Applications Nos. 10522/83, 11011/84 and 11070/84

Leopold MELLACHER and others

against

AUSTRIA

REPORT OF THE COMMISSION

(adopted on 11 July 1988)

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the cases as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The applications

2. The applicants in the first case, Leopold and Maria Mellacher, a married couple, are residing in Feldkirchen. The applicants in the second case, Johannes, Ernst and Anton Mölk and Maria Schmid, are all members of the same family and are residing in Innsbruck. The applicants in the third case, Christiane Weiss-Tessbach and Maria Brenner-Felsach, are residing in Vienna. All applicants are Austrian citizens.

3. The applicants in the first case are represented by Rechtsanwalt Dr. H.G. Medwed of Graz, the applicants in the second case by Rechtsanwalt Dr. L. Hoffmann of Innsbruck, and the applicants in the third case by Rechtsanwalt Dr. O. Weiss-Tessbach and Rechtsanwalt Dr. F. Leon, both of Vienna, who have subsequently instructed Rechtsanwalt Dr. G. Benn-Ibler of Vienna.

4. The applications are directed against Austria whose Government were represented by their Agent, Botschafter Dr. Helmut Türk of the Federal Ministry of Foreign Affairs.

5. The applicants in the first and second cases are joint owners of apartment houses in Graz and Innsbruck respectively. The applicants in the third case are the owner and usufructuary of an apartment house in Vienna. All applicants complain that their

contractual rents were reduced by judicial decisions under new legislation restricting rents. The relevant decisions were based on Section 44 paras. 2 and 3 of the 1981 Rent Act (Mietrechtsgesetz, Fed. Law Gazette No. 520/1981), which entered into force on 1 January 1982.

6. The applicants claim that the reduction of their rents amounted to an unjustified interference with their right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention. The applicants in the second case further allege that the reduction was discriminatory and contrary to Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1.

B. The proceedings

7. Application No. 10522/83 was introduced on 5 August and registered on 12 August 1983. Application No. 11011/84 was introduced on 22 May and registered on 19 June 1984. Application No. 11070/84 was introduced on 4 July and registered on 6 August 1984.

8. The Commission began its examination of the admissibility of Application No. 10522/83 on 14 May 1984, but decided to adjourn the further consideration. The examination of admissibility was resumed on 4 December 1984, when the Commission had also before it Applications Nos. 11011 and 11070/84. The Commission decided to give notice of all three applications to the respondent Government, in accordance with Rule 42, para. 2 (b) of its Rules of Procedure, and to invite them to submit before 22 March 1985 their observations in writing on the admissibility and merits of these applications.

9. The Government submitted observations concerning the first case on 4 March 1985 and observations concerning the other two cases on 19 March 1985. The applicants in the first case submitted observations in reply on 11 April 1985 and the applicants in the second and third cases on 9 May 1985.

10. The Commission decided on 8 July 1985 to join the cases and to invite the parties, in accordance with Rule 42, para. 3 (b) of the Rules of Procedure, to a hearing on the admissibility and merits of the applications.

11. The hearing was first scheduled for 6 March 1986, but at the Government's request postponed. At the hearing on 8 May 1986 the parties were represented as follows:

- the Government by their Agent, Botschafter Dr. Helmut Türk, Head of the International Law Department, Federal Ministry of Foreign Affairs, who was assisted by Ministerialrat Dr. Wolf Okresek, Federal Chancellery, Constitutional Law Department, and Ministerialrat Dr. Robert Tschugguel, Federal Ministry of Justice, Advisers;

- the applicants in the first case by Rechtsanwalt Dr. Hans Günther Medwed and Rechtsanwalt Dr. Gerold Kleinschuster, Graz; the applicants in the second case by Rechtsanwalt Dr. Ludwig Hoffmann, Innsbruck; the applicants in the third case by Rechtsanwalt Dr. Gerhard Benn-Ibler, Vienna.

12. Following the hearing, the Commission declared the applications admissible. The text of this decision, approved by the Commission on 16 July 1986, was on 22 October 1986 transmitted to the parties who were invited to submit before 31 December 1986 any supplementary observations on the merits which they wished to make. The Government and the applicants in the third case subsequently requested extensions of this time-limit which were granted by the President (until 28 February 1987 for the Government and 20 January 1987 for the applicants).

13. The applicants in the first case submitted their observations on 17 November 1986, the applicants in the second case on 13 January and the applicants in the third case on 19 January 1987. The Government submitted their observations on 26 February 1987. The applicants in the first case submitted observations in reply on 17 March 1987.

14. On 10 December 1986, 9 May, 8 July and 11 December 1987 and 7 May 1988 the Commission considered the state of proceedings.

15. After declaring the cases admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the cases. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

16. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. S. TRECHSEL, Acting President
G. SPERDUTI
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Sir Basil HALL

17. The text of this Report was adopted on 11 July 1988 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

18. The purpose of the Report, pursuant to Article 31 of the Convention is:

i) to establish the facts, and

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

19. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the applications as Appendix II.

20. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the cases

21. The facts are not in dispute between the parties. They may be summarised as follows:

1. Application No. 10522/83

22. The applicants in the first case jointly own a block of flats in Graz with several apartments leased out to tenants.

23. They bought this house in 1978 from the compensation for another real property which had been expropriated. They considered this to be a safe investment having regard to the legislation then in force which allowed to freely negotiate the rent in any new tenancy contracts. There were several unoccupied apartments in the house at the time of acquisition and this was reflected in the price which the applicants had to pay for the house.

24. Of the seven apartments in the house two were let to tenants whose contracts had been concluded before 1968 and whose rent was accordingly frozen at the level of 1914 (AS 23.75 and AS 23.80 monthly rent respectively). Five apartments were subsequently let under freely negotiated contracts pursuant to the 1967 legislation. One was let for a limited period of time (on the basis of a monthly rent of AS 1,300.-) and thus could not be struck by a measure of rent reduction under Section 44 of the 1981 Rent Act. The other four contracts were concluded on a permanent basis and could be subjected to such measures, but so far only one tenant has requested a reduction. In the other three cases the tenants allegedly wish to await the outcome of the present proceedings before they apply for a reduction. It would bring the rent down from AS 750.- to AS 232.-, from AS 2,850.- to AS 546.- and from AS 1,841.60 to AS 314.- respectively.

25. The apartment in respect of which a reduction was requested consists of two rooms and a kitchen (with a total surface of 40 m²). It was let on 15 September 1978 under a freely negotiated tenancy contract according to Section 16 para. 1 of the 1922 Rent Act as amended in 1967. The rent in this particular case was set at AS 1,870.- per month.

26. In application of the 1981 Rent Act, the tenant of the above apartment on 5 February 1982 applied to the competent Arbitration Board (Schlichtungsamt) of the City of Graz to reduce his rent to AS 330.- (= 150% of the regular rent for class D) as from 1 March 1982. After holding a hearing on 25 May 1982, the Board on 7 June 1982 allowed the application.

27. The applicants, dissatisfied with this decision, took the case to the courts, and the Board's decision thereby lost its effect. The tenant claimed that the apartment was in class D because when he rented the apartment it was without running water and toilet facilities. These facilities were subsequently installed in the apartment at the tenant's cost.

28. By a decision of 22 October 1982, the District Court (Bezirksgericht) of Graz confirmed that the apartment was in class D and that under Section 16 para. 2 of the Rent Act the regular monthly rent therefore should not exceed AS 5.50 per m². Under Section 44 para. 2, the rent had to be reduced to 150% of the regular amount, i.e. AS 8.25 per m², the total rent thus being AS 330.-. The overcharge as from 1 March 1982 (AS 12,320.-) had to be paid back to the tenant by virtue of Section 37 of the Act.

29. The applicants appealed claiming in particular that the restrictions resulting from the application of Section 44 of the Rent Act were unconstitutional. They invoked the Commission's decision on Application No. 8803/77 (Dec. 3.10.79, D.R. 17 p. 80) concerning the earlier rent protection legislation and argued that the Commission had found the restrictions under that legislation to be at the very limit of permissible interferences with property rights. The new legislation, being more restrictive, was in the applicants' view not permissible. The reduction of a freely and lawfully negotiated rent amounted to an expropriation of the landlord's property without

compensation. For these reasons, the applicants suggested that the appellate court refer the matter to the Constitutional Court for an examination of the constitutionality of the relevant legislation.

30. In addition, the applicants claimed that in the absence of a specific request by the tenant, the Court should not have ordered the reimbursement of the overcharged rent, and that the amount to be reimbursed was exaggerated because it included tax which the applicants had already paid but could not recover from the revenue office.

31. The Regional Civil Court (Landesgericht für Zivilrechtssachen) of Graz, however, rejected this appeal on 18 February 1983. It did not feel prompted to seize the Constitutional Court with the question of the constitutionality of Section 44 of the Rent Act, having regard to the Constitutional Court's case-law concerning similar issues. As regards the reimbursement, the Regional Court found that under the applicable provisions it had to be ordered ex officio, and the question of taxation was not in issue in the civil proceedings.

2. Application No. 11011/84

32. The applicants in the second case jointly own an apartment house in Innsbruck as a community of heirs. There are 15 apartments in this house of which 4 were let before 1968 on the basis of rent frozen at the level of 1914 (monthly rent AS 32.-, 90.-, 640.- and 212.- respectively). The other 11 apartments and business premises were let under freely negotiated contracts pursuant to the 1967 legislation, and could thus be made subject of measures of rent reduction under Section 44 of the 1981 Rent Act. However, so far only one tenant has requested such a measure. The other tenants (i.e. two firms with monthly rents of AS 25,120.50 and 4,655.- and eight private tenants with monthly rents of AS 3,660.-, 3,300.-, 3,093.-, 2,873.-, 2,735.-, 2,082.-, 1,827.- and 1,229.- respectively) allegedly wish to await the outcome of the present proceedings before making analogous requests.

33. The apartment in respect of which a reduction of rent was requested has a total surface of 68 m² and consists of three rooms and a kitchen, plus toilet and water facilities accessible through the corridor outside the apartment. It was let on 7 December 1972 under a freely negotiated tenancy contract according to Section 16 para. 1 of the 1922 Rent Act as amended in 1967.

34. The rent in this particular case was set at AS 800.- per month until August 1975, and at AS 1,500.- per month as from 1 September 1975 having regard to certain investments to be made by the tenants (including in particular the transfer of the water installations to the apartment). The rent was furthermore subject to an indexing provision on the basis of the consumer price index for 1966. As of April 1983, the rent would therefore have been AS 2,985.- per month. For reasons not explained by the parties, the tenants actually paid AS 1,308.30 as from November 1982.

35. On 4 October 1982, in application of the 1981 Rent Act, the tenants applied to the competent Arbitration Board (Schlichtungs-stelle) of the City of Innsbruck to reduce the rent to 150% of the regular rent for class D. The Board allowed the application by a decision of 6 April 1983.

36. However, the applicants then took the case to the courts, and the Board's decision thereby lost its effect. A new decision had accordingly to be taken by the District Court of Innsbruck.

37. Before the District Court, the applicants argued in particular that the apartment in question was in class B. Although the

improvement of standard had not been financed by themselves, but by the tenants, the improvements at the tenants' costs had been agreed in the original contract and had led to a reduction of the rent for the initial period. The tenants objected that the costs of their investments had by far exceeded the amount by which the rent had temporarily been reduced.

38. The District Court held on 22 June 1983 that the chargeable rent was in fact to be based on class D because the apartment had been in this class when the tenancy contract was concluded and the standard had not been improved by the landlords. It accordingly reduced the rent to AS 561.- as from November 1982. At the same time, it ordered the applicants to pay back to the tenants the overpayments received since that time (amounting to some AS 4,000.-).

39. The applicants appealed against this decision, claiming in particular that the application of the new legal provisions to them amounted to an expropriation or other disproportionate interference with their property rights as guaranteed by Article 5 of the Basic Law (Staatsgrundgesetz 1867) and Article 1 of Protocol No. 1 to the Convention. They suggested that the question of constitutionality should be referred to the Constitutional Court. Apart from that they again claimed that the chargeable rent should in any event be based on class B and not class D.

40. The Regional Court (Landesgericht) of Innsbruck partially allowed the appeal by a decision of 15 November 1983. It found that the District Court had failed to take into account the indexing provision of the initial contract. Apart from that it confirmed the District Court's decision.

In particular it found that the apartment had rightly been classified as a class D apartment having regard to its standard at the time of the conclusion of the tenancy contract.

41. The Regional Court had no doubts as to the constitutionality of the applicable legislation. Section 44 of the 1981 Act provided for an expropriation which was in conformity with the requirements of the Constitution and of the Convention. The public interest served by this legislation was the safeguarding of stable, socially and economically justified housing rents for apartments which as a rule served the urgent needs of those broad sectors of the population who depended on tenancy contracts. Such apartments were often provided by the landlords without any considerable expenditure of their own. In those circumstances it could hardly be maintained that the legislator had not acted in the public interest. Insofar as the legislation did not provide for any compensation for the landlords in respect of the above expropriation, the Court referred the applicants to the possibility to claim such compensation in the appropriate proceedings, i.e. non-contentious proceedings under the Railway Expropriation Act (Eisenbahn-Enteignungsgesetz).

42. Following this suggestion of the Regional Court, the applicants made an application to the District Court of Innsbruck on 28 December 1983 in which they claimed compensation from the State for legal expropriation, in the amount of AS 26,600.- (concerning the 14-month period between November 1982 and December 1983). The application was rejected on 5 July 1984 and the applicants did not appeal in time against this decision. Their subsequent application to be granted leave to appeal out of time was finally rejected by the Innsbruck Regional Court on 3 April 1986.

43. The applicants also filed an appeal against the Regional Court's above decision of 15 November 1983 claiming that the applicable legislation was unconstitutional. On 6 March 1984, the Supreme Court (Oberster Gerichtshof) rejected this appeal as inadmissible. It found that the appeal was directed against that part

of the Regional Court's decision which had confirmed the District Court's decision. An appeal against a decision of an appellate court was, however, admissible only insofar as it had not confirmed the decision of the court of first instance or if the appellate court itself had granted leave to appeal in view of the fundamental importance of the legal issue involved. In the present case leave to appeal had not been granted. In these circumstances there was no room for dealing with the applicants' arguments, in particular as regards the alleged unconstitutionality of the 1981 Rent Act.

3. Application No. 11070/84

44. The applicants in the third case are the owner and the usufructuary (Fruchtniesser) of a house in Vienna with several apartments leased out to tenants. Six further premises in the house are let for other than dwelling purposes under freely negotiated contracts (Section 16 para. 1 sub-para. 1 of the 1981 Rent Act).

45. Of the ten apartments let to private tenants two come under the provisions on the freeze of rent at the level of 1914; two are renovated apartments for which a freely negotiated rent is admissible under Section 16 para. 1 sub-para. 2; and two are class B apartments with a surface of more than 130m² for which a freely negotiated rent is admissible under Section 16 para. 1 sub-para. 4.

46. The remaining four apartments come within the scope of the maximum rent provisions of the 1981 Rent Act: In one case a new tenancy contract was concluded in 1986 under Section 16 para. 2 on the basis of square metre rent for class B (monthly rent AS 2,200.-), and in the other three cases freely negotiated rent agreements which now may be affected by measures of rent reduction under Section 44 were concluded in 1971, 1978 and 1979 respectively. Two of the tenants concerned who occupy class B apartments (monthly rent AS 6,132.25 and 5,847.- respectively) have not asked for a reduction of their rent. The third tenant has done so.

47. The relevant apartment consisting of six rooms, a kitchen, a corridor, a room with washing facilities and a toilet (total surface 200 m²) was let on 1 April 1979 under a freely negotiated tenancy contract according to Section 16 para. 1 of the 1922 Rent Act as amended in 1967. The rent was set at AS 3,800.- per month, subject to an indexing provision on the basis of the consumer price index for 1976. The rent had risen to AS 4,236.51 by January 1982.

48. In application of the 1981 Rent Act, the tenant of the above apartment wrote to the house administration on 23 December 1981 asking them to reduce his rent to AS 3,300.- (= 150% of the regular rent for class C) as from 1 January 1982. The applicants' lawyer replied on 13 January 1982 that the request was unjustified.

49. On 19 February 1982, the tenant applied to the competent Arbitration Board (Schlichtungsstelle) of the City of Vienna to reduce the rent to AS 3,300.- as from January 1982 according to the above legal provisions. After holding a hearing on 24 February 1982, the Board decided on 28 May 1982 to allow the application.

50. The applicants, dissatisfied with this decision, took the case to the courts, and the Board's decision thereby lost its effect. The applicants observed in particular that the tenant had in his original application referred to a square metre rent of AS 16.50, i.e. the rent corresponding to class B apartments. They submitted that this qualification of the apartment was correct and that the reduction of the rent was inadmissible in the case of apartments of class B exceeding a surface of 130 m² (Section 16 para. 1 sub-para. 4 of the Act). They further submitted that the house was situated in a zone of protection of monuments, and that the reduction of the rent

was inadmissible also under Section 16 para. 1 sub-para. 3. The tenant contested these arguments.

51. After holding several hearings, the District Court of Vienna City (Bezirksgericht Wien - Innere Stadt) decided on 31 August 1983 to reduce the rent to AS 3,300.- per month as from 1 January 1982. It held that the apartment had in fact been in class C at the date of the conclusion of the tenancy contract because the bathroom had not been fully equipped, and that Section 16 para. 1 sub-para. 4 of the Act was therefore inapplicable. Section 16 para. 1 sub-para. 3 was likewise inapplicable because it had not been proven that the house was situated in a zone of monument protection. It was true that the applicants had made considerable investments (in the total amount of AS 563,745.-), but this did not change the situation.

52. The applicants appealed from this decision alleging in particular that the apartment had been wrongly classified in class C, and that Section 16 para. 1 sub-para. 3 applied.

53. The Regional Civil Court (Landesgericht für Zivilrechtssachen) of Vienna rejected the appeal by a decision of 13 December 1983. It found that the District Court had correctly assessed the evidence and had rightly concluded that neither Section 16 para. 1 sub-para. 4 nor Section 16 para. 1 sub-para. 3 of the Act were applicable. In particular it had not been proven that the investments made by the applicants had been financed from other means than their rent income which they were legally obliged to use for maintenance purposes. It had therefore not been shown that they had borne a considerable financial risk of their own. In these circumstances the legal conditions for reducing the rent were fulfilled.

B. Relevant domestic law

1. The development of the rent control legislation until 1981

54. A system of rent control has existed in Austria since World War I. The 1922 Rent Act (Mietengesetz, Fed. Law Gazette No. 872/1922) which, subject to numerous amendments, remained in force until 1981, provided for the freezing of rents at the 1914 level (Section 2). The landlord was entitled to levy extra charges on account of current costs of administration, taxes, and special equipment (Betriebskosten, Sections 4 and 5). In case of the conclusion of new tenancy contracts he could ask for a supplement not exceeding a maximum amount laid down in the law (Neuvermietungszuschlag, Section 16 of the pre-1967 version).

55. The landlord was obliged to use the rent income for the normal maintenance costs of the building but he was not obliged to carry out any improvement measures (Section 6), which, however, could be undertaken with the agreement of the tenants concerned subject to a supplement to the rent to be paid by them (Section 5 first sentence). If the necessary maintenance costs were not covered by the rent income of the last seven years, the landlord could ask for an increased amount of rent (erhöhter Hauptmietzins) to be fixed by the court for a period not exceeding ten years. In that case the landlord was required to use the entire additional rent income during that period for the necessary maintenance measures (Section 7).

56. The 1922 Rent Act further provided for an important number of restrictions on the landlord's right to terminate tenancy contracts (Sections 19-23). In principle, such contracts could be terminated only for important reasons (Section 19 para. 1). The law specified what was to be regarded as an important reason within the meaning of this provision (Section 19 para. 2) and in practice the grounds of admissible termination of contract were interpreted in a restrictive manner. The contract did not terminate when the tenant died. The law provided for a right of succession (Eintrittsrecht) of near relatives (spouse, children and adoptive children, brothers and sisters) and

other persons who had lived in the household of the tenant (Section 19 para. 2 sub-para. 11). When the landlord or near relatives wished to use the apartment in question the contract could only be terminated if there existed an "urgent need" (which in practice was interpreted as meaning a "genuine emergency"), and if adequate alternative accommodation was put at the disposal of the tenant (Section 19 para. 2 sub-para. 6).

57. However, the above restrictions, in particular the restrictions on the claimable amount of rent, were not of universal application. No rent restrictions applied to apartments in buildings constructed after 1917 and to certain other apartments including apartments newly created after the entry into force of the 1922 Act (Section 1). A split housing market was therefore created which privileged the owners of newly constructed houses or apartments whose rental claims were subject only to the limitations resulting from the general provisions of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) concerning the law of contracts.

58. Under the German rule in Austria a price stop was introduced also in respect of certain tenancy agreements which did not come within the scope of the 1922 Rent Act (Mietzinsregelungsverordnung, Gesetzblatt für das Land Oesterreich, No. 159/1938). The price stop was maintained by Austrian legislation introduced in 1954 (Zinsstoppgesetz, Fed. Law Gazette No. 132/1954). In respect of tenancy contracts existing on 30 June 1954 the freely negotiated rent resulting from an earlier agreement could no longer be increased unless this was authorised by a judicial decision taken by analogous application of the relevant provisions of the 1922 Rent Act concerning rent increases. However, no restrictions applied to new contracts in respect of apartments which did not come within the scope of the 1922 Rent Act, i.e. first of all apartments in new houses.

59. In 1967, an amendment of the Rent Act (Mietrechtsänderungs-gesetz, Fed. Law Gazette No. 281/1967) brought about an important liberalisation also in respect of apartments which came within the scope of this Act. As from 1 January 1968 rent restrictions were continued only for earlier tenancy contracts which remained in force, including contracts maintained on the basis of the right of succession of another person than the original tenant. Here the freeze of rent continued to operate on the basis of conversion of each Crown of the 1914 rent into 1 Schilling for apartments and into 2 Schillings (3 Schillings as from 1 January 1969) for business premises. However, the parties could fix a higher rent by mutual agreement once the contract had lasted more than six months. New contracts were no longer subjected to any restrictions on the amount of rent even in respect of apartments which had previously been subject to rent control, provided that these apartments were relet within 6 months after the entry into force of the new legislation, or 6 months after vacation by the previous tenant (Section 16 para. 1, new version). The landlord was obliged to use at least half of his additional rent income for maintenance purposes (Section 16 para. 2).

60. The liberalisation of the market led to relatively high rents even for newly let apartments in old houses. The continued freeze of rent applied to existing contracts favoured a tendency for the perpetuation of old contracts, and a corresponding scarcity of vacancies in this category of apartments which had repercussions on the free market for new contracts. The relatively high amount of rent which could now be obtained for newly let apartments in old houses was also favoured by the existence of high rents in the market for newly constructed apartments which were exempted from the system of rent controls already before 1968. In 1981 a landlord could obtain on the free market up to thirty times the amount of rent frozen at the 1914 level.

61. The unfavourable development of the housing market led to the

re-introduction of rent controls for so-called substandard apartments in 1974. By a further amendment to the Rent Act (Mietengesetznovelle, Fed. Law Gazette No. 409/1974) fresh restrictions were introduced for new leases of such apartments. While the existing contracts in respect of these apartments remained unaffected (even if they were based on a free agreement concluded since 1968), new contracts could be concluded as from 1 August 1974 only on the basis of a legal square metre rent of AS 4.- (Section 16 para. 3 of the Rent Act as amended in 1974). As this amount was regarded as insufficient by many landlords, they preferred to leave vacant apartments in this category unoccupied, a fact which put an additional strain on the housing market and tended to favour higher rents for the remaining categories of apartments.

62. Apart from the above rent control provisions which affected mainly apartments in old houses constructed before World War I, the Austrian legislation prior to 1981 also included rent control provisions applicable to certain houses constructed at a later date, in particular houses constructed with public subsidies (Wohnbauförderungsgesetz 1968, Fed. Law Gazette No. 280/1967) or by non-profit housing associations (Wohnungsgemeinnützigkeitsgesetz 1979, Fed. Law Gazette No. 139/1979). This legislation contained detailed regulations on the calculation of rents which were based on the principle that they may not exceed the costs incurred by the owner. It has not been affected by the 1981 Rent Act.

2. The 1981 Rent Act (Mietrechtsgesetz)

63. The 1922 Rent Act (Mietengesetz) has been abrogated and replaced by a new Act (Mietrechtsgesetz, Fed. Law Gazette No. 520/1981) which entered into force on 1 January 1982. It was intended to bring about an overall reform of the law governing the relationship between landlords and tenants.

64. However, like the previous Rent Act, the 1981 Act is not of universal application to all tenancy contracts. Section 1 para. 2 exempts (i) premises let to certain types of enterprises, (ii) premises let as official residences, (iii) premises let for less than six months and (iv) premises let as secondary residences or for leisure purposes. Section 1 para. 3 furthermore excludes the application of the rent control provisions of the Act to buildings constructed and owned by non-profit housing associations which in this respect are subject to the special rent control provisions of the Non-Profit Housing Act (Wohnungsgemeinnützigkeitsgesetz, cf. para. 62 above). Section 1 para. 4 finally stipulates that only certain provisions (concerning the termination of tenancy contracts, the right of succession to tenancy contracts and maintenance contributions) shall apply to (i) buildings constructed without public subsidies after 30 June 1953, (ii) houses with not more than two separate apartments and (iii) freehold flats (Eigentumswohnungen) in buildings constructed after 1945. In these cases the amount of rent can be freely agreed without any restrictions.

65. As regards apartments and premises which come within the scope of the Act, a fundamental change has taken place concerning the system of rent control (cf. paras. 66-78 below). Further important modifications of the earlier legislation concern the landlord's obligations as to the maintenance of his property (cf. paras. 79-82 below). The provisions on termination of tenancy contracts have in substance been maintained subject to certain minor amendments (cf. paras. 83-84 below).

a) Provisions on rent control

66. But for the above exceptions (para. 64) all tenancy contracts governed by the 1981 Act are subject to certain measures of rent control. Three different types of such measures can be

distinguished:

- the general application of square metre rents to apartments in old houses constructed before 1945 ("Althauswohnungen") as regards new contracts (Section 16 paras. 2-4), and the possibility of tenants request a reduction to 150% of these rents as regards existing contracts which are based on a free rent agreement concerning such apartments (Section 44 paras. 2-3);

- the continued application of the previous rent restrictions in respect of existing tenancy contracts (Section 43 para. 2) subject to certain modifications (Sections 45 and 46);

- the introduction of a measure of moderation in respect of tenancy contracts where a free rent agreement is admissible (Section 16 para. 1).

aa) Square metre rent

67. The most important innovation of the 1981 Rent Act, and the one which is at issue in the present cases, has been the extension of the system of square metre rents (which in 1974 had been introduced in respect of substandard apartments, cf. para. 61 above) to all categories of apartments in houses constructed before 1945. Only if certain specific conditions are fulfilled is it admissible to conclude free rent agreements in respect of such apartments (cf. Section 16 para. 1).

68. If such conditions do not exist the rent applicable under any new tenancy contracts must not exceed the legal amounts laid down in Section 16 para. 2 of the Act. These are broken down according to four different classes of apartments ("Kategoriemietzins") without any further differentiation. The class is determined according to the condition of the apartment at the date of the conclusion of the tenancy contract (Section 16 para. 3). The applicable amounts are dynamic in the sense that they are adjusted to changes in the official consumer price index (Section 16 para. 4).

69. The system of square metre rents is not only the basis for any new tenancy contracts, it may also affect existing contracts concluded between 1968 and 1981 stipulating a freely negotiated rent. By virtue of Section 44 para. 2 a tenant occupying an apartment under a previously uncontrolled contract may apply to the competent authorities for a reduction of his rent (Mietzinsherabsetzung) to 150% of the regular amount calculated according to Section 16 paras. 2-4. In such cases the rent agreement shall be invalidated concerning the exceeding amount (Section 44 para. 3). The relevant provisions are reproduced below at paras. 77 and 78.

70. However, these provisions being part of an overall reform of the rent law must be seen in the context of the further measures of rent control introduced by the 1981 Rent Act which may be summarised as follows:

bb) Continued application of earlier rent restrictions

71. Where more far-reaching rent restrictions had been applicable under the previous legislation, they have in principle been maintained by the 1981 Rent Act (Section 43 para. 2). This concerns in particular tenancy contracts concluded before 1968 on the basis of rent frozen at the level of 1914, and contracts for substandard apartments concluded after 1974 on the basis of the regular square metre rent applicable at that time. Decisions authorising an increased amount of rent under Section 7 of the 1922 Rent Act have likewise been maintained.

72. However, if the rent does not reach two thirds of the

applicable square metre rent calculated according to Section 16 paras. 2-4, the landlord may levy the difference as a maintenance contribution (Erhaltungs- und Verbesserungsbeitrag), provided that he undertakes to carry out the necessary maintenance and improvement measures within the next ten years. If he does not comply with this undertaking, he must reimburse the tenant. A different calculation of the maintenance contributions, which is more favourable to the landlord, applies to premises let for other than dwelling purposes (Section 45).

73. Moreover, the continued application of the earlier rent restrictions is limited to the actual tenant and to certain persons who are entitled to continue the tenancy after his death, namely spouse, unmarried partner (Lebensgefährte) or near relatives under age who have lived in the tenant's household (Section 46 para. 1). If other persons entitled to continue the tenancy make use of this right, the landlord may charge the applicable square metre rent calculated according to Section 16 paras. 2-4 (Section 46 para. 2).

cc) Moderation of agreed rent

74. Agreements between the parties on the amount of rent are admissible under the 1981 Rent Act in respect of (i) all tenancy contracts concluded for other than residential purposes, (ii) tenancy contracts concluded for residential purposes as regards apartments in houses constructed after 1945 and certain apartments in houses constructed earlier if specific conditions are fulfilled (for details see Section 16 para. 1 of the Act, reproduced at para. 77 below).

75. However, the rent agreed in these cases may not exceed the appropriate amount which is justified by the particular conditions of the property in question (cf. the introductory phrase of Section 16 para. 1). If it does, it may to this extent be invalidated by a judicial decision (Section 16 para. 5 in conjunction with Section 37 para. 1 sub-para. 8).

76. This applies not only to new contracts, but also to existing contracts stipulating a freely negotiated rent (cf. Section 43 para. 1).

dd) Text of the relevant rent control provisions

77. Section 16 of the 1981 Rent Act read as follows at the time of the facts at issue (it has subsequently been amended in certain respects):

(German)

"Vereinbarungen über die Höhe des Hauptmietzinses

(1) Vereinbarungen zwischen dem Vermieter und dem Mieter über die Höhe des Hauptmietzinses für einen in Hauptmiete gemieteten Mietgegenstand sind ohne die Beschränkungen des Abs. 2 bis zu dem für den Mietgegenstand nach Grösse, Art, Beschaffenheit, Lage, Ausstattungs- und Erhaltungszustand angemessenen Betrag zulässig, wenn

1. der Mietgegenstand nicht zu Wohnzwecken dient; ...

2. der Mietgegenstand in einem Gebäude gelegen ist, das auf Grund einer nach dem 8. Mai 1945 erteilten Baubewilligung neu errichtet worden ist, oder der Mietgegenstand auf Grund einer nach dem 8. Mai 1945 erteilten Baubewilligung durch Um-, Auf-, Ein- oder Zubau neu geschaffen worden ist; ...

3. der Mietgegenstand in einem Gebäude gelegen ist,

an dessen Erhaltung aus Gründen des Denkmalschutzes, der Stadt- oder Ortsbildpflege oder aus sonst vergleichbaren Gründen öffentliches Interesse besteht, sofern der Vermieter unbeschadet der Gewährung öffentlicher Mittel zu dessen Erhaltung nach dem 8. Mai 1945 erhebliche Eigenmittel aufgewendet hat;

4. der Mietgegenstand eine Wohnung der Ausstattungskategorie A, deren Nutzfläche 90 m² übersteigt, oder eine Wohnung der Ausstattungskategorie B, deren Nutzfläche 130 m² übersteigt, ist, sofern der Vermieter eine solche Wohnung innerhalb von sechs Monaten nach der Räumung durch den früheren Mieter oder Inhaber an einen nicht zum Eintritt in die Mietrechte des früheren Mieters Berechtigten vermietet;

5. der Mietgegenstand eine Wohnung der Ausstattungskategorie A oder B in ordnungsgemässem Zustand ist, deren Standard vom Vermieter nach dem 31. Dezember 1967 durch Zusammenlegung von Wohnungen der Ausstattungskategorie C oder D, durch eine andere bautechnische Aus- oder Umgestaltung grösseren Ausmasses einer Wohnung oder mehrerer Wohnungen der Ausstattungskategorie C oder D oder sonst unter Aufwendung erheblicher Mittel angehoben worden ist; ...

6. der Mietgegenstand eine Wohnung der Ausstattungskategorie C in ordnungsgemässem Zustand ist, deren Standard vom Vermieter nach dem 31. Dezember 1967 durch Zusammenlegung von Wohnungen der Ausstattungskategorie D, durch eine andere bautechnische Aus- oder Umgestaltung grösseren Ausmasses einer Wohnung oder mehrerer Wohnungen der Ausstattungskategorie D oder sonst unter Aufwendung erheblicher Mittel angehoben worden ist; ...

7. das Mietverhältnis länger als ein halbes Jahr bestanden hat.

(2) Liegen die Voraussetzungen des Abs. 1 nicht vor, so darf der zwischen dem Vermieter und dem Mieter für eine in Hauptmiete gemietete Wohnung vereinbarte Hauptmietzins je Quadratmeter der Nutzfläche und Monat nicht übersteigen:

1. 22 S für eine Wohnung der Ausstattungskategorie A, das ist eine Wohnung in brauchbarem Zustand, deren Nutzfläche mindestens 30 m² beträgt, die zumindest aus Zimmer, Küche (Kochnische), Vorraum, Klosett und einer dem zeitgemässen Standard entsprechenden Badegelegenheit (Baderaum oder Badenische) besteht, die über eine zentrale Wärmeversorgungsanlage oder eine Etagenheizung oder eine gleichwertige stationäre Heizung und über eine Warmwasseraufbereitung verfügt;

2. 16,50 S für eine Wohnung der Ausstattungskategorie B, das ist eine Wohnung in brauchbarem Zustand, die zumindest aus Zimmer, Küche (Kochnische), Vorraum, Klosett und einer dem zeitgemässen Standard entsprechenden Badegelegenheit (Baderaum oder Badenische) besteht;

3. 11 S für eine Wohnung der Ausstattungskategorie C, das ist eine Wohnung in brauchbarem Zustand, die zumindest über eine Wasserentnahmestelle und ein Klosett im Inneren verfügt;

4. 5,50 S für eine Wohnung der Ausstattungskategorie D, das ist eine Wohnung, die entweder über keine Wasserentnahmestelle oder über kein Klosett im

Inneren verfügt oder bei der eine dieser beiden Einrichtungen nicht brauchbar ist und auch nicht innerhalb angemessener Frist nach Anzeige durch den Mieter vom Vermieter brauchbar gemacht wird.

(3) Die Ausstattungskategorie nach Abs. 2 richtet sich nach dem Ausstattungszustand der Wohnung im Zeitpunkt des Abschlusses des Mietvertrags. ...

(4) Die im Abs. 2 genannten Beträge vermindern oder erhöhen sich in dem Mass, das sich aus der Veränderung des vom Österreichischen Statistischen Zentralamt verlautbarten Verbraucherpreisindex 1976 oder des an seine Stelle tretenden Index gegenüber dem Zeitpunkt des Inkrafttretens dieses Bundesgesetzes ergibt, wobei Änderungen solange nicht zu berücksichtigen sind, als sie 10 vH des bisher massgebenden Betrages ... nicht übersteigen. ...

(5) Übersteigt der nach Abs. 1 vereinbarte Hauptmietzins den für den Mietgegenstand nach Grösse, Art, Beschaffenheit, Lage, Ausstattungs- und Erhaltungszustand angemessenen Betrag, so ist die Mietzinsvereinbarung so weit unwirksam, als sie dieses Höchstmass überschreitet. Ist der Hauptmietzins nach den Bestimmungen des Abs. 2 und 3 zu bemessen, so ist die Mietzinsvereinbarung insoweit unwirksam, als sie das darnach zulässige Höchstmass überschreitet.

(6) ... "

(English Translation)

"Agreements concerning the amount of the basic rent

(1) Agreements between the landlord and the tenant concerning the amount of the basic rent for premises rented under a head lease shall be permissible, irrespective of the restrictions set out in para. 2, up to the sum appropriate to the size, type, nature, situation, fittings and condition of the property, if:

1. the rented property is not used for residential purposes; ...

2. the property is located in a building which has been newly constructed on the basis of a building permit issued after 8 May 1945, or if the property has been renovated by conversion, the addition of an extra storey, the installation of fixtures or the building of an extension on the basis of a building permit issued after 8 May 1945; ...

3. the property is located in a building which, for reasons of public interest, should be preserved as a historic building, in order to conserve the townscape or landscape or on similar grounds, provided that, apart from the grant of public funds, the landlord has himself made a considerable financial contribution for its preservation after 8 May 1945;

4. the rented property is a class A flat with a usable floor-space of over 90m² or a class B flat with a usable floor space of over 130m², provided that the landlord lets a flat of this description within six months after it has been vacated by the previous tenant or occupier to a person not entitled to succeed to the rights of the previous tenant;

5. the rented property is a class A or B flat in a good condition, the standard of which has been considerably raised by the landlord, after 31 December 1967, by combining class C or D flats, by other large-scale construction measures for the extension or conversion of one or more class C or D flats or otherwise by means of considerable financial expenditure; ...

6. the rented property is a class C flat in a good condition, the standard of which has been raised by the landlord after 31 December 1967, by combining class D flats or by other large-scale construction measures for the extension or conversion of one or more class D flats or otherwise by the investment of considerable financial expenditure; ...

7. the tenancy has been in existence for longer than six months.

(2) If the conditions set out in para. 1 are not satisfied, the basic rent agreed between the landlord and the tenant for a flat rented under a head lease may not exceed, per month and per square metre of usable floor-space:

1. AS 22.- for a class A flat, that is a habitable flat with at least 30m² of usable floor-space, comprising at least a room, a kitchen (kitchenette), hall, lavatory and bathing facilities corresponding to the current standard (bathroom or bathing recess) and which has central heating, or single-storey heating, or comparable built-in heating and a source of hot water;

2. AS 16.50 for a class B flat, that is a habitable flat comprising at least a room, a kitchen (kitchenette), hall, lavatory and bathing facilities corresponding to the current standard (bathroom or bathing recess).

3. AS 11.- for a class C flat, that is a habitable flat which has at least a water supply and an indoor lavatory;

4. AS 5.50 for a class D flat, that is a flat which has either no water supply or no indoor lavatory, or which has these facilities one of which is not usable and has not been repaired within a reasonable time after the tenant has informed the landlord [of the defective state].

(3) The classes as described in para. 2 shall be determined by the condition of the flat at the time of the tenancy agreement. ...

(4) The amounts specified in para. 2 shall decrease or increase in accordance with any changes which occurred in the 1976 Consumer Price Index published by the Austrian Central Office of Statistics (or the index replacing it) as compared with the time when this Federal Act comes into force. Changes not exceeding 10% of the previously prescribed amount shall not be taken into account. ...

(5) If the basic rent agreed under para. 1 exceeds the appropriate amount for the size, type, nature, situation, fittings and condition of the property, the agreement as to rent shall be invalid to the extent that it exceeds this maximum. If the basic rent has to be calculated according to the provisions of paras. 2 and 3, the agreement as to rent shall be invalid to the extent that it exceeds the maximum permitted in those paragraphs.

(6) ... "

78. The relevant parts of Section 44 of the 1981 Rent Act read as follows:

(German)

"Überhöhter Hauptmietzins

(1) ...

(2) Der Hauptmieter einer vor dem Inkrafttreten dieses Bundesgesetzes gemieteten Wohnung kann vom Vermieter die Ermässigung des vorher vereinbarten Hauptmietzinses begehren,

1. wenn für die Wohnung im Zeitpunkt der Vereinbarung über die Höhe des Hauptmietzinses die in § 16 Abs. 1 Z. 2 bis 6 genannten Voraussetzungen nicht vorgelegen haben und

2. wenn der vereinbarte Hauptmietzins den Betrag um mehr als die Hälfte übersteigt, der sich für die Wohnung nach ihrer Grösse und Ausstattungskategorie im Zeitpunkt des Abschlusses des Mietvertrags oder einer späteren, vom Vermieter finanzierten Standardverbesserung nach § 16 Abs. 2 bis 4 als Hauptmietzins errechnet.

(3) Begehrt der Hauptmieter vom Vermieter die Ermässigung des vereinbarten Hauptmietzinses, so ist ab dem auf den Zugang dieses Begehrens folgenden Zinstermin die getroffene Vereinbarung über den Hauptmietzins insoweit rechtsunwirksam, als der Hauptmietzins das Eineinhalbfache des Betrages übersteigt, der sich für die Wohnung nach ihrer Grösse und Austattungskategorie (Abs. 2 Z. 2) als Hauptmietzins errechnet. Ist der Vermieter auf Grund einer Wertsicherungsvereinbarung zu einer Erhöhung des Hauptmietzinses berechtigt, so kann er ... auch die Erhöhung des ermässigten Hauptmietzinses begehren ... "

(English Translation)

"Exorbitant basic rent

(1) ...

(2) The tenant under the head lease of a flat rented before this Federal Act came into force, may require the landlord to reduce the basic rent which was previously agreed if:

1. the conditions set out in Section 16 para. 1 sub-paras. 2 to 6 were not satisfied in respect of the flat when the amount of the basic rent was agreed, and

2. the agreed basic rent exceeds by more than a half the amount of the basic rent calculated under Section 16 paras. 2-4 for the size and class of the flat at the time of the tenancy agreement or a subsequent improvement to the standard of the premises, financed by the landlord.

(3) If the tenant under the head lease requires the landlord to reduce the agreed basic rent, the agreement concerning the basic rent shall be invalid as from the first date on which rent becomes due following receipt of the request, to the extent that the basic rent exceeds one and a

half times the amount calculated for the size and class of flat (para. 2 sub-para. 2). If the landlord is entitled to increase the basic rent under a guaranteed value agreement, he may also require an increase in the reduced basic rent ..."

b) Provisions on the maintenance of buildings

79. The obligations of the landlord as to maintenance of buildings have been extended by the 1981 Rent Act. He is obliged to keep the building in a state of repair (Erhaltung) which corresponds to the local conditions (ortsüblicher Standard) and to use the current rent income obtained during the period of maintenance measures plus the rent income of the last ten years for this purpose. If this is not sufficient, he is obliged to use his own or borrowed capital, subject to an appropriate interest rate, in order to cover the difference (Section 3). In this context, the Act contains detailed accounting provisions (Section 20) which, inter alia, allow the landlord to keep for himself 20% of the costs spent for maintenance and improvement work if it has been carried out without asking for increased rents under Section 18 (Section 20 para. 1 sub-para. 2 b).

80. If the rent income of the last ten years and the expected rent income of the following ten years is not sufficient to cover the costs of imminent necessary maintenance measures, including the costs of the landlord's own or borrowed capital, the landlord may claim an increased amount of rent (erhöhter Hauptmietzins) from the tenants which shall be determined by a judicial decision (Section 18).

81. If the rent income of the last ten years is sufficient, or if it is not sufficient and the majority of tenants reach an agreement with the landlord as to the financing of the difference, the landlord is further obliged to carry out adequate improvement measures (nützliche Verbesserungen, Section 4). Such improvements concern inter alia the transfer of water installations and lavatories from outside into the apartments, and the upgrading of class C and D apartments (in some cases also by lumping together several apartments, Section 5) which then will be subject to the square metre rent according to Section 16 para. 2. The consent of the tenants concerned is required, but refusal to consent to the upgrading of a class D apartment constitutes a ground for the termination of the contract provided alternative accommodation is put at the disposal of the tenant (Section 30 para. 2 sub-para. 16).

82. The tenants may apply to the court for an order compelling the landlord to carry out maintenance and improvement measures (Section 6). However, they may also undertake such measures at their own cost and the landlord's right to object to this is restricted in certain respects (Section 9). If the tenant has carried out improvement measures he can claim reimbursement from the landlord when the contract is terminated (Section 10).

c) Provisions on the termination of tenancy contracts

83. The restrictions on the landlord's right to terminate tenancy contracts (cf. para. 56 above) have in substance been maintained by the 1981 Rent Act. In connection with the reformulation of the relevant provisions (Section 30) certain relaxations were brought about, e.g. where the landlord urgently needs an apartment for himself or for near relatives (para. 2 sub-paras. 8 and 9) or where he wishes to demolish, modify or improve a building (sub-paras. 14-16). Generally the applicable standard is still a strict one.

84. The unilateral right of the spouse, partner or near relatives to continue the tenancy after the death of the original tenant if they have occupied the apartment together with him has been maintained (Section 14), but only some of these persons can now profit from the continued application of rent restrictions resulting from the 1922

Act while the others are required to pay rent calculated on the basis of Section 16 para. 2 of the 1981 Act (cf. para. 73 above). The same persons now have a right of succession without modification of the rent already during the lifetime of the tenant if they have occupied the apartment together with him and if he leaves (Section 12). A tenant may exchange flats with another tenant without the consent of the landlord if the competent court so decides (Section 13).

d) Procedural provisions

85. Certain measures affecting the tenancy, including a reduction of rent under Section 44 of the 1981 Rent Act, require a judicial decision. According to Section 37 the relevant procedure takes place before the competent District Court in non-contentious proceedings (Verfahren ausser Streitsachen).

86. However, in certain municipalities where this is justified by the number of cases an administrative body may be set up to deal with the matter in the first place (Section 38). In these municipalities the court procedure can be instituted only after the administrative decision has been given. The Court procedure is not construed as an appeal against this decision, but as an entirely new procedure which has the effect that the administrative decision is simply set aside (Section 39).

3. Criticism of the legislation and review of its constitutionality

87. The 1981 Rent Act was adopted after heated debates in Parliament and in the media, in which representatives of the political parties and interest groups took part. This discussion has continued thereafter.

88. Harsh criticism was expressed in particular concerning the extremely complicated structure of the legislation and the resultant administrative difficulties created for the landlords. As regards the introduction of square metre rents, the criticism focussed on the appropriateness of this system as such, the lack of differentiation according to the particular circumstances of the buildings concerned especially as to regional market differences, and the low amount of the regular rents which in many cases allegedly are not sufficient to cover normal maintenance costs. It has also been doubted in many quarters that it is justified to apply the system of square metre rents to existing contracts and to leave it to the tenants concerned to apply for a reduction.

89. In the latter respect it was disputed whether this measure amounted to an expropriation and whether it was in conformity with the Constitution (cf. Glassl, Die Mietzinsherabsetzung gemäss § 44 Abs 2 und 3 MRG in konventionsrechtlicher Sicht, Österreichische Immobilienzeitung 1982 p. 4; Kassowitz, Mietzinsherabsetzung gemäss § 44 Abs 2 und 3 MRG und Bundesverfassung, Österreichische Immobilienzeitung 1984, p. 156; Gutknecht, Das Recht auf Wohnen und seine Verankerung in der österreichischen Rechtsordnung, Juristische Blätter 1982, p. 173; Funk, Verfassungsrechtliche Fragen des Mietrechtsgesetzes, in Korinek-Krejci, Handbuch zum Mietrechtsgesetz, 1985).

90. Nevertheless, this matter has apparently not been brought before the Constitutional Court (Verfassungsgerichtshof). According to the relevant provisions of the Federal Constitution (Bundes-Verfassungsgesetz, Articles 140 and 144) the individuals concerned have no possibility to seize this Court directly if the civil courts are competent. The civil courts on appeal level can request a review by the Constitutional Court if they have doubts as to the constitutionality of a legal provision which they are required to apply in a particular case (Article 89 para. 2 of the Federal Constitution in conjunction

with Article 140). However, as the present cases show, the competent civil courts had no such doubts concerning Section 44 of the 1981 Rent Act.

91. This is borne out in particular by a decision of the Supreme Court (Oberster Gerichtshof) of 3 July 1984 (50b 86/83, SZ 57/125) where it was stated that Section 44 does not give rise to any doubts concerning its constitutionality.

92. The Supreme Court considered that the legislation had for historically justified reasons limited the parties' freedom to agree on the amount of rent. In this respect it referred to the travaux préparatoires of the 1981 Act according to which the most difficult but also the most important part of the legislative reform was the gradual and smooth adjustment of existing leases to the new system. As regards this interference with existing tenancy contracts, the Court observed that the renting of an apartment was a continuing contract (Dauerschuldverhältnis) which in general was not entirely exempt from adjustments and changes. The fact that the 1974 Amendment had not interfered with existing contracts when introducing maximum rents for substandard apartments had no bearing on the admissibility of such a measure as part of the comprehensive reform of the rent law by the 1981 Act.

93. In the Supreme Court's view there was no provision in the Federal Constitution which in principle prevented ordinary legislation from interfering with lawfully acquired rights. The new provisions conformed strictly with the legislative policy of bringing existing leases into line with the new system of landlord-tenant relationships and were intended to ensure that the hiatus between the old and new systems remained small. Section 44 was a suitable instrument for achieving this aim. It enabled the landlord to receive 50% more rent than in case of re-letting and ensured that the tenant would not have to pay an unduly high rent. This was in line with the principles underlying Section 935 of the Civil Code (laesio enormis) and the Consumer Protection Act.

94. The tenant's power to have the rent reduced must be regarded in the whole context of the new legislation. By granting this right, the legislature had neither acted arbitrarily nor exceeded its powers, but had stayed within its margin of appreciation, in particular as the new possibilities of the tenants were counter-balanced by a series of provisions relaxing the freeze of rents at the 1914 level.

95. The Supreme Court considered that the reduction of rent involved merely a limitation on property, and not an expropriation within the meaning of Article 5 of the Basic Law on the Rights of Citizens (Staatsgrundgesetz 1867) which authorises expropriations in the general interest. While this Article also applied to limitations of ownership rights, the legislation could enact such limitations in the general interest without infringing the Constitution if they did not affect the essential content (Wesensgehalt) of the fundamental right of inviolability of property nor otherwise violate constitutional principles. This was not the case as Section 44 was necessary in the public interest and formed a well-balanced framework for adjusting old legislation to new legislation.

96. The Supreme Court further observed that under Article 1 of Protocol No. 1 to the Convention controls of the use of property must be in accordance with the general interest. As the Constitutional Court had confirmed, restrictions on property which complied with these principles were not unconstitutional. Therefore the interference with existing contracts was not incompatible with Article 1 of Protocol No. 1 either.

97. The Supreme Court finally denied a violation of the principle of equal treatment (Article 7 of the Federal Constitution) because it

considered that, taking the overall context into account, the system of rent adjustment was objectively justified.

4. Assessment of the value of real property

98. The assessment of the value of real property in Austria is governed by the Real Property Valuation Regulations (Realschätzordnung, Imp. Law Gazette No. 175/1897). According to these regulations buildings that are or can be rented in whole or in part as well as the open areas attached to them are always subject to a dual assessment, i.e. according to their capitalised rent proceeds and according to the value of the land and building.

99. The rent proceeds must be determined not only in respect of apartments which are actually let to tenants, but also in respect of apartments which at the time are vacant. The annual payments of taxes and other fiscal charges, the fire insurance premium and the annual average maintenance costs are to be deducted from the gross rent (Section 20 para. 2). The value of the land and buildings consists of the sales price of the land (Section 17) and the value of the buildings (Section 20 para. 1).

100. At the time of the facts of the present cases it was a stringent legal requirement that the mean value of the above two assessments be taken as the estimated value (Section 16 para. 3, former version). Repair costs caused by the bad state of buildings and exceeding the annual maintenance costs were deductable from this value (Section 20 para. 3).

101. Section 16 para. 3 has been amended with effect from 1 January 1986 (Fed. Law Gazette No. 561/1985). Now the estimated value is to be fixed within the range of the two aforementioned assessments and the reason why it is closer to either one or the other must be given. The surveyor thus has more latitude in his assessment.

III. SUBMISSIONS OF THE PARTIES

A. The applicants

102. The applicants in the three cases complain that their property rights under Article 1 of Protocol No. 1 to the Convention have been violated.

103. The applicants in case No. 11011/84 further allege a violation of Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, in that they were discriminated against in comparison with certain other categories of landlords.

1. Article 1 of Protocol No. 1

a) General

104. The applicants claim that the reduction of the rent due to them under lawfully concluded tenancy contracts cannot be described as a legitimate measure to control the use of property in accordance with the general interest. They generally consider the degree of interference with the landlords' rights brought about by the 1981 Rent Act as being disproportionate and in particular deny a pressing social need justifying such an interference with existing rent agreements.

105. The applicants distinguish the present cases from Application No. 8003/77 (Dec. 3.10.79, D.R. 17 p. 80) where the Commission qualified restrictions under the earlier rent legislation as a regulation of the use of property. They submit that, unlike the applicant in that case, they were not affected by legal restrictions which existed when they acquired the property nor could they hope for a gradual reduction of the impact of such restrictions. In fact the

1981 Act introduced new and more far-reaching restrictions which interfered with the substance of their property rights. While the restrictions under the earlier legislation were considered as proportionate to the aims of social policy permitted by the second paragraph of Article 1 of Protocol No. 1, this could not be said of the new additional restrictions under the 1981 Act even if they were to be qualified as regulations of the use of property.

106. The applicants claim that these new restrictions amounted to expropriation measures, and that they therefore come within the scope of the first paragraph of Article 1.

107. The applicants consider that there has been a legal expropriation of their contractual rights under the rent agreements, and at the same time a de facto expropriation of the substance of their real property.

108. Their contractual rights were based on the rent agreements concluded before the entry into force of the 1981 Act in conformity with the earlier legislation which had been in force since 1967. The applicants claim that their contractual rights under these agreements are "possessions" within the meaning of Article 1 of the Protocol. The general principles of international law, to which Article 1 refers, concern a concept of "property" which extends to all acquired or vested rights of economic value, including contractual rights.

109. The applicants also refer to the case-law of the Austrian Constitutional Court according to which the concept of "property" means all private rights of economic value, including besides the full right of ownership any part of this full right as a special right. This also accords with the notion of "property" within the meaning of the Austrian Civil Code. Section 353 of the Code defines property in the objective sense as "everything which belongs to a person, all his material and immaterial things", the latter including any rights of economic value (cf. Sections 285, 292). According to Section 354 property in the subjective sense is "the right to dispose of the substance and use of a thing at one's discretion, and to exclude any other person therefrom".

110. The use of real property, such as an apartment house, by the conclusion of tenancy contracts is in the applicants' view an essential part of the ownership right. Its nature as a separate right is shown by the fact that it can be transferred to another person than the owner, e.g. by the creation of a right of usufruct as in the third of the present cases. The usufructuary has the full right to decide on the use of the property in question and he can conclude tenancy contracts without the consent of the owner which will be binding on the owner when the usufruct is terminated. If the right of an usufructuary to use the property is a separate right, there is no reason why the same right should not also be considered as a separate property if it belongs to the owner of the real property in question.

111. The right in question is an existing right. It is not conditional in the sense that it will come into existence only at some future date (such as a right to inherit) or that it concerns a claim which has previously been circumscribed by specific legislation (such as the claim to fees considered in Application No. 8410/78, Dec. 13.12.79, D.R. 18 p. 216, to which the Government refer, cf. para. 140 below). It is a well-acquired right based on the legislation which was in force in Austria between 1968 and 1981 and which allowed the conclusion of freely negotiated rent agreements. The applicants were entitled to trust that those agreements would be respected by any future legislation.

112. In the applicants' submission there has been a legal expropriation of their contractual rights under the rent agreements.

While the interference with their contractual rights has not been brought about immediately by the legislation, which leaves the decision to seek a reduction of rent to the tenant, it is nevertheless a legal expropriation. In fact the tenant has been authorised by the legislation to expropriate the landlord, and no discretion was left to the authorities in this respect.

113. The applicants argue that the 1981 Act had a retroactive effect in that it allowed the tenants to obtain a judicial decision by which earlier agreements were partially declared void. In this way the tenants were encouraged to commit a breach of contract in respect of obligations which they had accepted under the said agreements. Such a measure could not be in the public interest, in particular as the applicants' acquired right to the rent was reduced very considerably without their being able to obtain any compensation.

114. As regards the alleged de facto expropriation of the applicants' real property, it is submitted that it belongs to the substance of the ownership right in a block of flats to be able to draw benefit from leases. This has been recognised by the Commission in Application No. 8003/77 (loc cit). However, by the cumulation of the various restrictions contained in the rent legislation, the landlord is reduced to the state of a mere administrator of his property. The philosophy underlying this legislation is that the landlord shall not be able to obtain any profit from his property. He must now in principle use the whole of the rent proceeds for the maintenance and repair of the building while under the previous legislation only half of the rent income from freely negotiated agreements was to be reserved for maintenance purposes and no obligations existed to improve the building. Moreover, the reference period of rent income to be used for maintenance purposes has been prolonged from 7 to 10 years.

115. Furthermore, the landlord's right to give notice to his tenants is severely restricted. For instance, it is virtually impossible to give notice to a tenant on the ground that a flat is needed for housing purposes of the owner, while on the other hand a very restrictive approach is taken when the ground of notice is that the tenant does not really need the flat. The tenant's right to transfer the tenancy contract to other persons is very broad, and a tenant may exchange his flat for that of another person without the landlord's consent being required. The landlord keeps no more than the nudum ius, i.e. the title in the property; he is deprived of the possibility to make an economically reasonable use of it.

116. By the introduction of new restrictions on the landlord, in particular as regards his right to fix the amount of rent by agreement with the tenant, the 1981 Act has led to a considerable reduction of the value of the real property which in fact amounts to a de facto expropriation of this property. According to the Real Property Valuation Regulations the value of blocks of flats depends mainly on the capitalised rent proceeds (Ertragswert), and this value has considerably decreased following the introduction of new maximum rents. In fact, the reduction of the rent to an amount which does not exceed the maintenance costs has the effect that the value based on capitalised rent proceeds is no longer a relevant factor for determining the value of the real property. It will be assessed more or less exclusively on the basis of the value of the land and buildings. This means an enormous decrease of the sales value. Buildings affected by the new restrictions are in practice very difficult to sell.

117. The applicants contest the Government's submission that restrictions on the sales value of apartment houses have always existed in Austria. Such restrictions did not exist between 1968 and 1981 insofar as during this period it was possible to conclude free rent agreements. They further observe that in each of the buildings

concerned in the present cases there are other tenancy contracts in which a reduction of rent can be requested and that new leases will in any event come within the scope of the even less favourable provisions of Section 16 paras. 2-4.

118. The applicants claim that, while the formal right to mortgage their real property for the purpose of obtaining a loan has not been taken away, there has been an interference with their property rights in this respect as well. The value of the real property having decreased, there is no longer the same economic basis for taking out a mortgage. In practice, loans can be obtained for mortgage only if they are intended for maintenance or repair work. Loans for other purposes would have to be paid back from other sources than the rent income. The applicants finally refer to the difficulty of those landlords who have contracted a loan under the earlier regime which they now are unable to pay back from the reduced rent income.

119. The applicants submit that the measures complained of violate the public interest. The legislation was criticised by representatives of all political parties. It is against the public interest to encourage tenants to violate the principles of good faith and to commit breaches of contract. The measures complained of lack a social justification and are disproportionate to the aim pursued.

120. The applicants find no urgent need for this legislation. The housing shortage to which the Government refer does not in reality exist. There are in fact some 100,000 - 150,000 unoccupied flats, and a considerable proportion of these are in houses affected by the legislation. Moreover, many of the flats coming under the legislation are not really needed by the tenants because they frequently have more than one flat. This is a consequence of the rent protection legislation, i.e. of the combined effect of cheap rents and generous application of provisions to protect tenants against termination of their contracts or provisions enabling them to transfer their tenancy rights to others. The legislation leads to a situation where the landlords prefer to leave flats unoccupied rather than letting them at an economic loss. There is also a trend away from rented apartments to owning property. In 1982 already 52% of the population lived in houses or apartments of their own. This shows that the economic and social importance of the rent legislation is limited.

121. The proportion of cases in which rent reductions under Section 44 of the Act take place is very small. That the legislation was not needed is also shown by the fact that the decision to seek a reduction of the rent is left to the tenant, and that the legislation provides for many exceptions. Also, it was not considered necessary in 1974 when square metre rents were first introduced for substandard flats to interfere with existing rent agreements. The 1981 Act now allows to interfere with such agreements even in respect of other categories of flats.

122. The regular rents fixed by the 1981 legislation do not, in the applicants' view, correspond to economic realities. A study prepared by a private house-owner association shows that an average square metre rent of AS 25.- is necessary to maintain houses. A survey of rents paid on the free market discloses a level of rents which is considerably above the legal rents but in no way exaggerated. The general level on the market is only 20% above that applicable to flats rented from municipalities which must be deemed to be based on special social considerations and which nevertheless often do not come within the scope of the rent protection legislation. It is not justified in the circumstances to place a special social burden on private house owners.

123. The applicants contest that calculation of the regular rents is based on sound economic principles. The mode of calculation explained by the Government was not used when the

legislation was being prepared. The Government had earlier stated that there was no reliable calculation of average costs, and that it would

hardly be possible to make such a calculation since each house is in a completely different condition. The applicants note that no differentiation is made between individual houses according to their particular conditions, nor any distinction with regard to regional differences. The same level of rent is applicable in big cities and rural areas, in the capital and elsewhere despite considerable regional market differences.

124. The applicants claim that their tenants are able to pay economically reasonable rents. The average income in Austria is comparable to that in other Western European States, but the level of rent envisaged by the legislation is very far below the standard in those countries. It would be socially justified for a tenant to spend about 20 to 25% of his income for rent. The Austrian legislation does not make any social differentiation, every tenant can ask for a reduction of rent irrespective of his income. It would be more in line with a social housing policy to give subsidies to tenants who really cannot afford the rent. The applicants observe that a system of rent subsidies exists and that tenants who cannot afford the rent may claim such subsidies. The proportion of expenditure for rent which is considered as justified in this context is about 20-25% of the income.

125. The applicants do not consider that the restrictions placed on the landlord are counterbalanced by other measures in his favour. These measures are in themselves insufficient because they do not allow the landlords to adjust rents to an economically justified level. The maintenance contributions under Section 45 of the Act cover only two thirds of what the Government themselves consider as a justified rent, and moreover must entirely be used for maintenance of the building and must be repaid if they are not used for this purpose. The same applies to the possibility of increasing rents under Section 18. Therefore these provisions, too, involve disadvantages for the landlord. The other improvements cited by the Government are negligible. In any event none of the provisions allegedly improving the situation of the landlord was applicable in the present cases.

126. In conclusion, the applicants submit that there was no public interest which could justify the measures taken against them, in particular the public interest to preserve property of private house-owners was disregarded. The measures in question did not strike the right balance between the public interests which may legitimately be pursued by a social housing policy, and the individual interests of the house-owners, and for this reason, too, these measures were wholly disproportionate and contrary to Article 1 of Protocol No. 1 as exceeding the margin of appreciation conceded by this provision.

b) Concerning the individual cases

Application No. 10522/83

127. The applicants stress that they bought the property in question in 1978 from compensation for other real property which had been expropriated. They considered this to be a safe investment having regard to the legislation then in force which allowed the conclusion of freely negotiated rent agreements for new tenancies. They could make use of this possibility concerning several apartments which were vacant at the time of acquisition. Accordingly there are now several tenants apart from the one who has asked for a rent reduction under Section 44 who could do the same depending on the outcome of the present proceedings.

128. The applicants submit that the value of the building decreased by some AS 184,000.- by virtue of a rent reduction in the one case at

issue. In this case the rent was reduced to one sixth of its original amount. It is now no more than a token rent which corresponds to the price of a simple meal for two persons in a cheap restaurant. The applicants' monthly loss is about AS 1,500.-.

129. The tenant in question, however, could well pay a higher rent. He had concluded the original contract in full knowledge of the circumstances and could choose between different apartments because there was no serious housing shortage at that time in Graz. The rent agreement was fair and corresponded to the market conditions. The tenant had to pay about 12-15% of his income for the rent, and this was reduced to about 2-3%. The Government's argument that the earlier amount was inappropriate cannot be followed. The tenant had apparently considered the rent to be appropriate in the circumstances.

130. Should the other tenants also request a reduction of their rent the total loss would be some AS 300,000.-.

Application No. 11011/84

131. The applicants stress that under the original tenancy contract of 1972 a low rent (AS 800.-) had been agreed in order to allow the tenants to improve the standard of the apartment by measures of their own. The rent chargeable as from September 1975, i.e. AS 1,500.-, was still in the lower range having regard to the fact that the apartment is located in the centre of Innsbruck in a good area and that the general level of rents in Innsbruck is high. The economic conditions in the western parts of Austria are different from Vienna and this case shows the shortcomings of the legislation as regards consideration of regional differences. It cannot be justified that the rent in this case was reduced to an amount per square metre and month which roughly corresponds to the price of half a litre of petrol. Several other tenants could also request a reduction of their rent.

Application No. 11070/84

132. A special feature of this case is the usufruct agreement between the two applicants. They claim that the rent reduction affected both the usufructuary's and the owner's right to the peaceful enjoyment of possessions: the usufructuary's because she has for the time being the exclusive right to use the property and to perceive the current rent income; the owner's because after the death of the usufructuary the right to use the property and to perceive the rent income will revert to her.

133. The apartment house in question is situated in a good location near the centre of Vienna. It has been renovated by the applicants at considerable expenditure (more than AS 500,000.-). All the other apartments in the house are in class B and the qualification of the apartment at issue in the same category was refused only because the bathroom was not fully equipped. If the apartment had been recognised as coming within class B, no rent restrictions would have applied because of its size.

134. The rent agreed was not excessive. For apartments in this category and location a square metre rent of some AS 35.- can be obtained at present. The rent agreed, revalorised according to the consumer price index of 1976, would correspond to a square metre rent of AS 26.80 which is considerably below the above amount. The tenant, a practising lawyer, could pay a rent on this basis.

2. Article 14 of the Convention

135. The applicants in case No. 11011/84 complain that they were discriminated against, contrary to Article 14 of the Convention, in the enjoyment of their property rights because they were treated differently from certain other categories of landlords, in

particular public house-owners. While the Rent Act does not formally distinguish between public and private house-owners, in reality public house-owners are treated differently because they usually profit from the more favourable provisions of the Non-Profit Housing Act.

136. The rent permissible under Section 14 of this Act includes a profit of some 8% of the capital invested, while a similar profit is not conceded to private house-owners affected by the provisions of the Rent Act. While the income of the non-profit housing associations may in principle be used for other purposes, the rent proceeds of the private house-owners must be entirely used for maintenance and repair. This amounts to discrimination against private house-owners.

B. The Government

1. Article 1 of Protocol No. 1

137. The Government consider that the restrictions on property contained in the 1981 Act cannot be regarded as a deprivation of possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1 to the Convention. They rely on the Commission's decision on Application No. 8003/77 v. Austria (Dec. 3.10.79, D.R. 17 p. 80), where the Commission found the first paragraph of Article 1 not applicable to restrictions on property imposed by rent regulations. The 1981 Act has in the Government's view not changed the legal position on which the Commission based that decision. The new Act did not interfere with the applicant's title as owners of the property nor with the substance of their property. Further, there is no shift of property to the State, but only a redistribution of financial advantages as between the landlords and tenants. For this reason, too, the rent reduction cannot be considered as an expropriation.

138. This conclusion is not affected by the applicants' allegation that they were deprived of a right attached to their property. Every restriction on property means that some of the rights associated with the ownership of the object, such as the right to financial benefit, are reduced to a smaller or greater extent by the legislation. This does not involve a deprivation of possessions contrary to the Convention. The other subsidiary rights of ownership such as the right to sell, bequeath or mortgage the property in question have remained unaffected.

139. Even if the right to a rent under a tenancy agreement concluded prior to the 1981 Act were to be considered as a protected interest under Article 1 of the Protocol, the reduction of the rent is only a restriction on property. Despite its reduction, the contractual right subsists; it only loses some of its substance (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 63).

140. The right to a fee under private law is protected only to the extent it was agreed upon by contract or was provided for by law (Eur. Court H.R., Van der Mussele judgment of 23 November 1983, Series A no. 70, p. 23, para. 48). If remunerations or fees are determined by statute, they are protected under Article 1 only up to the amount provided for under the pertinent legal provision. The Commission held that a legal reduction of such remunerations does not infringe Article 1 (No. 8410/78, Dec. 13.12.79, D.R. 18 p. 216). While in the present cases the rent was not limited for certain tenancy contracts when they were concluded, it was possible, according to the principles stated in the above cases, to curtail these rents by new legislation.

141. The Government observe that apartment buildings in Austria have

always been of a reduced sales value. It is the pivotal social concern of providing housing for a particular, financially weak social stratum which makes such a restriction of ownership rights admissible. Property is not protected without limits, but it is being protected under the condition of restrictions for social reasons.

142. The Government contest the applicants' assertion that owners cannot obtain financial benefits from rented houses coming under the 1981 Act. If he does maintenance and improvement work, the owner can use for himself without specific accounts 20% of the cost of such work, these amounts to be taken out of the rents perceived (Section 20, para. 1 sub-para. 2 (b) of the Act). Moreover, he is free after ten years to dispose of all rent income in so far as he has not used the rents for maintenance and improvement work. Even within this ten-year accounting period, the rents including interest are the owner's property. Only his freedom to dispose of the rent proceeds is restricted as a result of his obligation under the tenancy contract to keep the leased premises usable for the agreed purpose (cf. Section 1096 of the Civil Code and Section 3 of the Rent Act). He must use the rent during this period to maintain or improve the house if at least one of the tenants requires him to do so under Sections 3 or 4 of the Act.

143. In connection with the owner's obligation to maintain the premises, the cost for raising outside capital and reasonable debit interest on such capital, as well as a reasonable sum for interest forgone (at capital market rates) where the landlord's own capital is used, are deemed to be costs of maintenance work (Section 3 para. 3 sub-para. 1 of the Act). The owner thus is not deprived of the possibility of making profit from his real property nor was the legislation aimed at abolishing all entrepreneurial income. There is no reason to speak of unprofitability, of the owner being forced to abandon his property as being without value or of his having to bear permanent losses.

144. The Government contest the applicants' assertion that a square metre rent of AS 25.- per month is necessary to maintain a rented house. The survey conducted in 1981 by a private interest group contains components which have nothing to do with maintenance. There is no reliable calculation of average cost, and it would hardly be feasible to make such a calculation since each house is in a different condition depending on its age, the intensity of previous maintenance work, etc. Where the rent is not sufficient to maintain the house, the required additional amount may be ordered to be raised even over the tenant's objections for each house individually under the new procedure permitting increases of rents (Sections 18 and 19 of the Act).

145. The Government observe that the value of housing property has recently increased and even big investors such as banks, insurance companies etc. continue to acquire such property. The reason is that, according to the applicable valuation principles (Realschätzordnung), the value does not only depend on the rent proceeds (Ertragswert) but also on other factors (Substanzwert). While the reduction of rent for a flat in an apartment building will have an effect on the capitalised rent income this effect must be rated insignificant because the estimated value of the real property never corresponds to the capitalised rent income alone but is an amount between the capitalised rent income and the real estate value. Moreover, in the present cases only one apartment was affected in each of the apartment buildings concerned.

146. In practice it is possible to encumber half of the value with mortgages for loans. Although under the system of the Rent Act only loans for investments in the property can be repaid from the rent income while loans for other purposes must in principle be repaid from other sources, it is not justified to speak of an expropriation. The

substance of the property has not been affected.

147. In the Government's view, the 1981 Act therefore only contains rules on the use of property within the meaning of the second paragraph of Article 1.

148. This view is supported by the long-standing case-law of the Constitutional Court (since decision No. 1123/1928) concerning the rent legislation in Austria. While the Constitutional Court has not expressed itself on the constitutionality of Sections 16 and 44 of the 1981 Rent Act, the Supreme Court in its decision of 3 July 1984 has dealt with this issue and has held that the legislation involves no expropriation but only a restriction on property (cf. paras. 91-97 above). In this decision the Supreme Court relied on the Commission's decision on Application No. 8003/77 (loc cit.).

149. The Government invoke the Handyside judgment (Eur. Court H.R. judgment of 7 December 1976, Series A No. 24) where the Court held that those legal rules concerning the use of property are admissible which a State considers necessary in accordance with the general interest and that in this context the Contracting States are to be considered as the sole judges of the necessity of any such interference.

150. The protection afforded to property in Article 1 is couched in general terms and admits of more far-reaching restrictions through national legislation than are admissible, for instance, under the exceptions stated in Article 8 para. 2 of the Convention. It is explicitly reserved to States to order restrictions in the general interest. Article 1 thus places the determination of the substantive content of the property rights largely in the hand of the national parliaments.

151. This has been confirmed in the case of James and Others (Eur. Court H.R., judgment of 21 February 1986, Series A No. 98). The Government refer in particular to the following statements in paras. 46 and 47 of this judgment:

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest...
>
> The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is in the public interest unless that judgment be manifestly without reasonable foundation....
>
> Modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large."

152. The Government submit that the Austrian legislation at issue in the present cases pursues objectives similar to those of the British legislation at issue in the James and Others case which the Commission and Court found to be in conformity with Article 1 of the Protocol. In this respect they refer in particular to the considerations concerning the general interest as set out in the Government Bill proposing the 1981 Rent Act (see the decision on admissibility, Appendix II, at p. 53).

153. The provisions of the Act minister to a basic need of society,

namely housing. Special protection of tenants is required in particular because, unlike other groups of consumers, the financial burden on them is far heavier and thus less fair if they have to pay an unreasonably high amount of rent month after month for accommodation.

154. In this context special attention must be paid to the social conditions which prevailed in Austria at the time of the introduction of the new legislation, and which were characterised by extremely different rents for the same type of apartments depending on the date when the tenancy contract was concluded. There was indeed a scarcity of cheap accommodation in Austria and many tenants had to leave flats with free rent agreements because they were unable to afford the rent.

155. In order to ensure fair rents, Parliament in Section 16 para. 2 of the Act laid down, stating maximum amounts, what rents may not be exceeded in new tenancy contracts so as not to overtax the resources of people looking for an apartment who, in order to get it, might be prepared to pay amounts which are unreasonably high taking into account all relevant circumstances.

156. The square metre rents laid down in Section 16 para. 2 of the Act are based on an average calculation. The starting point for this calculation is the rent claimable for flats in new buildings constructed with public subsidies under the Federal Housing Subsidies Act (Bundes-Wohnbauförderungsgesetz) 1968 and the Non-Profit Housing Act (Wohnungsgemeinnützigkeitsgesetz) 1979. This legislation contains detailed regulations on rents which are based on the principle that they may not exceed the costs incurred by the owner.

157. In 1981 the average rent under this legislation was AS 29.37 per square metre and 80% of this has been taken as the basis for the class A rent under the 1981 Rent Act, the deduction of 20% being justified by the fact that the flats covered by this Act are not new and that the construction costs have generally been paid off. A deduction of 25% has been made for each further class in view of its lower standard. In this way account has been taken of the differences existing between various types of flats. There is an objective justification for fixing a lower maximum price for objects of a lower quality than for objects of a higher quality.

158. It is true that no differentiation has been made in the system of regular square metre rents according to the situation of each building. The conditions in each case differ substantially both as regards the state of maintenance and the maintenance costs. However, it is indispensable for a rent control legislation to introduce lump sums for the admissible amounts of rent. An individual consideration of each case would compromise the implementation of such a regulation. If, however, the rent fixed for class C and D apartments should not suffice to cover the maintenance costs, the owner may ask for an increased rent under Section 18.

159. As regards the various exceptions from the system of square metre rents which are laid down in Section 16 para. 1 of the Act, the Government submit that they concern very particular exceptional situations where it is justified to attach far more importance to economic considerations than in tenancy agreements covered by Section 16 para. 2 where the emphasis is placed on social circumstances. The priority of these economic considerations is justified where the building does not primarily serve residential purposes (Section 16 para. 1 sub-para. 1); where account must be taken of the imperative necessity of amortisation of the capital invested for the construction of new buildings (sub-para. 2; the deadline applied in this respect - i.e. the distinction between buildings constructed before and after 1945 - is justified because in the case of the former no amortisation costs accrue any longer); where high expenditure arises because of the public interest to preserve historic buildings (sub-para. 3); where larger and higher rated apartments are

at issue which normally are occupied by people who need no special social protection (sub-para. 4); where improvements are carried out by the landlord which cannot be financed from increased rents according to Section 18 and which serve the public interest in the modernisation of apartment buildings (sub-paras. 5 and 6); and finally where a tenancy contract has existed for more than 6 months and the tenant accordingly is no longer compelled to look for shelter (sub-para. 7, which may in particular be used to finance lesser maintenance and improvement work by avoiding high interest loans).

160. The 1981 Act also provides for an intervention in rental agreements concluded prior to the entry into force of the Act by reduction of the rent at the tenant's request to 150% of the rents listed in Section 16 para. 2 of the Act. Had no rule been introduced in addition to Section 16 para. 2 to cover "old" tenancy contracts in force on 1 January 1982, there would have been unjustifiable discrimination between old tenants and new tenants. Tenants who signed a contract before this date deserve the same protection in social policy terms, being in the same situation where they had to pay any price they could just barely afford, simply to get the apartment.

161. The interference with property complained of is reasonable and does not transgress the margin of appreciation conceded to national parliaments by Article 1. The Government refer to the Sporrong and Lönnroth case (Eur. Court H.R., judgment of 23 September 1982, Series A no. 52) according to which a reasonable balance must be struck between the protection of the community's general interest and the respect for property enjoined by Article 1.

162. In the Government's view paras. 2 and 3 of Section 44 of the Act pursue a legitimate objective of social policy, namely the protection of tenants' interests in a situation where reasonably priced accommodation is scarce. There is no contradiction with the public interest because, by ensuring fair prices and by conserving houses worthy of preservation, an important service is rendered to the general interest and it would be onesided to speak of unilateral benefits to the tenant.

163. One of the aims of Section 44 paras. 2 and 3 of the Act is to adapt old tenancy contracts to the whole system of reformed rental law and to minimise the hiatus between the former and the new system. Suitable machinery is introduced for making this adjustment. It is conceded to the owner that he will get 50% more rent than he would if the tenant terminated the tenancy and the apartment would thus have to be re-let. On the other hand, the tenant is protected from having to pay an excessive rent if he is not willing or able to terminate the contract and rent an apartment elsewhere. In adopting these transitional provisions, Parliament had in mind the provision of Section 934 of the Civil Code (laesio enormis), a provision which was on the statute books at the time when the tenancy contracts were signed, and this is why Parliament allowed a reduction to one and a half times the reasonable rent newly fixed in Section 16 para. 2 of the Act.

164. This measure must be considered within the overall framework of the reform rather than in isolation. The possibility for the tenant to ask for a reduction under Section 44, which puts a burden on the owner, is accompanied by a number of provisions easing the previous stringent tie on the amount of rent claimable under old contracts whose amount had remained unchanged since 1951. Thus there is a possibility to charge a higher rent than hitherto in the case of the succession of a new tenant (Section 46, para. 2). Further, the Act introduces a new possibility for the owner to charge maintenance contributions even against the tenant's will in addition to the rent, where the previous rent is so low that it does not reach two thirds of the amounts laid down in Section 16 para. 2 (Section 45).

165. Thus, Section 44 is only one of the measures introduced to adjust tenancy contracts concluded prior to 1 January 1982 to the overall system of the new Act. This Act is designed to bring rents negotiated at different times closer together in the general interest, taking into account the social policy objectives pursued. The rents were changed in two directions at the same time, up as well as down.

166. The fact that the reduction depends on the tenant's decision to make an application under Section 44 is explained by the private law nature of the rent agreements. In private law relationships there is generally no public interference ex officio. The fact that the decision is left to the tenant also tends to limit the interferences with existing rent agreements to cases where the reduction is really justified. The legislation also provides that after six months of tenancy a higher rent may be agreed, and tenants are often prepared to accept a higher rent e.g. in view of necessary maintenance and repair work because, in this way, they can avoid a costly procedure under Section 18 of the Act to increase the rent by a judicial decision.

167. The Government finally submit that the restrictions complained of are such as not to call for compensation. In this respect the Government rely in particular on Applications Nos. 9006/80 etc, Lithgow and Others v. the United Kingdom, Comm. Rep. 7.3.84, claiming that there existed specific grounds based on legitimate considerations of public interest to exclude the grant of compensation.

168. In all circumstances, it cannot be said in the Government's view that the principle of proportionality has been disregarded. There was no substantial disproportion between the burden placed on the individual and the public interest pursued by the legislation, namely to adjust the rents to the aims of social policy and remove excessive disparities between the rents claimed for equivalent apartments.

2. Article 14 of the Convention

169. The Government state that there is no difference of treatment as between public and private house-owners. The 1981 Rent Act applies to all house-owners alike, including public corporations such as the Federation, the Provinces and the municipalities who in this sphere act iure gestionis and are thus subject to exactly the same legal treatment as private parties.

170. Nor does the Act delimit the scope of applicability of the rent restrictions so as to cover mainly private house-owners while public house-owners would normally not be struck by such restrictions. The housing property of public corporations is usually organised in the form of non-profit making housing associations which are exempted from the provisions of the Rent Act but instead come within the scope of the different rent restrictions of the Non-Profit Housing Act. Any difference which may exist between the two systems of rent control is justified by objective and reasonable considerations.

171. As regards the various exceptions from rent control laid down in the Rent Act, the Government claim that they are in each case justified by special circumstances (cf. para. 159 above).

IV. OPINION OF THE COMMISSION

A. Points at issue

172. The following points are at issue:

a) Whether the effects of the 1981 Rent Act on the applicants amounted to a violation of their right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1

(Art. P1-1) to the Convention;

b) Whether the applicants in the second case were discriminated against, contrary to Article 14 (Art. 14) of the Convention, in the enjoyment of their property rights as guaranteed by Article 1 of Protocol No. 1.

B. Article 1 of Protocol No. 1 (Art. P1-1)

1. Nature and scope of the interference with the applicants' property rights

173. Article 1 of Protocol No. 1 (Art. P1-1) reads as follows:

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

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

174. The 1981 Rent Act interfered with rent agreements which the applicants had validly concluded with their tenants on the basis of the earlier legislation. After the entry into force of the 1981 Act the monthly rent was compulsorily reduced by the competent courts to the amounts of rent permissible under this Act.

175. As in the James and Others case (Eur. Court H.R. judgment of 21 February 1986, Series A no. 98, p. 9 et seq), the essence of the applicants' complaint is directed against the terms and conditions of the contested legislation. It does not relate to the manner of execution of the law by a State authority, be it administrative or judicial. Indeed, one of the applicants' criticisms was that the legislation does not allow scope for discretionary and variable implementation according to the particular circumstances of each individual property. The Commission must therefore direct its attention primarily to the contested legislation itself, in order to determine whether that legislation is compatible with Article 1 of Protocol No. 1 (Art. P1-1). This does not mean that it will examine the legislation in abstracto. The individual cases of rent reduction complained of illustrate the impact in practice of the reform it introduced and are, as such, material to the issue of its compatibility with the Convention. In this respect, the consequences of the application of the legislation in the three present cases are to be taken into account. The Commission thus will adopt the same approach as the Court in the above case (cf. paras. 35-36 of the above-mentioned judgment).

176. The applicants allege that the reduction of the rents amounted to a legal expropriation of their contractual rights under the tenancy agreements which they had concluded with their tenants and which they consider to be property rights within the meaning of Article 1 of Protocol No. 1 (Art. P1-1). They further allege that this reduction constituted a de facto expropriation of their real property, the value of which was considerably depreciated by the measures in question. They submit that they were thus deprived of their possessions and that the measures complained of must accordingly be examined under the second sentence of the first paragraph of Article 1.

177. The Government contend that the reduction of the rents merely involved a control of the use of the applicants' real property in accordance with the general interest, which must be considered under

the second paragraph of Article 1.

178. The Commission recalls that Article 1 comprises three distinct rules. The first rule, which is of a general nature, announces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the High Contracting Parties are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 61; James and Others judgment of 21 February 1986, Series A no. 98, p. 29, para. 37).

179. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (James and Others judgment, ibidem, p. 30, para. 37).

180. In the present case the Commission is first called upon to determine whether the measures complained of come under the deprivation rule in the second sentence of the first paragraph, or under the control rule in the second paragraph. The Commission has previously regarded rent restrictions as measures to control the use of property within the meaning of the second paragraph of Article 1 (cf. No. 673/59, Dec. 28.7.61, Yearbook 4 pp. 286, 294 and, in particular, No. 8003/77, Dec. 3.10.79, D.R. 17 p. 80). The latter decision, invoked by the Government, concerned the previous rent control legislation of Austria. There the Commission found "no expropriation" and did not consider that the contested legislation interfered with the applicant's title to the real property concerned, or with the substance of that property. It concluded that "the legislation cannot be considered as amounting to a deprivation of possessions" (loc. cit. p. 83).

181. However, unlike the present cases, that case concerned rent restrictions which had existed for a long time and which were accompanied by a number of further restrictions on the landlord's freedom to dispose of his property let to tenants such as, in particular, restrictions on his right to give notice. Restrictions of the latter type continue to apply under the 1981 rent legislation which, in addition, introduced a right of the tenants to demand a reduction of the rent claimable by the landlord in respect of existing tenancy contracts. The applicants' tenants made use of this possibility and obtained in each case a considerable reduction of the rent previously agreed. The applicants claim that this involved a retroactive legal expropriation of their contractual rights under the rent agreements concluded by them before the entry into force of the 1981 Act.

182. The Commission notes, however, that the Act did not directly affect the rents agreed upon, but that its application depended on a request by the tenants to the competent authorities. These authorities could declare the agreements partially void only as from the month following the tenants' request. Thus it cannot be said that the applicants were retrocatively deprived of rent proceeds which had lawfully and finally accrued to them. They were only deprived of part of their future rents.

183. The applicants claim that their contractual right to perceive the monthly rent agreed upon as long as the rent agreements remain in force is a separate property protected by Article 1 of Protocol No. 1 (Art. P1-1). The Government submit that the contractual right to a

certain amount of rent cannot be regarded as a separate property, but only as a partial right derived from the ownership in the real property.

184. The Commission recalls its case-law according to which certain contractual rights of economic value may be assimilated to property rights within the meaning of Article 1 of Protocol No. 1 (Art. P1-1) (cf. No. 8387/78, Dec. 4.3.80, D.R. 19 pp. 233, 237; cf. also mutatis mutandis No. 5849/72, Müller v. Austria, Comm. Report 1.10.75, D.R. 3 pp. 25, 31 concerning contractual rights acquired in connection with a public social security scheme). However, different considerations must apply to contractual rights such as those at issue in the present cases, where the holder of the right is also the owner of the real property concerned.

185. Here the ownership involves various possibilities to use the real property. According to the particular use made, certain rights flowing from the ownership come into existence. If each of these rights were to be considered as a separate property susceptible of deprivation of possessions within the meaning of the first paragraph of Article 1 no room would remain for regulations to control the use of real property under the second paragraph. The Commission considers the right to use the property by concluding tenancy contracts in relation to it as an aspect of the possession of the real property at issue. This interpretation follows the structure of Article 1 which distinguishes between property and its use.

186. The applicants' contractual rights to rent are therefore not a separate property and cannot be considered in isolation. The measures complained of must be examined as to their effect on the real property.

187. The applicants claim that these measures amounted to a de facto expropriation of their real property, the value of which was considerably depreciated by the reduction of their rents.

188. The Commission notes that there has been no formal expropriation of the applicants' real property. The owners have kept the title of the property and the right to sell, devise, donate or mortgage it, as well as the right to use it subject to the applicable legal restrictions. Insofar as such restrictions existed prior to the 1981 Act and were, in substance, maintained by this Act, a question of deprivation of possessions cannot arise.

189. With regard to new restrictions introduced by the above Act, the Commission recalls that, according to the case-law, one must "look behind the appearances and investigate the realities of the situation complained of"; the Convention guarantees must be real, concrete and effective (cf. Sporrong and Lönnroth judgment, loc. cit., p. 24, para. 63; Lithgow and Others v. the United Kingdom, Comm. Report 7.3.84, para. 352).

190. On this basis the Court recognised in the Sporrong and Lönnroth judgment (loc. cit.) that apart from formal expropriations the second sentence of the first paragraph of Article 1 might also extend to de facto expropriations which "can be assimilated to a deprivation of possessions". This case-law has been confirmed in the Erkner and Hofauer and Poiss cases (Eur. Court H.R., Erkner and Hofauer judgment of 23 April 1987, Series A no. 117, p. 65, para. 74; Poiss judgment of 23 April 1987, Series A no. 117, p. 108, para. 64). The concept of "deprivation" within the meaning of Article 1 first paragraph second sentence thus covers not only formal expropriations, but also de facto expropriations, i.e. measures which can be assimilated to a deprivation of possessions (cf. Sporrong and Lönnroth judgment, loc. cit.) or which interfere with the substance of property to such a degree as to amount to an expropriation (cf. No. 8003/77, Dec. 3.10.79, loc. cit.).

191. On the other hand, certain measures leading to a loss of property may nevertheless be regarded as a "control of use", or at least as being so intimately tied to a "control of use" that they continue to be covered by the second paragraph of Article 1 (cf. Eur. Court H.R., Agosi judgment of 24 October 1986, Series A no. 108, p. 17, para. 51; Handyside judgment of 7 December 1976, Series A no. 24, p.30, para. 63).

192. The question in the present cases is whether the reduction of the applicants' contractual rents was merely a constituent element of the control of the use of their property, or whether it amounted to a de facto expropriation.

193. The aim of the legislation clearly was to develop the control of the use of real property let to tenants. The existing restrictions involved limitations of the right to give notice to tenants (Section 30 of the Act) and the continued freezing of rent at a very low level in respect of tenancy agreements concluded before 1968 (Section 43 para. 2). However, under the new legislation the latter tenancy agreements could be modified, at the request of the landlord, by obliging the tenants to pay maintenance contributions (Section 45).

The right of the landlord to ask for increased rent in order to cover necessary repair work was also maintained in a modified form (cf. Section 18 of the 1981 Act as compared to Section 7 of the 1922 Act).

194. The new restrictions included, in particular, the application of square metre rents in respect of any future tenancy contracts (Section 16 para. 2) and the possibility for the tenants of apartments leased between 1968 and 1981 to ask for a reduction of the rent to 150% of these square metre rents (Section 44 paras. 2 and 3).

195. The applicants complain of measures of rent reduction taken against them under Section 44 at the request of certain tenants, and of the risk that other apartments may also be subjected to such measures. They complain of Section 16 para. 2 only insofar as its application would entail a further reduction of the rent in respect of any apartments which might become vacant in future after the tenants concerned had obtained a reduction of their rent under Section 44.

196. The Commission accepts that the introduction of new rent restrictions both as regards existing and future contracts affects the value of the real property concerned. However, it is not possible to consider this effect in isolation, e.g. on the basis of a capitalisation of the losses brought about by a tenant's request for rent reduction under Section 44 as suggested by the applicants. The legislation reformed the rent law as a whole and its depreciating effect was, to some degree, counterbalanced by a revalorising effect linked to the better possibilities for the landlord to make investments for the maintenance and improvement of his real property and to secure the financial participation of the tenants in such measures. This effect cannot be left aside when assessing the simultaneous depreciation brought about by the introduction of the new system of square metre rents.

197. The Commission also notes that the impact of rent restrictions for new contracts was delayed by the simultaneous operation of the provisions protecting existing tenancy contracts, and the reduction of rent in respect of existing contracts did not automatically affect all free rent agreements concluded between 1968 and 1981, but only those where the tenant requested a reduction. In practice this seems to have been a rather limited number. Even if other tenants of the applicants might make such requests in the future, it is not economically justified to evaluate losses in the value of property caused by an individual request for rent reduction on the basis of the total number of apartments for which a rent reduction could be

requested.

198. The Commission therefore finds that the enactment of Section 44 of the Rent Act 1981 and its subsequent application to the applicants, while affecting their real property and in particular the possibilities of use which are commonly associated with ownership, did not deprive them of the substance of their real property. Although a considerable economic burden was imposed on them by the new measures they also could take certain measures with a view to the revalorisation of their property.

199. Thus, although the right to rent must be regarded as an inherent element of real property, it cannot in the Commission's view be said that the measures complained of amounted to a de facto expropriation of the applicants' real property, and thus to a "deprivation of possessions" within the meaning of the first paragraph of Article 1 of Protocol No. 1 (Art. P1-1). It follows that these measures must be considered as a control of the use of property which comes within the scope of the second paragraph of Article 1.

2. Justification of the interference with the applicants' property rights

200. The applicants claim in essence that the measures taken against them were unjustified because they were not in the public interest and because they were disproportionate.

201. The Government argue that the second paragraph of Article 1 "sets the Contracting States up as sole judges of the 'necessity' for an interference" so that the task of the Convention organs is restricted "to supervising the lawfulness and the purpose of the restriction in question" (Eur. Court H.R., Handyside judgment of 7 December 1976, Series A no. 24, p. 29, para. 62).

202. The Commission observes that the relevant case-law has been further developed since the above judgment. In the light of the principles established it must examine in the present cases whether the reduction of the rents was "lawful", whether it pursued a purpose of "general interest" which was not manifestly without foundation, and whether it was proportionate and therefore could be "deemed necessary".

203. Article 1 para. 2 (Art. 1-2) recognises the right of the State "to enforce such laws" as it deems necessary to control the use of property in accordance with the general interest. Therefore only measures which have a sufficient basis in the domestic legal system are covered by this provision. The Court in the Handyside case has identified the task of the Convention organs in this respect as "supervising the lawfulness ... of the restriction in question" (Handyside judgment, loc. cit.).

204. The Commission finds that the reduction of the rent was "lawful". It was based on clear provisions in Section 44 of the 1981 Rent Act which left no discretion to the competent authorities. Moreover, the reduction was found to respect Austrian constitutional law and therefore must be regarded as lawful also in this respect. Although the Constitutional Court was not seized with the matter, the question of constitutionality was examined by the competent civil courts including the Supreme Court, which had no doubts concerning the constitutionality and lawfulness of this measure (cf., mutatis mutandis, No. 7360/76, Zand v. Austria, Comm. Report 12.10.78, D.R. 15 p. 80, paras. 71 - 72).

205. The criterion of "general interest" in the second paragraph of Article 1 is less strict. It is left to the national legislator to determine the aims which it deems to be in the "general interest". The national authorities accordingly enjoy a wide margin of

appreciation.

206. However, this does not mean that the international supervision is excluded. The Convention organs will respect the legislature's judgment as to what is "in accordance with the general interest" unless that judgment be manifestly without reasonable foundation. Although they cannot substitute their own assessment for that of the national authorities, they are bound to review the contested measures under Article 1 and, in so doing, make an inquiry into the facts with reference to which the national authorities acted (cf. mutatis mutandis James and Others judgment, loc. cit., p. 32, para. 46).

207. The Government claim that the 1981 legislation pursued a legitimate aim of social policy, i.e. the protection of tenants' interests in a situation of scarcity of cheap accommodation by an overall reform of the rental law designed to bring rents negotiated at different times closer together. The margin of appreciation allows in their view to interfere with existing contractual relations between private parties. The applicants see no public interest which could justify the measures taken against them. They claim that the public interest to preserve property of private house-owners at economically reasonable conditions was disregarded.

208. The Commission notes that the earlier system had operated in an unsatisfactory manner. It accepts that a situation of a sharply divided housing market with a tendency to leave certain apartments unoccupied could be regarded as socially unjustified. It therefore was legitimate for the legislature, having regard to its wide margin of appreciation, to adopt measures for restructuring the whole market and harmonising the level of rent under tenancy contracts concluded at different dates. In view of the importance of housing as a basic social need it was also legitimate to seek to curb excesses of the free play of market forces and aim at a general moderation of the level of housing rents. At the same time it was legitimate to control the practice of leaving apartments unoccupied and to promote the standard of housing by maintenance and improvement measures.

209. In the application of the test of necessity under Article 1 regard must be had to the principle of respect for peaceful enjoyment of possessions which is enunciated in the opening sentence of Article 1. For this reason the Commission must also examine "whether a reasonable relationship of proportionality [existed] between the means employed and the aim sought to be realised", or in other words, "whether a fair balance [was] struck between the demands of the general interest in this respect and the interest of the individual or individuals concerned" (Eur. Court H.R., Agosi judgment, loc. cit., p. 18, para. 52; and mutatis mutandis, Sporrong and Lönnroth judgment, loc. cit., p. 26, para. 69; James and Others judgment, loc. cit., p. 34, para. 52; cf. also the Commission's approach in Applications No. 7287/75, Dec. 3.3.78, D.R. 13 p. 30, and No. 8003/77, Dec. 3.10.79, D.R. 17 p. 80).

210. The Commission here notes that the methods chosen by the Austrian legislature to achieve the above legitimate aims involved the extension of rent controls. Fixed maximum rents were introduced for further categories of apartments in pre-World War II houses and applied not only to new contracts but, in a modified form, also to existing tenancy contracts. However, the landlords could avoid the fixed maximum rents for new contracts if they were ready to undertake improvement measures. New incentives for improvement measures were also created in respect of existing contracts.

211. The Commission notes that the proportionality of these measures was disputed both in Parliament and in the general public debate, mainly because of the introduction of the system of fixed maximum rents and its application also to existing tenancy contracts. However, it is inherent in the democratic process that different

political views on social justice prevail in various sectors of the population and will be reflected in the law-making process. It is understandable that the conflict of opinions will be the more accentuated when an important piece of socio-economic legislation is at issue which affects the interests of large groups. It nevertheless remains the legitimate task of the competent legislative body to determine the measures which it considers to be necessary in the general interest (cf., mutatis mutandis, James and Others judgment, loc. cit., p. 33 et seq., paras. 47 - 49).

212. In this context it was not unreasonable that the legislature decided to restrict the free market because it considered that the results had been unsatisfactory and socially unjustified. While the right to the peaceful enjoyment of possessions includes the possibility to use real property for purposes of financial investment and individual security, the owner has no right to the existence of a free market for the commercial use of his property. The introduction of price controls, which here took the form of maximum square metre rents, is a classical instrument of market regulation which cannot as such be regarded as incompatible with the second paragraph of Article 1 of Protocol No. 1 (Art. P1-1). Likewise it is not excluded by this provision that the legislator interferes with existing contracts between private parties with a view to extending the price controls to long-term financial obligations.

213. The Commission considers, however, that the interference with the use of property requires a special justification where it concerns contracts freely entered into. Because of the weight to be given to acquired contractual rights of the landlords when striking the balance with conflicting general interests, an interference with these contracts can be considered as legitimate only if a clear need for the protection of tenants calls for a modification of the contracts in question. Furthermore, a test of necessity must also be applied as regards the scope of interference with the landlords' contractual rights.

214. The Government do not contend that the rents agreed in the present cases between the applicant landlords and their respective tenants were exaggerated. It thus appears that in each case the amount of rent corresponded to the prevailing market conditions, without the landlords having profited from a special situation in the market for increasing the rent. However, the fact that the rent corresponded to the market conditions does not mean that the legislator could not legitimately consider this level as being generally too high and socially unjustifiable. Furthermore, the particular concern of harmonising the level of rent under agreements contracted at different dates could also justify an interference with existing tenancy contracts. The Commission therefore accepts that there were special grounds of sufficient importance to warrant an interference with existing contracts.

215. The applicants submit that the interference was disproportionate from both the economic and the social point of view. The regular rents are extremely low and do not even cover the normal maintenance costs. They further allege that the rents have been reduced far below the financial capacities of tenants.

216. The Government submit that the square metre rents laid down in Section 16 para. 2 of the Act for class A apartments correspond to 80% of the rent claimable for flats in new buildings constructed with public subsidies which may not exceed the costs incurred by the owner. The deduction of 20% is justified by the fact that construction costs have generally been paid off as regards apartments covered by this provision. A deduction of 25% has been made for each further class in view of its lower standard. Where the rent proceeds calculated on this basis are not sufficient to cover the owner's costs he may ask for an increased rent under Section 18 of the

Rent Act. In the Government's view there is no substantial disproportion between the burden placed on the individual and the public interest pursued by the legislation, namely to adjust the rents to the aims of social policy and remove excessive disparities between rents claimed for equivalent apartments.

217. The Commission finds that the Government have not sufficiently explained the 25% abatement in respect of each further class of apartments in relation to class A where the rent for new contracts is calculated in a manner which should normally allow the owner to cover his costs. It has not been shown that the owner's costs for the maintenance of class B apartments are 25%, those for class C apartments 50% and those for class D apartments 75% lower. The regular rents for the lower classes of apartments may therefore involve an element of penalisation of the landlord who does not invest in his property. It cannot be overlooked in this context that investments are made difficult by the legislation, given the far-reaching obligations placed on the landlord who decides himself or who is compelled by his tenants to carry out maintenance and improvement measures. The Commission further notes that the level of regular rent may be far below the portion of income which the average tenant is expected to pay for accommodation purposes even under the Austrian legislation concerning rent subsidies.

218. The effect is somewhat mitigated in the case of rent reduction under Section 44 because the rents applicable here are 50% higher than under Section 16 para. 2. This means that coverage of average costs will, as a rule, be achieved in respect of class B apartments. However, the further 25% abatements for classes C and D again have not been sufficiently explained.

219. The reduction of rent is accumulated with far-reaching restrictions on the landlord's right to give notice to his tenants. While the latter restrictions existed already prior to the 1981 Act by which they were maintained, they have acquired a new quality by the combination with the reduction of rents. Even if the landlord could give notice to a tenant who has requested a reduction of his rent, any new contract would now be based on the even lower level of rent under Section 16 para. 2.

220. The Commission recalls that the situation in the present cases is as follows (cf. paras. 22-53 above):

221. As regards Application No. 10522/83, the freely agreed rent for the category D apartment in question was reduced from AS 1,870.- to AS 330.-, i.e. to 17.6 % of the original amount. If the apartment in question became vacant it could be let for only AS 220.-, i.e. 11.7 % of the earlier rent. The applicants in this case had acquired the property from the compensation for another real property which had been expropriated and several other apartments may also be subjected to a measure of rent reduction.

222. In Application No. 11011/84 the monthly rent for a class D apartment was reduced from about AS 2,800.- to AS 561.-, i.e. 20 % of the original rent. In the case of a termination of the actual tenancy contract a new lease could be effected only on the basis of about AS 365.-, i.e. 13.3 % of the original rent. Again there are several other contracts in respect of which a reduction of rent could be requested.

223. The Commission finds that in these two cases the reduction of rent brought about by decisions under Section 44 of the 1981 Rent Act was not proportionate, but excessive even having regard to the State's margin of appreciation in the area of rent control legislation. It has not been shown that in these cases the reduced rent was sufficient to cover the applicants' necessary maintenance costs, nor that an average tenant could afford no more than the

reduced rent. The reduction of rent in these cases is therefore not justified under the second paragraph of Article 1 of Protocol No. 1 (Art. P1-1).

224. Finally, as regards Application No. 11070/84, the rent for a class C apartment was reduced from AS 4,236.51 to AS 3,300.-, i.e. 77.9 % of the original rent. In the case of re-letting the rent chargeable would be AS 2,200.-, i.e. 51.9 % of the original rent. Again there exist several other tenancy agreements in respect of which a reduction of rent could be requested.

225. However, the Commission considers that in this case the reduction of rent by about 20 % can still be considered as proportionate having regard to the State's margin of appreciation. It has not been shown that the reduced rent no longer allowed the applicants to finance the necessary maintenance costs. Although the particular tenant could perhaps afford the higher rent originally agreed, the rent was not reduced below the sum which an average tenant could reasonably be expected to pay in the circumstances. The Commission therefore accepts that the reduction of rent in this case is justified under the second paragraph of Article 1 of Protocol No. 1 (Art. P1-1).

Conclusions

226. The Commission concludes unanimously that there has been a violation of Article 1 of Protocol No. 1 (Art. P1-1) to the Convention in Applications No. 10522/83 and No. 11011/84.

227. The Commission concludes by ten votes to one that there has been no violation of Article 1 of Protocol No. 1 (Art. P1-1) to the Convention in Application No. 11070/84.

C. Article 14 (Art. 14) of the Convention

228. The applicants in the second case (No. 11011/84) allege that they were discriminated against, contrary to Article 14 (Art. 14) of the Convention, in the enjoyment of their property rights as guaranteed by Article 1 of Protocol No. 1 (Art. P1-1), in that they were treated differently from other categories of landlords.

229. However, having found a violation of Article 1 of Protocol No. 1 (Art. P1-1), the Commission finds no further issue under Article 14 (Art. 14) of the Convention in this case.

Conclusion

230. The Commission concludes unanimously that no separate issue arises under Article 14 (Art. 14) of the Convention in Application No. 11011/84.

D. Recapitulation

231. The Commission concludes

- unanimously that there has been a violation of Article 1 of Protocol No. 1 (Art. P1-1-) to the Convention in Applications No. 10522/83 and No. 11011/84 (cf. para. 226 above);

- by ten votes to one that there has been no violation of Article 1 of Protocol No. 1 (Art. P1-1) to the Convention in Application No. 11070/84 (cf. para. 227 above);

- unanimously that no separate issue arises under Article 14 (Art. 14) of the Convention in Application No. 11011/84 (cf. para. 230 above).

Secretary to the Commission Acting President of the Commission

(H. C. KRÜGER) (S. TRECHSEL)

Partly Dissenting Opinion of Mr. H.G. Schermers

1. In my contribution to the Liber Amicorum for Judge Wiarda l expressed some reservations as to the scope of the right of property as a fundamental human right. In many cases one may doubt whether the rights of an owner should prevail over those of a tenant. But the first Protocol to the Convention contains the right to the peaceful enjoyment of one's possessions and it belongs to the task of the Commission to see to it that the Article is properly respected.

2. The first paragraph of Article 1 prohibits in principle the deprivation of possessions, which means the taking of property. A difficult but fundamental question is to what extent a taking of part of the value of property should be considered as deprivation of property and therefore be permitted only if the rather severe requirements of the first paragraph are met.

The second paragraph of Article 1 entitles the State to control the use of property. Almost any restriction on the use of property will diminish its value. The sheer existence of the second paragraph therefore suggests that the first paragraph does not prohibit all measures diminishing the value of property. To some extent value of property may be taken away when the less severe conditions of the second paragraph are fulfilled.

3. A deprivation of property under the first paragraph and a control of the use of property under the second paragraph cannot be sharply distinguished. A temporary prohibition to use or sell a house for two weeks may seem a rather harmless restriction. A temporary prohibition to use or sell the first strawberry or the first herring of the year will mean an almost total taking away of its value. Similarly, an admission ticket to the World Cup football finals may be worth much before the match, but afterwards it only has some souvenir value.

4. As it is impossible to distinguish clearly deprivation of property from restrictions on the use of property we should rather look at Article 1 as a whole. The Article then prohibits the restriction of property rights unless the restriction is in the general (public) interest. That is the basic rule which applies to all Government measures which lead to a diminution in the value of property. In addition to this basic rule the more severe requirements of the first paragraph (the conditions provided by law and by the general principles of international law) should also be met when there is an actual taking away of property. The question of compensation, so important for the application of the first paragraph, does not rise in the present case. In my opinion there can be no question of the Government compensating the owners for the reduction of the rent.

5. Here, the restriction is clearly provided for by law, and the general principles of international law do not pose any particular problems. The question of whether the first or second paragraph of Article 1 applies is thus not relevant to the issue of whether the measures were justified as the extra conditions are, in any event, met. The only requirement that should in addition be fulfilled is that the restriction should be in the general (public) interest.

6. I find it difficult to accept that this general (public) interest was insufficient for justifying the law of 1981 in two of the three cases, but sufficient in the third. If the general (public) interest really requires these kinds of measures, then the limitation of property must be acceptable in all three cases.

But I do not think that the general (public) interest requires so general a measure. It may well be that some house-owners abused the housing shortage by claiming an unreasonably high rent, but there may also be cases where the rent agreed between the parties is reasonable. The fact that many tenants have not used their right to lower the rent demonstrates that, even those for whose benefit the rules are made do not all consider these rules necessary. A possibility to challenge excessive rents would probably have been sufficient for the protection of the general (public) interest.

It should also be taken into account that the law of 1981 does not affect the value of property in a more or less indirect way, but that it directly takes away income from the applicants without any evaluation of their individual cases. Once the law has accepted freely negotiated prices, it seems contrary to Article 1 to take away the agreed income without any review of individual cases.

I consider the system as applied in Austria is contrary to Article 1 of the first Protocol, irrespective of the question whether the actual decrease of the agreed rent is 82.4% (potentially 88.3%) (Application No. 10522/83), 80% (potentially 86.7%) (Application No. 11011/84) or 22.1% (potentially 48.1%) (Application No. 11070/84). I therefore have voted for a violation of Article 1 of the first Protocol also in the third case.

APPENDIX
I

HISTORY OF PROCEEDINGS

Date	Item
5 August 1983	Introduction of Application No. 10522/83
12 August 1983	Registration of Application No. 10522/83
22 May 1984	Introduction of Application No. 11011/84

19 June 1984	Registration of Application No. 11011/84
4 July 1984	Introduction of Application No. 11070/84
6 August 1984	Registration of Application No. 11070/84

Examination of Admissibility

14 May 1984	Commission's deliberations on Application No. 10522/83
4 December 1984	Commission's decision to invite the Government to submit observations on the three applications
4 March 1985	Government's observations on Application No. 10522/83
19 March 1985	Government's observations on Applications Nos. 11011/84 and 11070/84
11 April 1985	Applicants' observations on Application No. 10522/83
9 May 1985	Applicants' observations on Applications Nos. 11011/84 and 11070/84
8 July 1985	Commission's decision to join the cases and to hold an oral hearing
14 November 1985	Hearing fixed for 6 March 1986
5 December 1985	Government request postponement
23 December 1985	Hearing fixed for 8 May 1986
8 May 1986	Hearing on admissibility and merits; Commission's decision to declare the applications admissible
16 July 1986	Commission approves text of admissibility decision
22 October 1986	Admissibility decision communicated to parties

Examination of the Merits

22 October 1986	Parties invited to submit observations on the merits before 31 December 1986
17 November 1986	Applicants' observations on Application No. 10522/83
10 December 1986	Consideration of state of

	proceedings
15 December 1986	Government request an extension of the time-limit until February 1987
22 December 1986	Applicants in Application No. 11070/84 request an extension of the time-limit until 20 January 1987
5 January 1987	President extends time-limit for the Government until 28 February 1987 and for the applicants in Application No. 11070/84 until 20 January 1987
13 January 1987	Applicants' observations on Application No. 11011/84
19 January 1987	Applicants' observations on Application No. 11070/84
26 February 1987	Government's observations
17 March 1987	Applicants in Application No. 10522/83 reply to Government's observations
9 May 1987	Consideration of state of proceedings
8 July 1987	Deliberations on the merits
11 December 1987	Consideration of state of proceedings
7 May 1988	Consideration of state of proceedings
11 July 1988	Further deliberations on the merits; final votes; adoption of the Report