



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

COURT (PLENARY)

**CASES OF DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (ARTICLE 50)**

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

JUDGMENT

STRASBOURG

10 March 1972

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. G. BALLADORE PALLIERI

R. CASSIN

Å. E. V. HOLMBÄCK

A. VERDROSS

H. ROLIN

E. RODENBOURG

A. N. C. ROSS

T. WOLD

H. MOSLER

M. ZEKIA

A. FAVRE

J. CREMONA

G. WIARDA

S. SIGURJÓNSSON,

and also MM. M.-A. EISEN, *Registrar*, and J. F. SMYTH, *Deputy Registrar*,

Decides as follows on the question of the application of Article 50 (art. 50) of the Convention in the present cases:

PROCEDURE

1. The De Wilde, Ooms and Versyp cases - referred to the Court on 24 October 1969 by the Government of the Kingdom of Belgium ("the Government") - have their origin in petitions lodged in 1966 with the European Commission of Human Rights ("the Commission") by three Belgian nationals concerning certain aspects of Belgian legislation on vagrancy and its application to these three persons.

2. By judgment of 18 June 1971 the Court rejected a number of complaints made by the three applicants with respect to their detention under the vagrancy laws in force in Belgium. In particular, the Court held that there had been no breach of Article 5 (1) (art. 5-1) of the Convention, since it had "not found either irregularity or arbitrariness in the placing of the three applicants at the disposal of the Government" and had "no reason to find the resulting detention incompatible with Article 5 (1) (e) (art. 5-1-e) of the Convention" (point II-2 of the operative part of the judgment and paragraphs 66-70 of the reasoning).

On the other hand, the Court held that there had been a breach of Article 5 (4) (art. 5-4) in that the applicants had "had no remedy open to them before a court against the decisions ordering their detention" (point II-4 of the operative part of the judgment). On this point the Court found that the proceedings before a magistrate in regard to vagrants prescribed by Belgian law did not by themselves satisfy the requirements of Article 5 (4) (art. 5-4) and that a remedy before a court should therefore have been open to the applicants by which the lawfulness of their detention might be determined (paragraphs 74-80 of the reasoning). The Court further reserved for the applicants the right, should the occasion arise, to apply for just satisfaction on this issue (point II-13 of the operative part of the judgment).

3. On 27 September 1971, the Principal Delegate of the Commission, making reference to point II-13 of the operative part of the judgment, transmitted to the Registrar a letter dated 23 July in which the applicants' counsel asked the Commission to request the Court to award to his clients damages for "unlawful detention".

4. After consultation with the members of the Court, the President directed that the examination of this aspect of the cases should be conducted by the Judges who had taken part in the judgment of 18 June 1971. One of these Judges, Mr. Bilge, could not, however, exercise his functions as he has been appointed a member of the Turkish Government (Rule 4 of the Rules of Court).

5. On the instructions of the President, the Registrar requested the Agent of the Government, and then the Delegates of the Commission, to present their written observations on the question of the application of Article 50 (art. 50) of the Convention. The Registrar received these observations on 27 October and 17 December 1971; a memorandum from the applicants' counsel was appended to the Commission's observations.

6. By Order of 4 January 1972, the President of the Court:

- authorised the Agent of the Government to file a second memorial not later than 31 January on the understanding that he could complete it at the oral hearings;

- and, the Delegates of the Commission having intimated that they did not desire to present further written observations, decided that the oral hearings should open on 14 February.

The Government's second memorial was received at the Registry on 31 January 1972.

7. On 10 January, the Agent of the Government sent to the Registrar, for the information of the Court, statistics of the appeals presented under the transitional provisions contained in Section 2 of the Act of 6 August 1971 (see paragraph 13 below).

8. The public hearings took place on 14 February in the Human Rights Building at Strasbourg.

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. G. SPERDUTI,

Delegate.

The Court heard the addresses and submissions of Mr. Sørensen and Mr. De Meyer as well as their replies to questions put by the Court and by individual Judges.

The hearings were declared provisionally closed on 14 February.

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

AS TO THE FACTS

10. The Court is called upon to rule only on the question of the application of Article 50 (art. 50) in the present cases. Thus, as regards the facts the Court will confine itself here to giving a brief outline and for the rest it refers to paragraphs 15 to 43 of its judgment of 18 June 1971.

11. That judgment concerned the detention of De Wilde, Ooms and Versyp ordered by decisions of the magistrates at Charleroi, Namur and Brussels on 19 April 1966, 21 December 1965 and 4 November 1965 respectively under Sections 13 (in the cases of De Wilde and Versyp) and 16 (in the case of Ooms) of the Act of 27 November 1891 for the suppression of vagrancy and begging. De Wilde regained his freedom after a little less than seven months (three of which he spent serving a prison sentence), Ooms after one year and Versyp after one year, nine months and six days.

12. In the course of the proceedings before the Commission, the applicants each claimed 500 Belgian francs (BF) damages per day of detention. Their counsel, Me. Magnée, now relies on the judgment of 18 June 1971 to claim, on behalf of each of them, damages of 300 BF per day of "unlawful detention".

With that object, Me. Magnée began by addressing to the Belgian Minister of Justice, on 22 and 30 June 1971, two letters of which the first related to Versyp and the second to Ooms. On 12 July, the Minister replied that the Government could only apply the law as it stood while waiting for the Bill on "social misfits" - which it had introduced even before the judgment of 18 June 1971 - to be passed. Considering this reply to amount to a refusal contrary to the principle of the supremacy of international treaty law over national law, Me. Magnée informed the Minister, on 14 July that

he proposed to bring the matter before the "competent authorities" and to notify the Commission.

Counsel for the applicants did in fact write first to the Committee of Ministers - 16 July - to inform them of the Minister of Justice's refusal which implied, he alleged, a violation of the Court's judgment; he later wrote, on 23 July, to the Commission referring to Articles 5 (5), 48 and 50 (art. 5-5, art. 48, art. 50) of the Convention and requested the Commission to bring before the Court the claim made by each of his three clients.

On 2 August, he addressed to the Minister of Justice a letter concerning De Wilde which was worded in the same terms as the letters of 22 and 30 June. The Minister acknowledged its receipt on 12 August, noting that along with the other two it had been communicated by Me. Magnée to the Commission.

13. In its memorial of 27 October 1971, the Government pointed out to the Court that on 17 June 1971 it had tabled in Parliament a Bill on "social misfits" intended to replace the 1891 Act. The Government added that, desiring to comply with the judgment of 18 June 1971 without awaiting the passage of this Bill, it had voted by Parliament an Act of 6 August 1971 amending the 1891 Act and containing two sections. The first, which inserted a new section, numbered 16 bis, in the 1891 Act, provides that decisions taken under Sections 13 and 16 are henceforth made subject to the remedies available under the Code of Criminal Procedure, including appeal. Section 2 was a transitional provision: it specified that vagrants or beggars held in detention on the entry into force of the 1971 Act (4 September 1971) in execution of a decision taken under Section 13 or Section 16 of the 1891 Act, could exercise for a period of one month the remedy provided for at Section 16 bis.

AS TO THE LAW

I. AS TO THE ADMISSIBILITY OF THE APPLICANTS' CLAIMS

14. In its written observations of October 1971 and January 1972 and also at the oral hearings, the Government requested the Court to rule

"that the applications for compensation lodged with the Commission on behalf of the applicants are not admissible since the domestic remedies have not been exhausted".

15. In support of this submission, the Government relied, in the first place, on Article 26 (art. 26) of the Convention contending that this provision applied not only to the original petition addressed by an individual to the Commission under Article 25 (art. 25) but also to a claim for

compensation made by him after the Court has held that in his case there has been a violation of a right guaranteed by the Convention.

Article 26 (art. 26) reads: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."; Article 27 (3) (art. 27-3) then provides that "the Commission shall reject any petition referred to it which it considers inadmissible under Article 26 (art. 26)". This last provision therefore defines a condition to which the Commission's "dealing with" the case is subjected; it concerns "petitions" lodged with that organ. In other words, this provision relates to the institution of the proceedings which fall within Section III of the Convention. The present cases no longer relate to such proceedings but to the final phase of proceedings brought before the Court in accordance with Section IV on the conclusion of those to which the petitions of Jacques De Wilde, Franz Ooms and Edgard Versyp gave rise before the Commission. The claims made by the three applicants for compensation are not new petitions; they relate to the reparation to be decided by the Court in respect of a violation adjudged by the Court and they have nothing to do with the introduction of proceedings before the Commission under Articles 25, 26 and 27 (art. 25, art. 26, art. 27) of the Convention; while the Commission transmitted them to the Court, it did so without any accompanying report and solely with a view to giving the Court the assistance which, in a general way, it lends to the Court in accordance with Rule 71 of its Rules of Procedure.

The Court, like the Delegates of the Commission, is therefore of the opinion that Article 26 (art. 26) is not applicable in the present matter.

16. In support of its plea of inadmissibility, the Government put forward a second argument based on Article 50 (art. 50): as they had not exhausted domestic remedies, the applicants had not established, according to the Government, that Belgian internal law "allows only partial reparation to be made for the consequences" of the violation found by the judgment of 18 June 1971; it followed that their claims for damages were inadmissible.

In the Court's opinion, the part of the sentence just quoted states merely a rule going to the merits. If the draftsmen of the Convention had meant to make the admissibility of claims for "just satisfaction" subordinate to the prior exercise of domestic remedies they would have taken care to specify this in Article 50 (art. 50) as they did in Article 26 (art. 26), combined with Article 27 (3) (art. 27-3), in respect of petitions addressed to the Commission. In the absence of such an explicit indication of their intention, the Court cannot take the view that Article 50 (art. 50) enunciates in substance the same rule as Article 26 (art. 26).

Moreover, Article 50 (art. 50) has its origin in certain clauses which appear in treaties of a classical type - such as, Article 10 of the German Swiss Treaty on Arbitration and Conciliation, 1921, and Article 32 of the Geneva General Act for the Pacific Settlement of International Disputes,

1928 - and have no connection with the rule of exhaustion of domestic remedies.

In addition, if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention.

17. The Court therefore sees no reason to declare the claims in question inadmissible and will proceed to examine into their merits.

II. AS TO THE MERITS OF THE APPLICANTS' CLAIMS

18. The present stage of these cases revolves around Article 50 (art. 50) of the Convention which reads:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

19. In its written observations of October 1971 and January 1972 and at the oral hearings, the Government requested the Court to rule:

- "that the conditions required for the application of Article 50 (art. 50) of the Convention have not been fulfilled in the present cases;

- that it is not necessary to afford satisfaction to the applicants".

At the hearing in the afternoon of 14 February, the Commission's final submission was

"may it please the Court to grant the applicants appropriate satisfaction, bearing in mind that a new remedy has been introduced in Belgian law following the judgment given on 18 June 1971 by the European Court of Human Rights and thus indirectly following the applications lodged by MM. De Wilde, Ooms and Versyp with the Commission".

20. The Government submitted in particular that Belgian internal law enables the national courts to order the State to make reparation for damage caused by an illegal situation for which it is responsible whether this situation constitutes a breach of rules of internal law or of rules of international law. It would follow that the applicants have to take proceedings before the national courts; as they have not done so their claims for damages were not only inadmissible (see paragraph 16 above) but also without foundation.

The Court cannot accept this view.

No doubt, the treaties from which the text of Article 50 (art. 50) was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done. Nevertheless, the provisions of Article 50 (art. 50) which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of *restitutio in integrum* follows from the very nature of the injury; indeed, common sense suggests that this must be so a fortiori. The Court sees no reason why, in the latter case just as in the former, it should not have the right to award to the injured persons the just satisfaction that they had not obtained from the Government of the respondent State.

This is clearly the position in the present cases. Neither the Belgian internal law, nor indeed any other conceivable system of law, can make it possible to wipe out the consequences of the fact that the three applicants did not have available to them the right, guaranteed by Article 5 (4) (art. 5-4), to take proceedings before a court in order to have the lawfulness of their detention decided. Furthermore, the Belgian Government has declined to give De Wilde, Ooms and Versyp the compensation which they claimed.

The mere fact that the applicants could have brought and could still bring their claims for damages before a Belgian court does not therefore require the Court to dismiss those claims as being ill-founded any more than it raises an obstacle to their admissibility (see paragraph 16 above).

21. Where the consequences of a violation are only capable of being wiped out partially, the affording of "just satisfaction" in application of Article 50 (art. 50) requires that:

(i) the Court has found "a decision or measure taken" by an authority of a Contracting State to be "in conflict with the obligations arising from the ... Convention";

(ii) there is an "injured party";

(iii) the Court considers it "necessary" to afford just satisfaction.

According to the Government, none of these conditions has been fulfilled in the present cases.

22. First, the Court's judgment of 18 June 1971 was, it is alleged, directed only to a situation created by a "certain deficiency in legislation and in case-law" which did not amount to a "decision" or "measure".

The Court cannot accept this view. In the cases brought before it which had their origin in petitions lodged under Article 25 (art. 25), the Court was not called upon to give a decision on an abstract problem relating to the compatibility of provisions of Belgian law with the Convention but on the specific case of the application of the provisions in law to the applicants (see the De Becker judgment of 27 March 1962, Series A, page 26). In questions of liability arising from the failure to observe the Convention there is in any event no room to distinguish between acts and omissions.

23. Nor can the existence of an "injured party" be denied. In the context of Article 50 (art. 50) these two words must be considered as synonymous with the term "victim" as used in Article 25 (art. 25); they denote the person directly affected by the act or omission which is in issue. De Wilde, Ooms and Versyp, whom the Commission rightly found to be victims in declaring their petitions admissible, are thus also "injured parties".

24. On the other hand, the Government is correct in questioning the existence of damage. Each of the applicants claims, as just satisfaction, the sum of 300 BF per day of detention. For this claim to be successful, it would be necessary that their deprivation of liberty had been caused by the absence - found by the Court to be contrary to Article 5 (4) (art. 5-4) of the Convention - of any right to take proceedings before a court by which the lawfulness of their detention might be decided. But this is not the case here. In its judgment of 18 June 1971, the Court did not find "either irregularity or arbitrariness in the placing of the three applicants at the disposal of the Government" and it had "no reason to find the resulting detention incompatible with Article 5 (1) (e) (art. 5-1-e) of the Convention" (Series A, pp. 38-39, para. 70). The Court therefore does not see how the taking of proceedings to test merely the point of lawfulness dealt with in the requirements of Article 5 (4) (art. 5-4) could have enabled the applicants to obtain their release any sooner.

Moreover, the applicants had the benefit of free legal aid before the Commission, and later with the Commission's Delegates, and they have not made any point concerning costs which they may have incurred without reimbursement.

Finally, the Court does not find that in the present cases any moral damage could have been caused by the lack of a remedy which met the requirements of Article 5 (4) (art. 5-4).

25. Although, for the reasons given above, the Court finds it has to refuse to grant the compensation claimed by the applicants, it notes that Belgium has taken, as the Committee of Ministers stated on 18 January 1972 in connection with Article 54 (art. 54) of the Convention, legislative measures with a view to ensuring in matters of vagrancy the application of the Convention in that State.

FOR THESE REASONS, THE COURT,

1. Declares unanimously that the applicant's claims for damages are admissible,
2. Declares by fourteen votes to one that the applicants' claims for damages are not well-founded.

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

Sir Humphrey WALDOCK
President

Marc-André 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 Holmbäck, Ross and Wold;
- opinion of Judge Verdross;
- opinion of Judge Mosler;
- opinion of Judge Zekia.

H. W.
M.-A. E.

DE WILDE, OOMS AND VERSYP ("VAGRANCY")
v. BELGIUM (ARTICLE 50) JUDGMENT
JOINT SEPARATE OPINION OF JUDGES HOLMBÄCK, ROSS AND WOLD
**JOINT SEPARATE OPINION OF JUDGES HOLMBÄCK,
ROSS AND WOLD**

Although we concur in the decision rendered by the Court we regret not to be able to agree with the reasons given for this decision on a particular point, namely the interpretation of Article 50 (art. 50) of the Convention in paragraph 20 of the judgment.

It is a well known fact that this Article (art. 50) is modelled on clauses found in a number of arbitration treaties, e.g. the German-Swiss Treaty of Arbitration and Conciliation, 1921, Article 10, and the Geneva General Act for the Pacific Settlement of International Disputes, 1928, Article 32 (see, for example, Heribert Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* (1958), p. 106). These clauses were inserted to deal with the situation that a State, although willing enough to fulfil its international obligations, for constitutional reasons is unable to do so without changing its Constitution. They confer on the arbitral tribunal the power to transform this obligation into an obligation to pay to the injured party an equitable satisfaction of another kind.

We assume that Article 50 (art. 50) serves the same purpose as these model clauses and that it should be interpreted accordingly. On this basis it is obvious that the article according to its wording does not apply to the cases before the Court.

It appears from the wording of Article 50 (art. 50) that this article applies only under the condition that "the internal law of the said Party", i.e. the Party who has taken a decision or measure completely or partially in conflict with the obligations arising from the Convention, "allows only partial reparation to be made for the consequences of this decision or measure". Such reparation must in the present cases consist in the paying of compensation for damages, if any, incurred by the applicants as a consequence of the fact that their detention was ordered in contravention of Article 5 (4) (art. 5-4) of the Convention. The applicants themselves assess their claim for compensation in the amount of 300 BF for each of them per day of unlawful detention.

So the question arises, whether or not internal Belgian law allows the Belgian State to make full reparation in the sense of paying full compensation to the applicants as claimed, assuming that their claim is well-founded. In our opinion the applicants have afforded no proof that Belgian law does not allow full reparation to be made, whereas the Belgian Agent has convincingly argued that Belgian law provides remedies for the granting of full compensation. It follows that the said condition for the application of Article 50 (art. 50) is not fulfilled.

The reasoning of the judgment in paragraph 20 is to the effect that although according to its wording Article 50 (art. 50) covers only situations in which the impossibility of making full reparation is due to the law of the

JOINT SEPARATE OPINION OF JUDGES HOLMBÄCK, ROSS AND WOLD

State that has contravened the Convention, common sense suggests that the article a fortiori must apply also where the impossibility of restitutio in integrum follows from the very nature of the injury. This argument is, in our opinion, unsound. It presupposes that there is an absolute obligation on the State to restore to the applicants the liberty of which they have been deprived. But this cannot be so because of the maxim *impossibilium nulla est obligatio*.

The judgment operates with two hypothetical situations, the one "where the nature of the injury would make it possible to wipe out entirely the consequences of a violation" and the other where the very nature of the injury makes restitutio in integrum impossible. The Court sees no reason why "in the latter case just as in the former" the Court should not have the right to award just satisfaction. Of course the Court has the same right in both cases. But in both cases the competence of the Court is dependent upon the fact that the internal law does not allow full reparation. The consequences of a violation can never "be wiped out entirely". This criterion, which is completely alien to the text of Article 50 (art. 50) can only give rise to doubt and uncertainty. But even more serious is the fact that the judgment leads to the Court in fact assuming jurisdiction in respect to claims for reparation in all cases where full restitutio is impossible, regardless of the state of the internal law.

Our interpretation of Article 50 (art. 50) is in complete harmony with other provisions of the Convention and with the general ideas inherent in it concerning the enforcement of the obligations it imposes.

Thus, Article 5 (5) (art. 5-5) provides that "everyone who has been the victim of arrest or detention in contravention of this Article shall have an enforceable right to compensation". This provision clearly directs the injured party to seek redress in the courts of the State which has committed the contravention. More generally, Article 13 (art. 13) provides that "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". It would, indeed, be astonishing and disharmonious if Article 50 (art. 50), alongside this reference to national remedies, instituted a concurrent means of redress by direct application to this Court.

Further, in Article 53 (art. 53) the High Contracting Parties have undertaken to abide by the decision of the Court in any case to which they are parties. And in Article 54 (art. 54) it is provided that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

The general idea behind these various provisions obviously is that the Convention relies on the Contracting Parties to fulfil their obligations according to the Convention voluntarily by means of decisions and measures taken within their domestic jurisdiction. Relying on this

willingness of the Contracting Parties to comply in good faith with their obligations, the general rule is that a party claiming to be injured must seek redress before the national courts and not before the European Court of Human Rights. There is one exception: if the national law of the State prevents it from making full reparation Article 50 (art. 50) confers on this Court the power to afford just satisfaction to the injured party.

For these reasons we hold that Article 50 (art. 50) does not apply in the cases now before the Court from which it follows that the Court lacks jurisdiction to deal with the applicant's claims.

SEPARATE OPINION OF JUDGE VERDROSS

(Translation)

I am in agreement with the Court's judgment but would like to add some general remarks on the interpretation of Article 50 (art. 50) of the Convention.

Under this provision the Court, after finding that the Convention has been violated, may "if necessary" afford "just satisfaction to the injured party", "if the internal law" of the respondent State "allows only partial reparation to be made for the consequences" of the act that was held to be contrary to the Convention.

It clearly follows from the French text ("si le droit interne ... ne permet qu'imparfaitement d'effacer les conséquences") - as from the English text - that before it may make a decision on just satisfaction the Court must enquire whether the injured person can obtain adequate compensation by taking appropriate steps under the internal law of the respondent State.

If the Court comes to the conclusion that this question should be answered in the affirmative it seems to me that it is in accordance with the spirit and general system of the Convention for the Court first to allow the respondent State the option of granting the injured party adequate compensation under its own procedure. By acting in this way the Court retains its jurisdiction to assure itself that this satisfaction is provided in an adequate manner and within a reasonable time to be fixed by the Court.

It is true that one might counter this line of argument by saying that the respondent State could settle the matter with the injured party immediately after the judgment in which the Court found that the Convention had been violated. This solution, however, would seem to me to overlook the fact that in order to have legally adequate satisfaction there must always be impartial judicial proceedings. If, therefore, the respondent State makes such proceedings available to the injured party it has done all it can at the beginning to make reparation for the consequences of the violation of the Convention.

The need for the Court to give in the first place the respondent State the option of affording the injured party adequate satisfaction through its own courts is felt especially at the initial stage of the application of Article 50 (art. 50): on the Court's interpretation of this provision will depend the legislative measures which the States will have to take in order to comply with this interpretation.

SEPARATE OPINION OF JUDGE MOSLER

(Translation)

I agree with the whole of the judgment. I would, however, like to add some remarks as to the scope of the Court's jurisdiction in connection with the obligation of the State concerned to make reparation through its own law and through its internal administrative and judicial procedures for the consequences of the violation imputed to it. In the present cases, the Court rightly remarked that it was not necessary to refrain from taking a decision until the applicants had applied for compensation to a Belgian court (see paragraph 20 in fine of the judgment). However, the relevant part of the judgment does not state whether the Court drew this conclusion merely from the twofold fact that in the three cases before it *restitutio in integrum* was impossible (paragraph 20) and that no pecuniary loss or moral damage could be found (paragraph 24) or whether it considered generally that Article 50 (art. 50), in referring to the internal law of the State in question, covers only the cases in which *restitutio in integrum* is possible and those where it is excluded by the very nature of the violation. It thus remains uncertain whether the Court should take the internal law into consideration in other situations where neither of these two last hypotheses applies.

I should like to explain the interpretation of Article 50 (art. 50) on which I have relied in concurring in this part of the reasons set out in the judgment.

1. In my opinion, Article 50 (art. 50) constitutes the basis of the Court's jurisdiction in all cases - including those mentioned in Article 5 (4) (art. 5-4) - where just satisfaction ("*une satisfaction équitable*") is claimed by an applicant whose case before the European Commission of Human Rights has finally terminated in a decision by the Court establishing that the State in question has violated the Convention.

2. In all cases where the Court finds that there has been a violation resulting from a decision or measure taken by an authority of a High Contracting Party the Court must, in the very words of Article 50 (art. 50), enquire whether the internal law of the said Party allows reparation to be made for the consequences of this decision or measure. This conclusion is essential on account of the broad wording used in the text as well as its intrinsic meaning.

3. It follows by implication from Article 50 (art. 50) that the obligation imposed on the High Contracting Parties by Article 53 (art. 53) of the Convention to abide by the decision of the Court includes a duty to make reparation for all the consequences which the violation has caused to the applicants whose complaint has led to the Court's judgment. This duty is therefore not limited to putting an end to the violation: it also extends to making good the damage suffered by the applicants. Although the duty to make good the damage resulting from an injury which has been established

by the decision of an international court derives from general international law, it was necessary to confer expressly upon the Court, by a clause in the European Convention on Human Rights, jurisdiction to grant satisfaction to the person injured. Since the applicant is not party to the proceedings before the Court, the object of those proceedings, strictly speaking, is not the damage suffered by him but the violation of the Convention alleged against the respondent State. It follows that the effects of the judgment relate only to the finding of a violation; they do not extend to the consequences which the violation has involved for the person concerned. It was thus necessary to confer on the Court an additional jurisdiction enabling it in special circumstances to afford just satisfaction.

4. The first question to be investigated by the Court when applying Article 50 (art. 50) is therefore to determine exactly what these consequences are: the measures to be taken to ensure as complete a reparation as possible will depend on the answer to this question.

5. These measures will vary according to the nature of the damage suffered.

(a) If the nature of the violation allows of *restitutio in integrum* it is the duty of the State held liable to bring this about. For example, the consequences of an expropriation which has been declared unlawful by the Court must be wiped out by restoring the expropriated property. The Court has neither the jurisdiction nor the practical means to do this itself. If in such a case the national law only allows partial *restitutio in integrum* to be made, it is the Court which has to afford just satisfaction for those consequences of the injury for which it has not been possible to make reparation. It is for the Court to assess the effectiveness of the national law in this matter.

(b) If the nature of the injury prevents any *restitutio in integrum*, for example because the violation involved facts the effect of which cannot be retroactively removed, the violation may also have involved other consequences for which, by their nature, reparation can be made. Thus, the victim of a violation may have suffered pecuniary loss through having lost an opportunity of finding employment or by having had to pay his lawyer. It may likewise happen that equity demands that he should be granted compensation for moral damage. If, as in the vagrants' case, the primary consequences of the injury cannot be made good either by any internal law or by the Court the national legislature and administration may nevertheless provide for reparation for the secondary consequences.

In every case where such secondary damages are involved the Court has, in my opinion, jurisdiction to decide on them, no matter whether the internal law allows, does not allow, or allows only partial, reparation to be made. However one interprets the German-Swiss Treaty of Arbitration and Conciliation of 3 December 1921 (see paragraphs 16 and 20 of the judgment, and the address of the Commission's Principal Delegate) which

together with other classical arbitration clauses served as a model for Article 50 (art. 50), this article does not restrict the Court's jurisdiction to cases involving *restitutio in integrum* or compensation for an irreversible act causing damage. The Court's jurisdiction extends to every kind of damage caused by the violation. This conclusion is based both on the very wording of Article 50 (art. 50), which is broader than that of the corresponding clauses in the above-mentioned treaties and on the special nature of the Convention, which is designed to ensure the protection of the individual (see, *mutatis mutandis*, the *Wemhoff* judgment of 27 June 1968, p. 23).

(c) The position must be the same if the injury can only be made good by pecuniary compensation, for example if something which has been unlawfully requisitioned is destroyed or lost and so cannot be restored to its owner.

6. Article 50 (art. 50) provides that when the Court is considering what satisfaction is just it shall take account of the remedies provided by the national law. The Court must enquire whether the national law allows or does not allow reparation to be made for the consequences of the violation or only allows partial reparation to be made and if necessary afford such satisfaction as it considers fair. If consideration of the national law were to be excluded with regard to all the other consequences of an injury the result would be that the substantive right to obtain damages and the remedies for the implementation of this right would have no effect on the Court's deliberations when it was dealing with a claim for reparation brought before it. The respondent State would lose the option of complying by its own means with the judgment establishing the violation. This would discourage the State from introducing in its national law provisions ensuring such satisfaction.

7. This interpretation does not, however, imply that the Court should require an applicant to exhaust the domestic remedies. That solution would amount to creating a new procedural hurdle similar to that in Article 26 (art. 26) and this was quite rightly excluded in paragraph 20 of the judgment. Nevertheless, the Court cannot itself take a decision until the applicant has attempted, by making use of the means available to him under the internal law, to obtain satisfaction from the national authorities. The Court has jurisdiction to assure itself that such satisfaction can be obtained within a reasonable time and that the result will be fair. If difficulties are encountered in obtaining satisfaction the Court can, bearing in mind the extremely long proceedings before the Commission (after exhaustion of the domestic remedies) and then before the Court itself, grant such compensation as it thinks fit, without being obliged to wait for the completion of the national proceedings. It has competence to decide according to the circumstances of each individual case to what extent it will await the result of the applicants' claims before the national authorities. It

can lay down time-limits after the expiry of which it will examine the results achieved and itself decide on the question of satisfaction.

8. In the De Wilde, Ooms and Versyp cases the placing of the applicants in detention was, according to the judgment of 18 June 1971, lawful under the Belgian law in force at the time. Under Article 5 (1) (e) (art. 5-1-e) of the Convention the Court had to take the national law as its starting point. Thus, the primary injury was not the detention as such but the absence of any right to take proceedings before a "court" in accordance with the definition given in that judgment. The Belgian Act of 6 August 1971 establishing a remedy could not put this matter right retrospectively. It is the very nature of the violation which makes restitutio in integrum impossible. It is, however, conceivable that there might be secondary consequences to be made good. The Court rightly enquired whether such consequences existed in the present cases and I agree with it in thinking that there were none.

SEPARATE OPINION OF JUDGE ZEKIA

I respectfully agree with the views expressed in the judgment of the Court, As to the Law, Part I on admissibility and Part II on the merits of the case, except the concluding declaratory part of the judgment embodied in the second part dissenting the applicants to damages altogether.

The Court, after finding the applicants' claims for damages admissible, declared that the claims for damages were not well-founded.

In its original judgment of 18 June 1971, the Court reserved for the applicants the right, should the occasion arise, to apply for just satisfaction on the issue relating to the breach of Article 5 (4) (art. 5-4) of the Convention.

The applicants applied to the authorities in Belgium and later to the Commission for compensation as envisaged in the original judgment. Their application was turned down by the Belgian authorities and eventually reached this Court, through the Commission, for consideration. It is true the way the applicants framed their claim for damages was not an acceptable one. Once this Court declared in an unreserved final form that there was no breach of Article 5 (1) (e) (art. 5-1-e), any claim for damages relating to their detention and the duration of such detention or the nature of their detention - whether under Section 13 of 16 of the Belgian 1891 Act - becomes untenable. Their claim for damages, therefore, calculated on the basis of detention - per diem or otherwise - was rightly rejected.

What is left is the inconvenience caused to the applicants in their endeavour to vindicate their right to a judicial decision as to the legality of their detention. Article 5 (4) (art. 5-4) makes it incumbent on the High Contracting Parties to the Convention to render available a court to deal summarily with cases of detainees under Article 5 (1) (art. 5-1) who dispute the legality of their detention, with a view to obtaining their release if such detention is found unlawful.

The Court found that there was no judicial forum answering the requirements of Article 5 (4) (art. 5-4) at the time the applicants were detained. They petitioned the Commission; their complaints were investigated and found to be admissible and in the reported opinion of the Commission the respondent State was found in contravention of Article 5 (4) (art. 5-4) of the Convention.

The case of the applicants was brought before the Court which in turn confirmed that there was violation of Article 5 (4) (art. 5-4) by the respondent State.

Petitions to the Commission were filed by the applicants in the year 1966 and the judgment of this Court touching their complaints was delivered in the middle of 1971.

It was a right recognised to the vagrant applicants to dispute the lawfulness of their detention before a court of law in their own country

which could deal with their recourse in a summary way. This right was denied to them. They had to petition the Commission of Human Rights and incur all expenses and inconvenience in presenting their case before the commissioners and later had to pursue their claims through the Commission before this Court. The applicants were entitled to know from a judicial authority in the country they lived, within a short time of the order for their detention, whether they were rightly or wrongly detained under the order of the police magistrate. Instead they had to travel a long way and wait for years to obtain a judicial decision as to whether they were rightly kept in detention. Instead of knowing within a matter of days whether they were rightly or wrongly detained they had to pursue a long cumbersome procedure before two international bodies of jurists in order to get the answer.

They are surely entitled to be reimbursed for the extra expenses incurred before the Commission and this Court. It is true that we do not exactly know whether they did incur any expense or if they did what was the amount incurred but this, I suggest, could easily be referred to the Registry of this Court to be ascertained and dealt with. In my view, the applicants ought not to be deprived of their costs in vindicating their rights in the way they did. Unless they acted in bad faith, or their petition was devoid of any merits, or their application could be described as frivolous or vexatious or an abuse of the process of the Court, I cannot see how they could be deprived of their costs. On the contrary the very fact that the Commission of Human Rights ruled that their petitions were admissible and in their reported opinion found that there was a contravention of Article 5 (4) (art. 5-4), strongly supports the view that the applicants acted in good faith and their case was not devoid of merit. In other words, they honestly believed that they were not lawfully detained and they had a case for judicial consideration.

Since our Court is competent to give just satisfaction to a victim of a violation of the provisions in the Convention, I entertain no doubt that we possessed the power to award costs to the applicants if we thought the circumstances of the case warranted such course.