to be adopted.

The applicants are not the persons who instituted proceedings before the magistrate. Apart from the unsuitability and inadequacy of its procedural rules, if the magistrate could be considered as the court under Article 5 (4) (art. 5-4), then his decision is expected to be a judicial one, that is a decision in a declaratory form that the detention of the applicants is lawful or unlawful. The Conseil d'État, however, in the Du Bois case, in connection with the nature of the order of the magistrate, authoritatively stated that placing a vagrant at the disposal of the Government is not the result of a criminal offence but "an administrative security measure ... of a purely administrative nature".

It is obvious from what has been said that the magistrate in applying Sections 13 and 16 of the Vagrancy Act of 1891 was performing administrative and not judicial functions, as one would have expected a court to discharge its duties under Article 5 (4) (art. 5-4).

Even if we accept, for argument's sake, the magistrate constituting a police court with a competence to decide speedily lawfulness of detention for the purpose of Article 5 (4) (art. 5-4), could it be said that a detainee during the period of his continued detention can apply anew to the said magistrate to decide about the legality of such detention? An order of detention might be lawful at its inception but it cannot be said that irrespective of any supervening events it continues to be lawful throughout the duration of his detention.

Can it be said that, after the decision of the Conseil d'État in the Du Bois case, the way to seeking a remedy by a vagrant detainee is wide open and therefore if there was a gap in the Belgian judicial system in connection with Article 5 (4) (art. 5-4) this no longer existed? I have my doubts about this. As a rule, High Judicial or Administrative Tribunals, in all countries, are not suited for the delivery of speedy decisions contemplated in the

Article (art. 5) in question. The decision on the lawfulness of a detention might depend not only on the legal aspect but also on the consideration of the factual aspect of a case. The High Courts, administrative or otherwise, as a rule are not inclined to go deeply into the factual aspects of the case. But this is a matter for the future. If the constitution and the procedural rules of the Conseil d'État, as well as the time at their disposal, allow them to deal speedily with recourses coming from the inmates of the vagrancy centres or assistance homes so much the better for this class of detainees.

I am therefore of the opinion that the Belgian State failed, within the material period, to discharge its obligations under Article 5 (4) (art. 5-4) of the Convention.

As to issues in No. 4

Failure on the part of the Government to make available, for the applicants under detention, a court in which they could institute proceedings for obtaining a decision on the lawfulness of their detention, in my view, does not necessarily amount to a violation of Articles 3 to 6 (art. 3, art. 4, art. 5, art. 6) of the Convention. These Articles (art. 3, art. 4, art. 5, art. 6), although inter-related with Article 5 (4) (art. 5-4), are not interdependent. Because there was no court available for the applicants to decide whether they were rightly or wrongly kept in detention it does not necessarily follow that they were unlawfully detained. On the material, documentary or otherwise, put before us, I cannot say that the detention of the applicants under the relevant Belgian Act and procedure was unlawful. Allegations of contraventions of other Articles of the Convention, independently of Article 5 (4) (art. 5-4), have not been substantiated. In this connection I respectfully associate myself with the views expressed in the main judgment.

The consideration for a remedy, due to violation of Article 5 (4) (art. 5-4), is up to the national authority to decide as per Article 13 (art. 13), which 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."

I have, however, to make certain reservations. This Court having been called upon to decide on allegations of contraventions of certain Articles of the Convention has to pronounce judgment on the evidence available. In doing so, however, one can not lose sight of the fact that the proper forum for deciding the legality of the detention under Article 5 (1) (e) (art. 5-1-e) is the national court where applicants could go and adduce before it the evidence they possess. Strictly speaking, applicants are not parties before our Court.

I entertain, therefore, doubts as to what extent our Court can pronounce final and binding judgments on matters primarily falling within the

jurisdiction of the national courts, access to which might be rendered possible in the future.

JOINT SEPARATE OPINION OF JUDGES BALLADORE PALLIERI AND VERDROSS
JOINT SEPARATE OPINION OF JUDGES BALLADORE
PALLIERI AND VERDROSS

(Translation)

We regret that on several points we are not able to agree with the judgment.

First, we cannot go so far as the judgment in declaring at paragraph 69: "Having thus the character of a vagrant the applicants could ... be made the subject of a detention". In our opinion, the Court is not, in the first place, competent to declare that a person is a vagrant any more than to declare that a person is a criminal or of unsound mind. It can only find that this or that criterion has been established in internal law in accordance with a lawful procedure conforming to the requirements of the Convention in a way which renders legitimate certain measures taken by the State. Apart from this, since in the Court's opinion the applicants were not in a position to have supervised within the meaning of Article 5 (4) (art. 5-4) of the Convention the lawfulness of their alleged character of a vagrant, it had to be concluded that there were perhaps very strong reasons to hold that they were vagrants and that it was permitted to undertake and pursue the appropriate procedure, but that the state of vagrancy could not yet be considered to exist according to the Convention. The same principle as that in Article 6 (2) (art. 6-2) of the Convention is applicable here ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"). According to the Court, the state of vagrancy was not lawfully established because of the violation of Article 5 (4) (art. 5-4) of the Convention; it was therefore still to be presumed that they were not vagrants.

The judgment finds, on the contrary, that the state of vagrancy could be taken as established (a conclusion of which it takes account, moreover, in paragraphs 89 and 92) and it accepts that the Belgian Government took the measures allowed by the Convention against vagrants. In these circumstances, it seems rather difficult to understand how the conclusion can be reached that there has been a violation of the Convention by the Belgian State.

On the other hand, if, while admitting that in the present cases one was actually dealing with vagrants for whom the measures (deprivation of liberty) provided for by the Convention were allowed, one nonetheless adds that the Belgian Act, due to its undeniable imperfections, does not offer sufficient guarantees to ensure the observance of the Convention in all cases, it is easy to object that it is not at all the Court's function to judge in abstracto the worth of the legislation of a Contracting State. The jurisdiction of the Court is conditioned by the presence of a victim (Articles 5 (5) and 48 (b) of the Convention) (art. 5-5, art. 48-b) and the Court's task is to put right

the wrong suffered by the person concerned. Without a victim, no condemnation of a State by the Court is possible.

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As regards more particularly the proceedings mentioned in Article 5 (4) (art. 5-4) of the Convention, there are several points on which we are in agreement with the Court. First of all, the Court states, quite rightly in our opinion, that the Convention requires only the supervision by a judicial organ of the measures taken by the police, irrespective of whether this control is exercised *ex officio* or at the request of the interested party. We also agree with the Court in accepting that the Belgian magistrate, invested with jurisdiction to decide in vagrancy matters, is a court independent of the executive and enjoying the guarantees afforded to the judges by Articles 99 and 100 of the Belgian Constitution. Similarly, we can also accept that the magistrate necessarily decides on the lawfulness of the detention which the prosecuting authority requests him to sanction. Lastly, the same is true of the finding that the procedure before the said magistrate allows certain rights of the defence and presents certain judicial features, such as the hearing taking place and the decision being given in public. Nevertheless, the Court finishes by deciding that all this is not sufficient.

In the opinion of the Court the forms of the procedure need not necessarily be identical in each of the cases where the Convention requires the intervention of a court. Once again, we agree with the Court: one cannot, for example, consider the procedure for the detention of a person of unsound mind to be satisfactory if it did not include medical examinations fully guaranteeing objectivity and competence. But, in the present cases, the Court says that the deprivation of liberty complained of by the applicants resembles very closely that imposed in criminal cases and that therefore the procedure to be followed should not provide guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe. This comparison seems scarcely exact to us. Shelter in an assistance home or in a vagrancy centre is not quite the same as being locked in prison; the consequences are not shameful to the same degree; release can be requested and obtained at any time, which is not the case where a prison sentence is being served. On the other hand, it must be emphasised that the decision of the magistrate in vagrancy matters deals simply with the existence of certain factual conditions which are quite easily established and which do not require either a lengthy investigation or long hearings. A rather simplified procedure therefore normally suffices.

To conclude, detention for vagrancy is a particular measure of security, sometimes requested by the interested persons themselves and very different

JOINT SEPARATE OPINION OF JUDGES BALLADORE PALLIERI AND VERDROSS

from detention in a criminal case. It is perhaps otherwise in the only case where the placing at the disposal of the Government is not of a temporary and transitory nature but is decided for a whole determinate period which, according to Belgian law, can go up to seven years. In that case it can reasonably be asked whether this is not a sort of conviction and sentence, and even quite a serious one, to which the ordinary guarantees of criminal procedure should apply. The Court however has not made an abstraction of this case, which concerned only some of the applicants; moreover, De Wilde and Versyp, who were both placed at the disposal of the Government for two years, were released before, and one of them well before, the expiry of the term which thus does not seem to be as rigorous as a criminal sentence. With all reservations as to the compatibility in general of the Belgian law with the Convention, we do not believe that in the present cases there are sufficient elements to support the conclusion that there has been a violation on this point by the Belgian Government of the applicants' right protected by Article 5 (4) (art. 5-4) of the Convention.

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We cannot follow the Court on yet another point. Even if the decision of the magistrate does not constitute the result of proceedings before a court, within the meaning of Article 5 (4) (art. 5-4) of the Convention, the Court has not taken into account, as it should have done, the possibility of appealing to the Conseil d'État. It is true that, although the applicants failed to appeal to the Conseil d'État, the Court has unanimously declared the submission of non-exhaustion of domestic remedies to be ill-founded for the reason that the applicants can not be blamed for not having attempted an appeal which, according to established case-law, was inadmissible. This, however, does not mean that such an appeal could not have been possible. The Du Bois case, which was already pending at the time of the detention of the applicants, reversed the former case-law and the Conseil d'État decided that the orders of the magistrates in vagrancy matters were subject to appeal to it. An appeal by the applicants which would very likely have been the subject of a decision by the Conseil d'État subsequent to the Du Bois judgment would have been dealt with in the same way and would have been declared admissible and then judged. From the uncertainty of the situation existing at the time, while in spite of the previous case-law to the contrary a new attempt to appeal to the Conseil d'État had already been made and had finally been crowned with success, no argument can be drawn either to deny that, according to the *communis opinio*, there had then been exhaustion of domestic remedies or to deny that, this notwithstanding, the real possibility of an appeal existed. The applicants can ask to be excused for not having

entered an appeal which at that time seemed ill-founded but they cannot seriously complain that an appeal did not exist which in fact existed.

It must also be added that the Court has acknowledged (paragraph 82) that the Convention is directly applicable in Belgium so that any alleged violation of the Convention could have been submitted for examination by the superior administrative court once the latter had, as in the Du Bois case, declared itself competent to examine the magistrate's orders. The Court finally does not omit to emphasise that nothing allows it to be affirmed a priori that the Conseil d'État would not have decided speedily.

Even if the magistrate does not constitute the court mentioned in Article 5 (4) (art. 5-4) of the Convention, the appeal to the Conseil d'État, which was admissible at the time of the proceedings, is enough to prevent it being declared that there has been a violation of this provision of the Convention by the Belgian Government.

COLLECTIVE SEPARATE OPINION OF JUDGES
HOLMBÄCK, RODENBOURG, ROSS, FAVRE AND BILGE

(Translation)

The Court has decided, by a majority of nine votes to seven, that there has been a violation of Article 5 (4) (art. 5-4) in that the applicants could not take proceedings before a court against the decisions ordering their detention.

In our opinion this decision is not well-founded. The following are the reasons for our opposition to this part of the judgment.

1. The system of protection of Human Rights set up by the Convention comprises two types of applications:

(a) interstate applications, that is those by which a State refers to the Commission any breach of the provisions of the Convention by another State (Article 24 of the Convention) (art. 24); and

(b) individual applications, that is by persons claiming to be victims of the violation by a State of the rights set forth in the Convention (Article 25 of the Convention) (art. 25).

The difference in character between the two types of applications has been demonstrated in particular by the decision of the Commission on the admissibility of the applications by Denmark, Norway, Sweden and the Netherlands against Greece, of 31st May 1968. The Commission observed

"that, under Article 24 (art. 24) of the Convention, any High Contracting Party may refer to the Commission 'any alleged breach of the provisions of the Convention by another High Contracting Party' ('tout manquement aux dispositions de la présente Convention qu'elle croira pouvoir être imputé à une autre Partie Contractante'); whereas it is true that, under Article 25 (art. 25), only such individuals may seize the Commission as claim to be 'victims' of a violation of the Convention; whereas, however, the condition of a 'victim' is not mentioned in Article 24 (art. 24); whereas, consequently, a High Contracting Party, when alleging a violation of the Convention under Article 24 (art. 24), is not obliged to show the existence of a victim of such violation either as a particular incident or, for example, as forming part of an administrative practice". (Yearbook 1968, p. 776)

Then again, the Commission's precedents are well-defined in the decision of 8th January 1960, X against Ireland, in which the Commission considered that

"it is clear from Article 25 (1) (art. 25-1) of the Convention that the Commission can properly receive an application from a person, non-governmental organisation or group of individuals only if such persons ... claim to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention; ... it follows that the Commission can examine the compatibility of domestic legislation with the Convention only with respect to its application to a person ... and only insofar as its application is alleged to constitute a violation of the Convention in regard to the applicant person, ... and whereas, therefore, in a case submitted by an individual under

DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (MERITS) JUDGMENT
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Article 25 (art. 25), the Commission is not competent to examine in abstracto the question of the conformity of domestic legislation with the provisions of the Convention". (Yearbook 3, pp. 218-220)

In perfect harmony with the Commission, the Court decided in the De Becker case (Judgment of 27th March 1962, p. 26) that

"the Court is not called upon, under Articles 19 and 25 (art. 19, art. 25) of the Convention, to give a decision on an abstract problem relating to the compatibility of (the national) Act with the provisions of the Convention, but on the specific case of the application of such an Act to the applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention". (See also Digest of Case Law, No. 299; "Les Droits de l'Homme", European Colloquy of 1965: Ganshof van der Meersch, pp. 208 et seqq., Scheuner, p. 363; Vasak: La Convention européenne, No. 190; Monconduit: La Commission européenne, p. 188)

Thus, the Court has to examine not whether Belgian legislation, analysed in abstracto, satisfies the requirements of the Convention, but solely whether the applicants have been "victims" of a violation of the provisions of the Convention guaranteeing their rights in the specific circumstances in which they found themselves and having regard to their conduct, acts and omissions. In such cases there can be no violation of the Convention unless it is proved that the rights of the applicants have been violated, not nominally, but in a concrete way by a decision or measure of the administrative or judicial authority.

2. The underlying concept of the judgment is that the procedure instituted by Belgian legislation is too summary; consequently, it does not guarantee to the vagrants sufficient protection of their rights and does not meet the requirements of Article 5 (4) (art. 5-4) of the Convention.

The consequence which the Convention draws from the violation of Article 5 (art. 5) is that the victim of an unlawful detention has an enforceable right to compensation (Article 5 (5)) (art. 5-5). It is for the State to make reparation, if possible, for the consequences of the decision or measure attacked; all the same, the judgment must inform it as to the nature and extent of the damage. If internal law allows of only partial reparations "the Court shall, if necessary, afford just satisfaction to the injured party" (Article 50 of the Convention) (art. 50).

Yet the judgment, which has limited itself to an abstract criticism of the Belgian legal system, does not say what are the legal effects of the unlawful detention of the applicants.

3. Article 5 (4) (art. 5-4) of the Convention provides that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings ..." before "a court ...". The Convention clearly specifies proceedings (un recours) before a court (un tribunal). There is no doubt that it is the magistrate who orders the detention. Nor was there in the Belgian legal system as applied up to the Du Bois judgment of 7th June 1967 - a

judgment subsequent to the ratification of the Convention - any real possibility of taking proceedings before a court. But it is obvious that Article 5 (4) (art. 5-4) of the Convention was conceived in contemplation of the case where detention is ordered by the police authorities, which measure must be submitted to judicial supervision (Commission's report, para. 176). As, under Belgian law, the detention is ordered by a judge, judicial supervision of the lawfulness of detention is incorporated in the decision and this is done *ex officio*.

The hearings have clarified this point. The Commission's report shows (para. 176) that, in the opinion of MM. Sørensen and Castberg, members of the Commission, the requirements of Article 5 (4) (art. 5-4) are satisfied as soon as the lawfulness of the deprivation of liberty is examined by a court exercising judicial jurisdiction, even if there has not been a previous judicial decision; in such a case, the word "proceedings" ("recours") had no independent meaning. At the hearing of 18th November 1970, Mr. Sørensen, the Principal Delegate of the Commission, explained that the majority of the Commission had not shared his opinion because Belgian legislation did not provide a further supervision of the lawfulness of the detention. However, the 1891 Act provides at Sections 15 and 18 that the Minister of Justice shall release detained persons, whose detention he considers to be no longer necessary. The Commission did not take into account that, during their detention, the applicants had had the right to request their release, on the ground that their detention was no longer justified, and to complain of the nature, which in their opinion had become unlawful, of their detention, as well as, moreover, of any violation of their rights by the administrative authorities by addressing themselves to the Minister of Justice and by way of an appeal against a negative decision of this authority to the Conseil d'État. Although the applicants addressed many requests to the Minister of Justice, none of them appealed to the Conseil d'État which did not therefore pronounce itself on the lawfulness of their continued detention.

It must finally be pointed out that, under Article 60 (art. 60) of the Convention, the provisions of the Convention may not be construed in a way that limits the rights ensured under national legislation. Hence, as the Belgian legislation goes further than Article 5 (4) (art. 5-4) in that it institutes a compulsory supervision of the lawfulness of detention - while the Convention provides only the possibility of taking proceedings - it takes precedence over the text of Article 5 (4) (art. 5-4) on this point, and this precisely by virtue of Article 60 (art. 60) of the Convention.

4. The Commission, although acknowledging that the magistrate is a judicial organ (report, paras. 89-90), considered that Belgian legislation did not observe Article 5 (4) (art. 5-4) of the Convention because the decision the magistrate takes is of an administrative nature. And the judgment of our

Court states that the procedure in question is affected by the administrative nature of the decision to be given (para. 79).

The Convention, however, does not here distinguish between an administrative and a judicial decision. In any event, the boundary line between the two functions cannot be traced according to specific criteria. Many administrative acts involve a jurisdictional function (see Carré de Malberg, *Théorie générale de l'État*, I, p. 762). Many judicial acts contain an administrative element: in passing judgment, the judge sitting in a criminal court fulfils a judicial function, which consists in ascertaining whether the conduct of the accused comes under the provisions of the law and in assessing the degree of guilt; in addition, he determines the sentence by a decision which forms part of the administrative function.

The 1891 legislator expressly considered the magistrate to be a judicial authority (Section 2). In fact the function of a magistrate in vagrancy matters involves a decision of an administrative nature, which is preceded by a judicial activity consisting of the examination of the legal conditions which justify the detention and of the decision which closes this examination.

5. The criticism which the judgment levels at Belgian legislation is that it has not instituted satisfactory guarantees for the protection of the rights of vagrants. It is appropriate to examine whether the applicants have had the opportunity to defend themselves and whether the decisions taken in their regard are vitiated by arbitrariness.

The decision which the magistrate is called upon to take is the detention, that is a measure of deprivation of liberty. Contrary to what was said in the *Neumeister* judgment (p. 44, para. 24), that the term court "in no way relates to the procedure to be followed", it has to be accepted that where the authority can order deprivation of liberty, a procedure must be followed which gives the person concerned every possibility of defending himself.

Now "in these cases the proceedings before the magistrate are in public and ... the parties have an opportunity to be heard. The judge is required to hear the defence of the person brought before him who has the right to be assisted by a lawyer; he can apply to the judge for investigation to be made and in particular for witnesses to be heard; when the judge grants such an application the witnesses are heard in the presence of the person concerned who may make his observations on the evidence given. The judge must give reasons for his decision". (report, para. 190, individual opinion of Mr. Welter, member of the Commission)

The judgment states (para. 79) that the only provision relevant to the right of defence appears in Section 3 of the Act of 1st May 1849 which affords an adjournment of three days to the person concerned if he so requests. It must however be added that, by virtue of Section 11 of the 1891 Act, the public prosecutor is empowered to release the arrested person

pending the hearing (report, footnote 1 to para. 164); this is to allow for a preparation of the defence.

It is quite true that the legal procedure is summary. However, if there were no national rule of procedure applicable, it would not necessarily follow that the decision of detention would be unlawful. What is essential is that the principles of law underlying Articles 5 and 6 (art. 5, art. 6) of the Convention be respected and, particularly, that the vagrants be given the opportunity to state all the circumstances relating to their condition, that they can bring forward all their means of defence and, if necessary, that they have the benefit of free legal aid. And these principles are incorporated in Belgian national law; they are in perfect accord with Belgian legislation. At a hearing of the Commission on 6th April 1967, Me Magnée, counsel for the applicants, admitted expressly that the assistance of a lawyer is granted to the vagrant within the three-day period if he so requests.

It is clearly established then that the three applicants abandoned the exercise of the rights granted to them for their defence. We shall see further on under point 6 how very understandable it was that they behaved in this way.

Under Section 12 of the 1891 Act "the magistrate shall ascertain the identity, age, physical and mental state and manner of life of the persons brought before the police court". It is not open to the Court to presume that any of the magistrates who dealt with these cases did not act in all conscience and mindful of all the rights of the persons concerned.

6. It is not contested that, at the time of the orders of detention, the three applicants were vagrants. The magistrate was, therefore, bound to order their detention. He had to decide whether the vagrant was to be sent to an assistance home (Section 16 of the 1891 Act) or to a vagrancy centre (Section 13). Detention in an assistance home is ordered for one year at most. Detention in a vagrancy centre is for at least two years. Ooms was detained in an assistance home, De Wilde and Versyp in a vagrancy centre.

The case of Ooms is a simple one. Ooms, who had many convictions in criminal cases and had been detained four times as a vagrant, presented himself at the police station to be dealt with as a vagrant, unless a social service found him a job. His request was acceded to; he was placed in an assistance home.

Does the application of Section 13 of the 1891 Act rather than Section 16 in the cases of De Wilde and Versyp indirectly amount to a violation of Article 5 (4) (art. 5-4) of the Convention which implies that the judgment must be delivered in circumstances which guarantee a proper administration of justice?

Regarding Article 5 (1) (art. 5-1) of the Convention the Commission stated (report, para. 186): "It is not for the Commission to decide whether the municipal law was correctly applied by the competent authorities in the

present cases, provided that an examination of the proceedings does not show that the authorities acted arbitrarily". The same holds good for Article 5 (4) (art. 5-4) and for the role of the Court.

Section 13 of the 1891 Act provides for placement in a vagrancy centre of "able-bodied persons who, instead of working for their livelihood, exploit charity as professional beggars and persons who through idleness, drunkenness or immorality live in a state of vagrancy".

The detention of vagrants is a security measure which, while training the individual to work and possibly overcoming his urge for drink, aims at removing the dangers he represents for society.

The Brussels magistrate, before whom Versyp was brought – Versyp insisted on his return to the welfare settlements, as he had been in Merksplas before - was, at the time of the interrogation, in possession of a report of the Brussels Social Rehabilitation Office (dated 4th November 1965), stating in particular: "all our attempts at rehabilitation have failed on account of his apathy, idleness and weakness for drink". Furthermore, his criminal record discloses 24 convictions for larceny and attempted larceny, indecent assault, drunkenness, travelling without a ticket, assault and receiving stolen property; and, in addition, three previous detentions for vagrancy. The magistrate's order refers expressly to Versyp's examination and to his file, which contains, inter alia, the aforementioned report from the Social Rehabilitation Office. The detention note (of 4th November 1965) indicates the motives for the detention, "apathy, idleness and weakness for drink".

When De Wilde presented himself at the Charleroi police station after spending some nights at the railway station, he declared that he had never been placed as a vagrant. The magistrate asked for an information note (it is dated 19th April 1966) which shows thirteen convictions for various offences, of which six involved sentences of imprisonment for larceny, and, in addition, five previous detentions for vagrancy. The magistrate's order refers to the examination and file which includes the aforementioned information note. It is worthy of note that De Wilde, released on 16th November 1966, was again detained for vagrancy, during the proceedings, from 11th January 1967 to 15th May 1967.

Is it possible to consider that the measure taken by the two magistrates at Brussels and Charleroi was arbitrary? An act is arbitrary when it violates in a serious and obvious way a legal rule or again when it is devoid of all serious justification. The least one can say is that it has not been proved that the magistrates at Brussels and Charleroi clearly violated Section 13 of the 1891 Act when, in placing Versyp and De Wilde in a vagrancy centre, they took into consideration the moral and social disorder which characterised the behaviour of these two vagrants.

Even the applicants' counsel, who had stated "very incidentally" that Versyp was contesting the application of Section 13 of the 1891 Act in his regard, did not, as the Commission stated (report, para. 51, footnote 1), take up the complaint again either at the hearing before the Commission on 8th February 1968 or in the final conclusions submitted during that hearing. Moreover, the Commission did not go into this complaint in its memorial to the Court, nor did the applicants' counsel do so in his observations appended to the Commission's memorial.

7. To conclude: the three applicants were vagrants. They were detained for vagrancy. The order of detention was made by a court and with the formalities of a public hearing in the presence of the parties during and after which the persons appearing had the opportunity to avail themselves of all means of defence. They did not make use of this right. The clearly established facts show that the measures taken in their regard were not arbitrary and that it is doubtful whether other magistrates or even a court of appeal could have come to decisions appreciably different from those which were taken.

It is impossible to deduce from the facts that the applicants were victims of a violation by the Belgian authorities of the rights which the Convention guarantees to them.