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

COURT (PLENARY)

CASE OF NATIONAL UNION OF BELGIAN POLICE v. BELGIUM

(Application no. 4464/70)

JUDGMENT

STRASBOURG

27 October 1975

In the case of the National Union of Belgian Police,

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

MM. G. BALLADORE PALLIERI, *President*,
H. MOSLER,
A. VERDROSS,
E. RODENBOURG,
M. ZEKIA,
J. CREMONA,
G. WIARDA,
P. O'DONOGHUE,
Mrs. H. PEDERSEN,
MM. T. VILHJÁLMSSON,
R. RYSSDAL,
W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs. D. BINDSCHEDLER-ROBERT,

and also Mr. M.-A. EISSEN, *Registrar* and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 10 and 12 May and from 29 September to 1 October 1975,

Delivers the following judgment which was adopted on the last-mentioned date:

PROCEDURE:

1. The case of the National Union of Belgian Police (Syndicat national de la police belge) was referred to the Court by the European Commission of Human Rights (hereinafter called "the Commission"). The case has its origin in an application against the Kingdom of Belgium lodged with the Commission by the National Union of Belgian Police on 5 March 1970.

2. The Commission's request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was lodged with the registry of the Court on 7 October 1974, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the Kingdom of Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose, on the part of the Kingdom of Belgium, a violation of the

obligations binding on it under Articles 11 and 14 (art. 11, art. 14) of the Convention.

3. On 15 October 1974, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality, and Mr. G. Balladore Pallieri, the President of the Court, being ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of the Court respectively. The five judges chosen were Mr. A. Favre, Mr. G. Wiarda, Mr. P. O'Donoghue, Mr. T. Vilhjálmsson and Sir Gerald Fitzmaurice (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Belgian Government (hereinafter called "the Government") and of the Delegates of the Commission regarding the procedure to be followed. By an Order of 30 October 1974, the President of the Chamber decided that the Government should file a memorial within a time-limit expiring on 31 January 1975 and that the Delegates should be entitled to file a memorial in reply within two months of the receipt of the Government's memorial.

The Government's memorial was received at the registry on 29 January and that of the Delegates on 25 March 1975.

5. After having consulted, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President decided by an Order of 26 March 1975 that the oral hearings should open on 7 May.

6. At a meeting held in private on 12 April 1975 in Paris, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise(d) serious questions affecting the interpretation of the Convention ...". On the same day, the President instructed the Registrar to request the Agent of the Government and the Delegates of the Commission to communicate certain documents to the Court. These documents were received at the registry on 18 and 28 April 1975 respectively.

7. After having consulted, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President of the Court decided by an Order of 16 April 1975 that the opening of the oral hearings should be deferred until 8 May.

8. On 7 May 1975, the Court held a preparatory meeting to consider the oral stage of the procedure. On this occasion the Court decided proprio motu in pursuance of Rules 38 para. 1 and 48 para. 3 taken together, that during the oral hearings it would hear, on certain questions of fact and for the purpose of information, Mr. Félix Janssens, administrateur délégué and Secretary General of the applicant union.

9. The oral hearings were held in public at the Human Rights Building at Strasbourg on 8 and 9 May 1975.

There appeared before the Court:

- for the Government:

Mr. J. NISET, Legal Adviser
at the Ministry of Justice, *Agent*;
Mr. A. HOUTEKIER, Barrister,
Mr. J. DE MEYER, Professor
at the University of Louvain, *Counsel*;
Mr. V. CRABBE, Inspector General of Public Services,
Mr. C. DUMORTIER, Principal Adviser
at the Ministry of the Interior, *Advisers*;

- for the Commission:

Mr. J.E.S. FAWCETT, *Principal Delegate*,
Mr. J. CUSTERS, *Delegate*,
Mr. J.M. NELISSEN, who had represented the applicant before the Commission, assisting the delegates under Rule 29 para. 1, second sentence.

In accordance with its decision of 7 May 1975, the Court heard Mr. Janssens on the following day. The Court then heard the addresses and submissions of Mr. Houtekier and Mr. De Meyer for the Government and of Mr. Fawcett, Mr. Custers and Mr. Nelissen for the Commission, as well as their replies to questions put by the Court and by several judges.

10. On 28 May, leave having been granted by the Court, Mr. Janssens replied in writing to two questions which the Court had put to him on 8 May 1975 when he had not been in a position to supply the necessary details immediately. His reply was communicated to the Delegates of the Commission and to the Government and gave rise on the part of the latter to written observations which were received at the registry on 18 June 1975.

On 22 August 1975, the Secretary to the Commission forwarded to the Registrar certain comments from the applicant union on those observations. On 26 August, the Registrar communicated these comments to the Government which informed him, on 16 September, that it did not think it necessary to revert to the explanations it had earlier given to the Court.

AS TO THE FACTS

11. The facts of the case may be summarised as follows:

12. The applicant, the National Union of Belgian Police, has its headquarters at Brussels-Schaerbeek. The union descends from the Belgian Police Federation founded in 1922 and changed its name in 1930; in 1939 it was constituted in the form of a non-profit-making association within the

meaning of the Act of 27 June 1921. Associations of this kind have capacity in civil law.

13. The applicant union is open to all members of the municipal police, including rural policemen, regardless of rank, but members of the two State police forces, the criminal police attached to the prosecuting authorities (police judiciaire près les parquets) and the gendarmerie, may not at present belong to it. It numbers police superintendents and deputy superintendents amongst its members.

The list of the applicant union's members deposited on 21 July 1971, in accordance with law, contained the names of 99 persons; this was not the whole of its membership but only the "active members", that is to say, those "who are delegated by the sections to represent them at the general meeting" and are alone entitled to vote (Article 5 of the applicant union's articles of association annexed to the Moniteur belge of 8 July 1960). The applicant union claims to have had 7,226 paid-up members in 1961 and that their numbers fell to 6,162 in 1971, 6,011 in 1972, 5,896 in 1973 and 5,748 in 1974. It is alleged by the applicant union that this steep decline of some 20% was due specially to the trade union consultation policy contested in the present case. The Government does not dispute the fact of the decline but does not attribute it to the cause put forward by the applicant.

There being about 12,000 men serving in the municipal police – whose establishment provides for 13,722 -, at the end of 1974 the applicant union represented almost half of the members of the force.

14. The municipal police, whose members are classified as municipal officials, is entrusted both with functions of an administrative and crime-deterrent character, as well as with criminal-police functions. In carrying out its administrative and crime-deterrent duties, the municipal police is directly subject to the municipal authorities and placed under the orders of the burgomasters; on the other hand, in the exercise of its criminal-police functions, it is subject solely to the authority of the State and more especially the judicial authorities (autorités judiciaires).

The two State police forces are distinct from the municipal police. The gendarmerie, itself also vested with both administrative police duties (maintenance of order) and criminal-police duties, can in addition discharge military duties in certain circumstances and is organised on military lines. The criminal police attached to the prosecuting authorities (la police judiciaire près les parquets) has, for its part, exclusively criminal-police (de police judiciaire) duties.

The municipal police force amounts to some 13% of municipal staff and less than 10% of all municipal and provincial staff. At the end of 1974, municipal staff totalled 88,809 officials to which number were added the staff of municipal social welfare boards (28,999), inter-communal associations (12,156) and provinces (14,260). The gendarmerie and

criminal police numbered respectively 13,392 and 827 members as of 30 June 1970.

15. Under Article 3 of its articles of association, the aim of the applicant union is "any activity directly or indirectly relating to the study, protection, development, improvement and progress of any matter concerning the rights and occupational interests of the Belgian police, particularly by means of trade union action."

16. Freedom of association is recognised in Belgium by Article 20 of the Constitution and is guaranteed in all fields by the Act of 24 May 1921. Furthermore, Belgium is a party to International Labour Organisation Conventions no. 87 concerning Freedom of Association and Protection of the Right to Organise (Act of 13 July 1951) and no. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Act of 20 November 1953). These various provisions safeguard, inter alia, the right freely to form trade unions, the right to join or not to join them, the right of trade union members freely to elect trade union representatives and the right of trade unions freely to organise their administration.

While therefore in Belgian law freedom is the rule for trade unions in matters of founding, organising, recruitment and propaganda, the same is not true of consultation of trade unions by public authorities acting as employers. In order to avoid having to negotiate with an ever increasing number of parties, the public authorities have in fact fixed certain criteria for selection based on the idea of representativeness of trade unions. They have also introduced this principle in several Acts dealing with relations between employees and employers in the private sector, for example the Act of 17 July 1957 on the Health and Safety of Workers and the Hygiene of Places of Work and Working Conditions, the Act of 29 May 1962 setting up a National Labour Council and the Act of 5 December 1968 on Collective Labour Agreements and Joint Committees.

17. Apart from a Decree of 26 September 1946 referred to below (paragraph 19), the first regulation on trade union consultation in the public sector dates back to a Royal Decree of 20 June 1955 applicable to State officials exclusively. The Royal Decree confines consultation to organisations having a seat on a "trade union advisory committee" set up within each ministerial department and a seat in a "general trade union advisory committee" operating under the aegis of the Prime Minister. These committees are consulted on all proposals concerning the status of State officials, organisation of services and work, safety, health and improvement of places of work.

The representative character of these trade unions is assessed at two levels, first at the level of the different ministerial departments and secondly at the level of the State administration as a whole. The sole criterion for representativeness is the number of members, determined by elections held

in principle every four years. In fact, the last trade union elections were held in 1959. The elections due to be held in 1963 were postponed sine die at the request of the large trade union federations, which had obtained a low percentage of votes in 1959.

In the case of the criminal police attached to the prosecuting authorities, the Government has reserved the benefit of consultation for the organisations which are confined to members of this force (Royal Decree of 21 February 1956); the Government states that in fact these organisations are in turn affiliated to the three large Belgian trade union federations. As regards the gendarmerie, Section 16 para. 2 of the Act of 14 January 1975 provides that members of the gendarmerie may join only occupational associations composed solely of gendarmes. The National Staff Union of the gendarmerie has been recognised as the sole organisation representing members of the corps.

18. There are no general regulations governing relations of municipal and provincial authorities with trade unions. The municipal authorities are free to set up trade union consultation if they so wish. Some of them, such as the towns of Antwerp, Charleroi, Mons and Verviers, have done so and set up commitees - generally organised like those which operate at national level - on which sit delegates of certain representative trade union organisations. Otherwise there is no organised consultation but trade unions may, as everywhere else in the country, lodge claims or make representations on behalf of a member without any condition of representativeness.

19. The position proves to be very different as regards relations between the Ministry of the Interior, which is the supervisory authority, and the staff of municipalities and provinces.

After a first attempt (a Bill of 1957) had failed, trade union consultation was introduced at this level by an Act of 27 July 1961. Prior to that there had been no statutory provisions. A Decree issued by the Regent on 26 September 1946 had set up a trade union consultative committee at the Ministry of the Interior. On this committee there were, amongst others, delegates of the Union of National Associations of Civil Servants and Municipal Officials, including the secretary general of the applicant union; but the Government states that the commitee was of little importance and soon ceased to meet.

20. Section 9 of the Act of 27 July 1961 reads as follows: "The general arrangements to be made by the King ... shall be decreed after consulting representatives of those organisations that best represent the staff of the provinces and municipalities ... The forms of such consultation shall be determined by the King."

Under the same section the representative organisations are to be consulted on the following subjects: staffing, recruitment and promotion conditions for municipal staff, pecuniary status and salary scales for the

staff of provinces and municipalities, general rules governing certain allowances and bonuses, rules governing the adjustment of pay scales and pecuniary status in line with the changes which have occurred since 1 January 1960 in the pecuniary status of staff of the ministries, conditions for appointment to the posts of police superintendent and deputy superintendent and criteria for up-grading.

21. Consultation is important on two counts. First, the Government is bound to ask for the opinion of the representative organisations and, secondly, in the course of consultation it informs the representative organisations of its proposals in order that they may make known their opinions before any decision is reached.

The consultation machinery is set in motion for the preparation of every rule-making instrument - Bill, Royal Decree, ministerial decree or circular - which relates to the matters listed above. Royal Decrees and ministerial circulars have been formulated in this way, usually concerning the entire staff of provinces and municipalities, but several of them containing measures peculiar to the municipal police and some valid only for that force.

22. If an organisation is not recognised as representative, it is barred from the consultation procedure but may nonetheless, inter alia, submit claims to the supervisory authority, ask to be heard by it, refer cases to it and make representations on behalf of its members.

23. The modalities of consultation of trade unions recognised as representative were first fixed by a Royal Decree of 23 October 1961. This Decree set up a trade union consultation committee attached to the Ministry of the Interior, on which the only trade union delegates were the representatives of the four large trade union federations listed in the following paragraph (Article 2).

The applicant union applied to the Conseil d'Etat for a declaration of annulment of the Decree. However, on the day of the hearing, 15 October 1964, the Moniteur belge published a Royal Decree of 12 October 1964 withdrawing the provision which was being challenged. The case was then removed from the list of the Conseil d'Etat.

24. A Royal Decree of 2 August 1966 re-organised the trade union consultation in question. While the consultation committee remained, its membership was radically changed in respect of both the number and appointment of representatives. The representatives were no longer to be appointed by specified trade unions but by "the organisations most representative of the staff of the provinces and municipalities". Article 2 para. 2 specified what was to be understood by "most representative":

> "Those organisations which are open to all staff of the provinces and municipalities and which protect such staff's occupational interests shall be deemed to be the organisations most representative thereof. Each such organisation shall make itself known by sending to the Minister of the Interior by registered post, within forty days

of publication of this Decree in the Moniteur belge, a copy of its articles of association and a list of its officers. The Minister of the Interior shall verify whether it complies with the conditions required and shall notify it of his decision."

Four trade unions, of which the first two have since merged, were recognised as meeting these criteria: the Liberal Union of Civil Servants; the Liberal Public Services Union (a member of the Affiliated Belgian Trade Unions); the Affiliated Public Services Unions, Provincial and Municipal Sector (a member of the Belgian General Federation of Labour); and the Affiliated Christian Public Services Unions, Provincial and Municipal Sector (a member of the Christian Trade Unions).

It is difficult to specify the number of persons affiliated in these various organisations. Some of the applicant union's members are also affiliated to one or other of the large federations. The Government says that two of these federations have 1,500 policemen as members.

At least two of the trade union organisations recognised as representative have technical committees for the municipal police, which, as occasion arises, deal with problems particular to this force.

25. On 22 September 1966, the applicant union asked the Minister of the Interior to consider it as one of the most representative organisations of staff of provinces and municipalities for the purposes of the implementation of the above-mentioned Royal Decree. By letter of 14 February 1967 the Minister replied as follows: "From the documents you have submitted it does not appear that your organisation fulfils the required conditions, namely that it should be open to all the staff of the provinces and municipalities and protect such staff's occupational interests".

26. Prior to that, on 25 October 1966, the applicant union had applied to the Conseil d'Etat for a declaration of annulment of the Royal Decree of 2 August 1966, alleging that Section 9 of the Act of 27 July 1961 had been contravened. The applicant contended that Section 9, which was drafted in very wide terms, implied that the organisations grouping officials by category and without regard for their opinions should, subject to their being the most representative organisations, be consulted on an equal footing with the organisations in which officials joined together according to their political feelings and without distinction as to their occupations. In the applicant's view, the preparatory work to Section 9 showed that consultation should extend to every representative organisation which protected the occupational interests of staff governed by particular staff regulations. Claiming that three quarters of the men in the municipal police belonged to it and that the force had its own regulations and constituted a corps within the personnel of the municipalities; the applicant thus maintained that it was representative in a twofold way, the number of its members as compared with the number of municipal policemen and the special character of their functions. In the submission of the applicant, the King had acted ultra vires in stipulating that the condition "representative"

must be confined to organisations open to the whole of provincial and municipal staff.

The applicant union did not refer to Articles 11 and 14 (art. 11, art. 14) of the Convention nor to Article 20 of the Belgian Constitution. It submitted, however, albeit in a subsidiary way, that Article 2 para. 2 of the Royal Decree violated the principle of trade union freedom in that it made it "obligatory" for police officers to join "political" trade unions.

27. The Minister of the Interior submitted in reply that Section 9 para. 1 of the Act of 27 July 1961 provided explicitly for consultation of the organisations most representative of the staff of the provinces and municipalities. The Minister added that the Conseil d'Etat, in its opinion no. L 94 38/2, had taken the view that there was no objection to considering as the most representative organisations those which "included staff members of all categories". The Minister inferred from this that the application was ill-founded.

28. The Conseil d'Etat dismissed the application on 6 November 1969. It held that "while the criterion of number advanced by the applicant was acceptable when applied to workers in the private sector or even to civil servants and officials in large government departments belonging to the same hierarchical structure and subject to the same regulations, it cannot be accepted in the present case since the officers concerned belong to widely different categories which have no link between them, some being governed by separate regulations". It further considered "that this diversity of categories and regulations has the effect of making the consultation of organisations representing staff much more difficult; that, in each category, the persons concerned will tend to claim as many advantages as possible for themselves without paying any heed to the implications of measures on which they are consulted for the position of the other staff members, whereas the authority has to take such implications into account; that the consultation of the organisations by the Government cannot in most cases serve any useful purpose unless it concerns organisations which comprise staff belonging to all categories and which therefore have to strike some balance in their claims in order to protect the interests of all their members". It found "that in considering the organisations representing the occupational interests of all staff of the provinces and municipalities to be the organisations most representative of such staff, the Decree being challenged is not contrary to the intention of the statute"; "that the applicant is in error in still maintaining that the contested provision is contrary to the principle of trade union freedom by making it obligatory for police officers to join political trade unions; that in fact the contested provision does not oblige police officers to join any trade union nor any particular trade union."

The judgment ended with the conclusion "that in the organisation of public services the King may confine the consultation of occupational organisations to whichever organisations are the most representative of the

staff as a whole, which procedure has repeatedly been given statutory confirmation" (translated from Recueil des arrêts et avis du Conseil d'Etat, 1969, pp. 941-942).

29. In the meantime a Royal Decree of 20 August 1969 had abolished the committee provided for in the Decree of 2 August 1966, but preserved consultation of the most representative organisations as provided in Article 2 para. 2 of the 1966 Decree; since then, such consultation takes place in writing.

30. An Act of 19 December 1974 re-organised the relations between public authorities and trade unions of officials in the service of those authorities. Section I of this Act provides that the system which the Act establishes may be made applicable by the King – with certain exceptions one of which concerns the "members of the armed forces" - not only to the staff "of the administration and other government departments", particularly of the "services which assist the judicial authorities (pouvoir judiciaire)", but also to the staff of the provinces and municipalities including the municipal police.

The Act establishes a procedure of negotiation (Chapter II) and a procedure of consultation (Chapter III).

For negotiation, the Act provides that the King shall establish three "general committees" namely, "the Committee for the National Public Services", "the Committee for Provincial and Local Public Services", and "the Joint Committee for all Public Services" (Section 3), as well as "special committees" among which will be committees competent for "questions relating to the staff" of provincial or municipal services (Section 4). The King shall determine "the composition and operation" of these committees (Section 5) on which only "representative ... organisations" shall sit from the trade union side (Section 6). Section 7 defines in detail the criteria of representativeness for each of the three general committees, Section 8 for the special committees.

Consultation shall take place within "consultation committees" set up by the King for "services and groups of services comprising not less than twenty-five officials" (Section 10). Section 12 provides that "the trade union organisations represented on a special negotiating committee shall be entitled to appoint delegates to sit on the consultation committees set up within the competence of that committee".

There will be negotiations on "the basic regulations" concerning "staff administration matters", "pecuniary status", "pension schemes", "relations with trade union organisations", and "the organisation of the social services"; on "regulations, internal measures, or directives, of a general nature relating to the subsequent fixing of staff structures, to working hours or to the organisation of work"; lastly, on Bills concerning any of these various matters (Section 2). There will be consultation for "decisions determining the staff structure of the services covered by the consultation

committee in question", "regulations which the King has not specified as basic regulations", etc. (Section 11).

In its observations of 18 February 1975, the applicant union expressed the opinion that the present case would "probably become pointless" "if the Act of 19 December 1974 became applicable to municipal officials".

At hearings of 8 and 9 May 1975, the Government stressed that the application of the 1974 Act to provincial and municipal staff would not be an easy matter and would require more time. The Government consider that it may in any case be inferred from the text and the preparatory work of the Act that even when it becomes applicable to such staff it will not change the trade union status in a way favourable to category-based unions. In its view, the applicant union will not be entitled to sit on a general or special negotiating committee.

The applicant accordingly now feels that "it is doubtful wether the new law will give just satisfaction to the union" and has so informed the Court through the Commission.

31. In its application lodged with the Commission on 5 March 1970, the National Union of Belgian Police alleged violation of Articles 11 and 14 of the Convention in conjunction with Article 17 (art. 17+11, art. 17+14), in that the Belgian authorities refused to recognise it as a representative organisation, thus debarring it from the consultation provided for by the Act of 27 July 1961. The union also claimed damages which it provisionally assessed at 100,000 Belgian francs.

The Commission declared the application admissible by a final decision of 8 February 1972, after having rejected on 28 May 1971 certain of the preliminary objections made by the respondent Government.

During the examination of the merits the applicant union confined itself to relying on Article 11 (art. 11), both on its own and in conjunction with Article 14 (art. 14+11).

32. In its report of 27 May 1974, the Commission expressed the opinion:

- unanimously, that the State, whether acting as "legislator" or "employer", assumes obligations within the scope of Article 11 para. 1 (art. 11-1) of the Convention;

- by eight votes to five, that the right to consultation and, more generally, freedom to bargain collectively are important and even essential elements of trade union action falling within the scope of Article 11 para. 1 (art. 11-1);

- by eight votes to five, that this right to consultation is not however unlimited, the limit being, in the case of the applicant union, the existence of an objective criterion for representativeness;

- unanimously, that the regulations at issue on trade union consultation in Belgium do not constitute a breach of Article 11 para. 1 (art. 11-1) of the Convention;

- unanimously, that the difference in treatment introduced by Belgian legislation between different categories of unions is justified in the

circumstances of the case and is consistent with Articles 11 and 14 (art. 14+11) of the Convention taken together.

The report contains a separate concurring opinion to which four other members of the Commission subscribed.

33. The Government made the following final submissions at the oral hearing on 8 May 1975 in the afternoon:

> "May it please the Court:
>
> - in the first place, Article 11 (art. 11) does not apply in the present case and there is therefore no reason to consider whether there has been violation of Article 14, taken in conjunction with Article 11 (art. 14+11);
>
> - alternatively, there has been violation neither of Article 11, (art. 11), nor of Article 14 in conjunction with Article 11 (art. 14+11)."

AS TO THE LAW

34. The applicant's complaints may be summarised as follows:

The National Union of Belgian Police complains of the Government not recognising it as one of the most representative organisations that the Ministry of the Interior is required to consult under the Act of 27 July 1961, which relates to such matters as staff structures, conditions of recruitment and promotion, pecuniary status and salary scales of provincial and municipal staff. The applicant union, which is excluded from this consultation as regards both questions of interest to all such staff and questions peculiar to the municipal police, considers that it is put at a disadvantage compared with the three trade unions open to that staff as a whole, as defined in Article 2 para. 2 of the Royal Decree of 2 August 1966. The applicant submits that this provision greatly restricts its field of action, thereby tending to oblige the members of the municipal police to join the organisations considered to be "representative" but having a "political" character incompatible with the "special vocation" of the police. The applicant union further maintains that the Government has, on the other hand, agreed to take account of this special vocation in the case of the two other police forces, wich are subject to State authority, namely the criminal police attached to the prosecuting authorities (Royal Decree of 21 February 1956) and the gendarmerie (letter of 17 March 1972 and subsequently the Act of 14 January 1975).

On these various points, the applicant relies on Article 11 (art. 11) of the Convention, considered both on its own and in conjunction with Article 14 (art. 14+11).

35. Having come to the conclusion that there was no violation of the Convention, the Commission referred the case to the Court, emphasising the

importance of the questions that arose therein on the interpretation and application of those two Articles (art. 11, art. 14).

36. Having regard to the information at its disposal concerning the Act of 19 December 1974 and its state of application (paragraph 30 above), the Court considers that there is no call in the present case to take account of the said Act; moreover, neither the Commission nor the Government have invited the Court to decide the case on the basis of this Act.

I. ON THE ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

37. Article 11 para. 1 (art. 11-1) of the Convention reads: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

38. The majority of the Commission has expressed the opinion that the essential components of trade union activity, which in its view include the right to be consulted, come within the scope of the provision cited above.

The Court notes that while Article 11 para. 1 (art. 11-1) presents trade union freedom as one form or a special aspect of freedom of association, the Article (art. 11) does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it. Not only is this latter right not mentioned in Article 11 para. 1 (art. 11-1), but neither can it be said that all the Contracting States in general incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention, which distinguishes it from the "right to a court" embodied in Article 6 (art. 6) (Golder judgment of 21 February 1975, Series A no. 18, p. 18, para. 36).

In addition, trade union matters are dealt with in detail in another convention, also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 Octobre 1961. Article 6 para. 1 of the Charter binds the Contracting States "to promote joint consultation between workers and employers". The prudence of the terms used shows that the Charter does not provide for a real right to consultation. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6 para. 1. Thus it cannot be supposed that such a right derives by implication from Article 11 para. 1 (art. 11-1) of the 1950 Convention, which incidentally would amount to admitting that the 1961 Charter took a retrograde step in this domain.

39. The Court does not, however, share the view expressed by the minority in the Commission who describe the phrase "for the protection of his interests" as redundant. These words, clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development

of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 para. 1 (art. 11-1) certainly leaves each State a free choice of the means to be used towards this end. While consultation is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11 (art. 11), to strive for the protection of their members' interests.

40. No-one disputes the fact that the applicant union can engage in various kinds of activity vis-à-vis the Government. It is open to it, for instance, to present claims and to make representations for the protection of the interests of its members or certain of them. Nor does the applicant union in any way allege that the steps it takes are ignored by the Government. In these circumstances, the fact alone that the Minister of the Interior does not consult the applicant under the Act of 27 July 1961 does not constitute a breach of Article 11 para. 1 (art. 11-1) considered on its own.

41. As regards the alleged infringement of personal freedom to join or remain a member of the applicant union, the Court stresses the fact that every member of the municipal police retains this freedom as of a right, notwithstanding the Royal Decree of 2 August 1966. It may be the fact that the steady and appreciable decline in the membership of the National Union of Belgian Police is to be explained at least in part, as the applicant maintains, by the disadvantage the applicant is placed at compared with trade unions enjoying a more favourable position. It may be the fact too that this state of affairs is capable of diminishing the usefulness and practical value of belonging to the applicant union. However, it is brought about by Belgium's general policy of restricting the number of organisations to be consulted. This policy is not on its own incompatible with trade union freedom; the steps taken to implement it escape supervision by the Court provided that they do not contravene Articles 11 and 14 (art. 14+11) read in conjunction.

42. Having thus found that there is no violation of paragraph 1 of Article 11 (art. 11-1), the Court is not called upon to have regard to paragraph 2 (art. 11-2), on which in any case both the Commission and the Government stated they did not rely.

II. AS TO THE ALLEGED VIOLATION OF ARTICLES 11 AND 14 (art. 11, art. 14)

43. Article 14 (art. 14) is worded as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

political or other opinion, national or social origin, association with a national minority, property, birth or other status."

44. Although the Court has found no violation of Article 11 para. 1 (art. 11-1), it has to be ascertained whether the differences in treatment complained of by the applicant union contravene Articles 11 and 14 (art. 14+11) taken together. Although Article 14 (art. 14) has no independent existence, it is complementary to the other normative provisions of the Convention and Protocols: it safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in those provisions. A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may therefore infringe this Article when read in conjunction with Article 14 (art. 14) for the reason that it is of a discriminatory nature. It is as though Article 14 (art. 14) formed an integral part of each of the Articles laying down rights and freedoms whatever their nature (case relating to certain aspects of the laws on the use of languages in education in Belgium, judgment of 23 July 1968, Series A no. 6, pp. 33-34, para. 9).

These considerations apply in particular where a right embodied in the Convention and the corresponding obligation on the part of the State are not defined precisely, and consequently the State has a wide choice of the means for making the exercise of the right possible and effective. As the Court has noted above at paragraph 39, Article 11 para. 1 (art. 11-1) enunciates a right of this kind.

45. The Court has already found that the applicant is at a disadvantage compared with certain other trade unions. The subject-matter of the disadvantage, i.e., consultation, is no doubt one which in principle is left by Article 11 para. 1 (art. 11-1) to the discretion of the Contracting States, but it constitutes one of the modalities of the exercise of a right guaranteed by this provision as it has been interpreted by the Court at paragraph 39 above, i.e., the right of the members of a trade union that their union be heard in the protection of their interests. Belgium has in fact instituted a system of consultation in its relations with provincial and municipal staff as well as with its own officials; the State has selected consultation as one of the means of making possible the conduct and development by trade unions of collective action in the protection of their members' occupational interests. Accordingly, Article 14 (art. 14) is pertinent in the present context.

46. It is not every distinction, however, that amounts to discrimination. In the judgment cited above, the Court stated that "in spite of the very general wording of the French version ('sans distinction aucune'), Article 14 (art. 14) does not forbid every difference in treatment in the exercise of the rights and freedoms recognised". Taking care to identify "the criteria which enable a determination to be made as to whether or not a given difference in treatment ... contravenes Article 14 (art. 14)", the Court held

that "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification", and that "the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies". The Court went on to point out that "a difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised" (ibid. p. 34, para. 10).

47. It is the duty of the Court to see whether the differences of treatment at issue have this kind of discriminatory character. In so doing, the Court "cannot assume the rôle of the competent national authorities" which "remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention"; "review by the Court concerns only the conformity of these measures with the requirements of Convention" (ibid. p. 35, para. 10).

48. The applicant union complains of not being a body which must be consulted by the Ministry of the Interior, like the three trade unions open to all provincial and municipal staff, on proposals of interest to the municipal police, no matter whether such proposals concern all categories of municipal officials or particularly the police.

As the Court has pointed out above, the Royal Decree of 2 August 1966 has in this respect caused inequality of treatment to the prejudice of the "category-based" organisations such as the applicant union. The Government has urged that it wished to avoid "trade union anarchy" and considered it necessary "to ensure a coherent and balanced staff policy, taking due account of the occupational interests of all provincial and communal staff". This is a legitimate aim in itself and the Court has no reason to think that the Government had other and ill-intentioned designs underlying Article 2 para. 2 of the above Royal Decree. In particular, there is nothing to show that the authorities intended to confer on the three large trade union organisations, on account of their all being politically committed, an exlusive privilege in the matter; besides, if there existed or were to exist a trade union organisation without political leanings open to all provincial and municipal staff and protecting their occupational interests, the provision at issue would compel the Minister of the Interior to consult that organisation too.

The applicant union has stated, it is true, that it is hard to see "how the Government can claim that it is in the general interest to avoid fragmentation of trade union organisations in matters connected with the municipal police, when the Government itself has kept separate the trade union activities of the criminal police and has recognised a category-based apolitical union as the only organisation representing members of the

gendarmerie". In the Court's opinion, however, Articles 11 and 14 (art. 11, art. 14) of the Convention do not oblige Belgium to set up for provincial and municipal staff, and for the municipal police in particular, a consultation system analogous to the one in operation for State officials, including members of the criminal police attached to the prosecuting authorities and of the gendarmerie.

49. It remains to be seen whether the disadvantages to which members of the applicant union are put compared with members of the trade unions consulted under the Act of 27 July 1961 is justified not only in principle (paragraph 48 above) but also in scope.

The answer seems clear insofar as consultation covers questions of a general nature which are of interest to all provincial and municipal staff: in this regard, the measure contained in Article 2 para. 2 of the Royal Decree of 2 August 1966 is a proper means of attaining the legitimate aim sought to be realised.

Finally, the Court has examined the question whether discrimination, contrary to Articles 11 and 14 (art. 14+11) taken together, results from the further fact of denying the applicant union the right to be consulted on certain matters which concern the municipal police alone, for example conditions for appointment as superintendent or deputy superintendent (Royal Decree of 12 April 1965 and ministerial circular of 18 May 1965, both published in the Moniteur belge of 21 May 1965). These specific matters represent only a part of the matters subject to obligatory consultation. Moreover, special questions may also arise concerning various other categories of provincial and municipal staff, which, if they were to combine in category based trade unions, would have no right to consultation either. It is understandable therefore that the Government has not felt bound to make exceptions which might have finished by leaving the rule laid down in Article 2 para. 2 of the Royal Decree of 2 August 1966 devoid of significance. The Court is of the opinion that the uniform nature of the rule does not justify the conclusion that the Government has exceeded the limits of its freedoms to lay down the measures it deems appropriate in its relations with the trade unions. The Court considers that it has not been clearly established that the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued by the Government. The principle of proportionality has therefore not been offended.

III. AS TO THE APPLICATION OF ARTICLE 50 (art. 50)

50. The Court, having thus found that there has been no violation of the Convention, considers that in the present case the question of the application of Article 50 (art. 50) of the Convention does not arise.

FOR THESE REASONS, THE COURT,

1. Holds unanimously that there has been no breach of Article 11 (art. 11);

2. Holds by ten votes to four that there has been no breach of Articles 11 and 14 (art. 14+11) taken together.

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

For the President
Hermann MOSLER
Vice-President

Marc-André EISSEN
Registrar

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

- opinion of Judge Zekia;

- joint opinion of Judges Wiarda, Ganshof van der Meersch and Bindschedler-Robert;

- opinion of Judge Sir Gerald Fitzmaurice.

H. M.
M.-A. E.

SEPARATE OPINION OF JUDGE ZEKIA

The factual aspect of the case

The facts relating to this case are given in the first part of the judgment of the Court. I need not recapitulate them. I will confine myself by referring very briefly to facts which I consider indispensable for expressing my views on the legal aspect of the case.

The legal aspect

A. Whether Article 11 para. 1 (art. 11-1) of the Convention is violated

The respondent Government, by various royal decrees promulgated in the years 1946, 1955, 1961, 1964, 1966, 1969 and by an Act of 19 December 1974, conferred the right of consultation, in one form or another, on the organisations which were open to all staff of the provinces and municipalities and which for this reason were considered to have complied with the requirement of being a "most representative" body.

For trade unions the right of consultation by public authorities on matters vital to their interests undoubtedly is of importance: (a) the Government is bound to seek the opinion of the organisation entitled to be consulted on subjects such as recruitment to the service, promotion conditions, pay scales, pecuniary and pension rights and so on; (b) furthermore, the Government makes known to such organisations, in advance, the decisions intended to be taken on subjects affecting their interests in one way or another. Organisations therefore are afforded the opportunity of putting forward their opinion before a decision material for their interests is finally taken by the authorities.

The Minister of the Interior, by his letter of 14 February 1967, refused to acknowledge the applicant union as one entitled to be consulted by public authorities on matters already referred to, on the ground that from the documents it had submitted - the constitution and the articles of association of the applicant union (the National Union of Belgian Police) - he found that there was no compliance with the requirements of being open to all the staff of the provinces and municipalities and thereby protecting the occupational interests of all such staff.

Does this refusal to confer the right to consultation, in the light of the facts and the relevant provisions of law, amount to an infringement of the right "to form and to join trade unions for the protection of his interests", as provided by Article 11 para. 1 (art. 11-1) of the Convention?

My short-cut approach for an answer is as follows:

The determining factors to be considered are two.

(1)

(a) Could the right, sought by the applicant union, for consultation be regarded as sine qua non for a person having the right to freedom of association and to form or join trade unions for the protection of his interests? In other words, whether one can or cannot conceive of a right referred to above only if it is also accompanied by the right to consultation.

The answer to this is obviously a negative one.

(b) Let us take the less stringent test. Could a right to be consulted be regarded as a constituent element of, or as inherent in and inseparable from, the right to freedom of association and to form and join a trade union ...?

My answer to this is also in the negative. Taking into account the wide sphere of operation pertaining to trade union activities, my answer to the above could not be otherwise.

(2) Ought such a right of consultation to be accepted as of vital importance for the activities of a trade union within the frame of the normal concept of a trade union?

I will answer this also in the negative but with a certain amount of hesitation. In this connection, one has to bear in mind the fact that organisations of the status of the applicant union have the right to make their claims to the appropriate authorities and also to be heard by them on the matters appertaining to their status and interests, although they are not entitled to any information in advance as to the measures (executive or administrative) intended to be taken by the Government or its organs. This to some extent, but not to a full extent, alleviates the hardship incurred by the denial by the Government of the right of consultation to the applicant union.

Time may however come, although I am not sure that it has not come, when the right of consultation, like the right of collective bargaining, will be taken for granted and considered predominant within the scope of the normal activities of a trade union. In such an eventuality the right to be consulted will have to be recognised as inherently included in Article 11 para. 1 (art. 11-1).

I share the view therefore that there was no violation of Article 11 para. 1 (art. 11-1) by the respondent Government.

I pass now to the consideration of the second outstanding question which is by no means an easy one to tackle.

B. Is there a breach of the Convention when Article 11 para. 1 is taken in conjunction with Article 14 (art. 14+11-1)?

In my view, Article 11 para. 1 (art. 11-1) deals with the recognition and with the conferment of a right to freedom of association including the right to form and join trade unions for the protection of the would-be members' interests, whereas Article 14 (art. 14) deals with the obligation of a State to secure the enjoyment of rights and freedoms set forth in the Convention, and the right referred to is undoubtedly one included therein.

The phrase "to secure the enjoyment of the rights and freedoms" (la jouissance des droits et libertés) refers to the manner in which a right conferred by other Articles of the Convention is to be implemented and made use of.

A State is bound to secure without discrimination the enjoyment of such a right.

The right of a trade union to be consulted by the Government is not, at any rate expressly, among the rights enumerated in the Convention. Such right, however, might very well be recognised as an ancillary or consequential right in the enjoyment of the right embodied in Article 11 para. 1 (art. 11-1).

Article 11 (art. 11) begins with the words "Everyone has the right ..." The wording itself does away with the necessity of making provision for non-discrimination. When a right is conferred on everybody without qualification or limitation, it goes without saying that it is granted without discrimination on any ground.

The State undertakes under Article 14 (art. 14) not only a mere recognition of the rights in the Convention without discrimination, but goes further and assumes responsibility for the way such rights are to be utilised where the Government takes part directly or indirectly in the mode of such utilisation.

The enjoyment of a right is different, to my mind, from the acquisition and the recognition of a right. It is therefore relevant to consider whether the regulations made by the Belgian Government on trade union consultation constitute a breach of Article 11 para. 1 taken together with Article 14 (art. 14+11-1).

The judgment of the Court deals in extenso with the relevant facts and with submissions on legal points advanced by both sides. I need not reiterate them. It suffices for me here to make certain observations on certain salient points relating to the issue under consideration.

One has to take into account the "pros and cons" embodied in the submissions made by both sides.

In the first place, it can hardly be disputed that the right to consultation conferred on a trade union is a very important one. In this respect I agree to

a great extent, if not to the full extent, with the Commission's majority opinion expressed in its report of 27 May 1974 (paragraph 76 in fine): "the right to consultation and at a more general level, the freedom to bargain collectively, are important and even essential elements of trade union action falling within the scope of Article 11 para. 1 (art. 11-1)".

Nor can it be disputed that the applicant union is placed at a disadvantage compared with the status of the other trade unions that enjoy the right of consultation.

From the above it can easily be deduced that the applicant union has been treated discriminatorily.

We come now to the crucial point, namely as to whether this treatment amounts to a discrimination in the enjoyment of the right to form and join a trade union, within the meaning and scope of Article 14 (art. 14) of the Convention.

Here we may be immensely assisted by the criteria enunciated by this Court in the Belgian "Linguistic" case. I quote a few extracts from the said judgment:

> "The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment ... must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

(Case relating to certain aspects of the laws on the use of languages in education in Belgium, judgment of 23 July 1968, Series A no. 6, p. 34, para. 10).

There remains the application of the above criteria to the facts of this case.

The main reason advanced on behalf of the Government for the refusal to recognise the right of consultation for the applicant union is the one indicated by the Minister of the Interior in his letter of 14 February 1967 to which I have already referred. In that letter it was stated that the articles of association of the applicant union did not keep the door open, for membership, to all the staff of the provinces and of municipalities and did not protect the interests of such staff, the underlying principle of these requirements being the "most representative" theory adopted as the criterion for acquiring the right of consultation. In support of the soundness and the necessity for the adoption of this criterion, we have been told in effect that if the right of consultation were to be conferred on every trade union, then the ever increasing number of the trade unions, on the one hand, and the diversity of their problems touching on their interests, on the other hand, would render consultation impossible or useless and the whole thing would result in chaos or anarchy. I must admit that this is a summary of my

impressions from addresses made and documents submitted on behalf of the Government. My impressions may not be exact.

The applicant union, on the other hand, maintains that it has a long history in the service of the country and that the union was descended from the Belgian Police Federation founded in 1922 and its members in their twofold capacity are entrusted with important duties. In their capacity as an administrative police force they deal with matters such as traffic control, censuses, supervision of building and passports. In their second capacity they act as criminal police carrying heavy responsibilities in the investigation of crimes and offences.

The applicant union is of a non-political character. The non-recognition to the applicant union of the right of consultation, has adversely and heavily hit the union. From 7,226 in 1961, the membership of the union dropped to 5,748 in 1974.

Although the members of the applicant union in discharging their administrative duties come under the supervision of the municipal authorities, in their capacity as a criminal police force, they are answerable at national level to the Government. In addition, they have their own professional secrets which they might have to disclose to other union members if they were to be affiliated to them for the purpose of qualifying themselves for the right of consultation.

It has been argued on the part of the Government that the applicant union was entitled to submit claims and make representations to be heard on matters relating to the interests of their members. Since this is the case, one wonders what would be the additional amount of inconvenience to the Government if the right to consultation were not withheld from the applicant union. In other words, I am inclined to the view that the administerial difficulties and the necessity of restricting and limiting the number of trade unions entitled to the right of consultation - in any case as far as the applicant union is concerned - were over-emphasised.

Having considered the case as a whole, I have come to the conclusion that in the light of the guidelines enunciated by this Court in the Belgian "Linguistic" case cited already, there was neither reasonable justification nor reasonable relationship of proportionality in withholding the right of consultation from the applicant union. It seems to me therefore that the Belgian Government has violated Article 14 (art. 14) of the Convention in respect of a right emanating from Article 11 para. 1 (art. 11-1).

JOINT SEPARATE OPINION OF JUDGES WIARDA, GANSHOF VAN DER MEERSCH AND BINDSCHEDLER-ROBERT

(Translation)

We agree in general with paragraphs 1 to 48 of the judgment but, to our regret, we are unable to associate ourselves with the conclusion in paragraph 49.

The applicant union is the only trade union, in the strict sense of the term, in which combine members of the Belgian municipal police, and it comprises a very large proportion of them; as such, it is representative of this category of officials. Yet the applicant union is excluded from the benefit of the obligatory consultation provided for by the Act of 27 July 1961 on the ground that it fails to fulfil one of the conditions of representativeness defined in Article 2 para. 2 of the Royal Decree of 2 August 1966, that of being "open to all staff of the provinces and municipalities".

Is is stated in paragraph 48 of the judgment that the aim sought to be achieved by Belgium in issuing the regulations at issue - to avoid "trade union anarchy" and "to ensure a coherent and balanced staff policy taking due account of the occupational interests of all provincial and communal staff" - is a legitimate aim in itself. We share the opinion of the majority of the Court on this point; nevertheless, the pursuit of the aim in question would in our view not only not exclude, but even demand, the taking into consideration of the specific occupational interests of certain categories of officials. While we accept, like the majority, that the measure contained in Article 2 para. 2 of the Royal Decree of 2 August 1966 constitutes a proper means of attaining that end insofar as consultation covers questions of a general nature which are of interest to all provincial and municipal staff, the same is not true of matters peculiar to the municipal police.

These matters are both numerous and important. As explained in paragraph 14 of the judgment, the municipal police combine functions of two fundamentally different kinds, those of administrative and crime-deterrent police and those of criminal police; in the exercise of these different functions the municipal police is subject to separate authorities. By reason of the very nature of its various functions, the municipal police is in a position which is basically different from that of other provincial and municipal staff. It follows that the occupational interests of the members of the municipal police do not invariably coincide with those of the other staff and in some instances are totally disparate. The responsible authorities are quite aware of this, as they often make regulations valid solely for the municipal police - for example, the Royal Decree of 12 April 1965 and ministerial circular of 18 May 1965 on the qualifications for the post of

superintendent or deputy superintendent (Moniteur belge of 21 May 1965) - or constituting exceptions, as regards that force, to the rules applicable in general to all provincial and municipal staff.

For the observance of the obligations binding upon it under Articles 11 and 14 (art. 14+11) of the Convention, taken in conjunction, the Government should therefore, in specific matters such as those, consult the applicant union in which combine the persons mainly interested. This would not lead to any real danger of "trade union anarchy". The disadvantage suffered by the members of the applicant union in the protection of their occupational interests by reason of the uniform and inflexible character of the criterion laid down by Article 2 para. 2 of the Royal Decree of 2 August 1966 cannot be justified; it necessarily entails discrimination compared with the members of the trade unions which are consulted under the Act of 27 July 1961.

SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

I.

1. I agree with the judgment of the Court in the present case that there has been no infraction of Article 11 (art. 11) of the European Convention on Human Rights. Nevertheless, my approach to its interpretation differs in certain important respects from that of the Court. As regards Article 14 (art. 14) I must differ entirely, inasmuch as I consider that Article (art. 14) to be totally irrelevant and inapplicable so soon as it is found - as the Court's judgment does find - that the right or freedom, the enjoyment of which must not be subjected to discrimination contrary to Article 14 (art. 14), is not a right or freedom "set forth" (vide Article 14) (art. 14) in Article 11 (art. 11) or any other provision of the Convention. Thus for me it is not so much a question of whether, in the present case, there has or has not been discrimination, as that this question does not arise. If it did arise for me, I should hold that there had been discrimination for the same reasons as those stated in the joint separate opinion of Judges Wiarda, Ganshof van der Meersch and Bindschedler-Robert in this case.

2. However, before I come to these matters I would like to deal with certain others of a more general character, raised by the written and oral arguments of the Commission in the present case - matters which concern the interpretation and application of the Convention as a whole.

3. In paragraph 56 of its report in the present case, the Commission referred to a previous report made by it - in the Golder case[1]. After recalling the views as to the principles of interpretation applicable to the European Convention which it had expressed in paragraphs 44-46 of the latter (Golder) report[2], it went on to quote verbatim the following passage from paragraph 57 of that report, on which it was stated that "special emphasis" was laid:-

> "The overriding function of the Convention is to protect the rights of individuals and not to lay down as between States mutual obligations which are to be restrictively interpreted having regard to the sovereignty of these States. On the contrary the role of the Convention and the function of its interpretation is to make protection of the individual effective."

(- "but only", it should at least have been added, "within the limits of the Convention as such").

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[1] In which the Court pronounced judgment on 21 February 1975.

[2] Report dated 1 June 1973 in relation to Application no. 4451/70 (see Series B no. 16, p. 12 et seq.).

4. The opinion expressed in the above-quoted passage has been vigorously developed on behalf of the Commission in two later cases[3], also, like the present National Union of Belgian Police case, involving questions of trade union rights arising out of Articles 11 and 14 (art. 11, art. 14) of the Convention, very similar to those in issue in the present case. Although the Court has not yet pronounced itself on these other cases, the public oral arguments in respect of them have been delivered, and the verbatim record of them is available[4]. I can therefore properly comment on them to the extent at least that they are relevant to the parallel questions at issue in the present (National Union of Belgian Police) case.

5. The passage quoted in paragraph 3 above is obviously correct in one respect, where it says that it is not the function of the Convention "to lay down as between States mutual obligations" – that is to say obligations of the type where performance by each party of its obligations is conditional on a corresponding performance by the others. The obligations of the Human Rights Convention are objective obligations, which each party is independently bound to carry out. Non-performance could not, in principle, and special circumstances apart, become excusable merely on the ground of a failure to perform by another party. However, this in no way disposes of the quite separate question of whether those obligations are to be construed liberally or conservatively (terms which I prefer to broad or extensive on the one hand, and narrow and restrictive on the other).

6. This question of construction I dealt with in some detail in paragraphs 32-39 (more especially 38 and 39) of the dissenting part of my separate opinion in the Golder case. The Commission has had an opportunity in the present (Belgian Police) case to answer the points I then made, but it has not done so. The passage quoted in paragraph 3 above contained no answers to them, their essential feature being that they consisted largely of statements of incontrovertible fact, not simply opinion. The European Convention on Human Rights was a Convention of a highly novel character that had never before been concluded; it did involve the Contracting Parties in obligations of a kind governments had never previously undertaken, and concepts which, only twelve years previously perhaps (before 1940), would have been regarded not only as unthinkable, but as being quite outside the normal framework of international law - particularly as regards the revolutionary notion of the right of the individual to petition in an international forum against his own government; and for these reasons governments, though they caused the Convention to be drawn up, were slow to bind themselves to it as actual parties, and still slower to accept the separately provided for right of individual petition, as to which they have retained the faculty to

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[3] The Swedish Engine Drivers' Union and Schmidt and Dahlström cases (Applications nos. 5614/72 and 5589/72, reports of the Commission of 27 May and 17 July 1974, documents D 64.180 and D 68.252 (rev.)).

[4] Documents CDH (75) 65 and 66 (hearings of 23, 24 and 25 September 1975).

accept it only temporarily, and to free themselves from it in due course if they so desire. And it is such separate and voluntarily continued acceptance alone that has given the Court and the Commission jurisdiction to hear and determine cases of this class - to which the present one, like the Golder case, belongs.

7. In such circumstances, can it really be contended with any credibility, as was done in the later arguments before the Court[5], which I mentioned in paragraph 4 above, that "the whole notion that it [the Convention] has to be understood in terms of the intention of the parties in 1949/50 ... is quite unrealsistic"? What would be unrealistic would be any other view than that, even though what the parties then intended may not be the sole applicable criterion. But to pretend that it is not at least one of the most important of the applicable criteria - that it must even be excluded entirely - this is what would lack realism and reason.

8. The remark which I have just cited was followed up and stressed by another, wich I here quote somewhat out of context - a lapse which I will put right in a moment. It was to this effect, namely that "one must not be influenced by what governments may have thought they were achieving or were trying to achieve in 1949 and 1950."[6] Not even to be "influenced by" is surely to go rather far, since it seems to suggest that one should actually ignore or take no serious account of what the governments thought. This is not a tenable view; and with regard to it I believe it is pertinent to remember that the functioning of the European Convention, and of its enforcement and judicial machinery, is watched by non-European Governments who would be even more hesitant to subscribe to the right of individual petition than the European governments were in 1949/50 - as is clearly shown by the continuing lack of any move to introduce a similar concept, or machinery, into the Universal Covenants of Human Rights. There is a risk in my opinion that such governments would be seriously deterred from ever doing so if it appeared that one of the consequences was liable to be that the limitations which they intended as to the scope of the relevant covenant or convention may not be respected by the organs of enforcement.

9. The context of the remark I quoted early in paragraph 8 above was as follows. The speaker had expressed the view that the European Convention, "although in form a treaty", was not "a treaty in the traditional sense" but was really in the nature of a "constitutional instrument" (the intended inference presumably being that the ordinary rules of treaty interpretation would not necessarily apply to it). The speaker went on to point out that the article on interpretation in the Vienna Convention on the Law of Treaties (Article 31) made no mention of the intentions of the parties, but rather of the object and purpose of the treaty. There then followed the passage

[5] See CDH (75) 65, p. 3.
[6] Loc. cit., p. 3.

quoted in paragraph 8 above, preceded by the words, "therefore, even if it [the European Convention] is regarded as a treaty, one must not be influenced by what governments may have thought", etc. This chain of reasoning calls for the following observations:

(i) The objects and purposes of a treaty are not something that exist in abstracto: they follow from and are closely bound up with the intentions of the parties, as expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes. Moreover, the Vienna Convention - even if with certain qualifications - indicates, as the primary rule, interpretation "in accordance with the ordinary meaning to be given to the terms of the treaty"; - and as I have previously had occasion to point out, the real raison d'être of the hallowed rule of the textual interpretation of a treaty lies precisely in the fact that the intentions of the parties are supposed to be expressed or embodied in - or derivable from - the text which they finally draw up, and may not therefore legitimately be sought elsewhere save in special circumstances; and a fortiori may certainly not be subsequently imported under the guise of objects and purposes not thought of at the time. From these considerations it is therefore clear that the Vienna Convention implicitly recognises the element of intentions though it does not in terms mention it.

(ii) I have no quarrel with the view that the European Convention - like virtually all so-called "law-making" treaties - has a constitutional aspect, although the considerations summarised in paragraph 6 above indicated that, even regarded as a constitution, the Convention should be given a conservative rather than an extensive interpretation. But what I find it impossible to accept is the implied suggestion that because the Convention has a constitutional aspect, the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties. Such a view moreover overlooks the patent fact that, even in the case of constitutions proper, and even allowing for certain permissible interpretational differences of treatment between treaties and constitutions as indicated in paragraph 32 of the dissenting part of my opinion in the Golder case, there are rules of interpretation applicable to constitutions, and these rules have in large measure a character closely analogous to those of treaty interpretation. Thus national courts will interpret their national constitutions - or legislative acts made under them - with reference (inter alia at least) to the intentions of the legislature, or original framers of the constitution, in the sense at any rate that interpretations clearly not contemplated by these, or falling outside the scope of the legislative clause or constitutional provision concerned, will normally be rejected. Furthermore, at least in all countries in which there is a basic written constitution, it is precisely one of the functions of the courts to characterise, as being "unconstitutional", acts, whether of the executive or

of the legislature, which are considered to be contrary to or not compatible with the letter or spirit of the constitution, - something which it would be hardly possible to do without taking due account of the factor of "intentions".

10. I am not of course suggesting that a Convention such as the Human Rights Convention should be interpreted in a narrowly restrictive way - that it should not indeed be given a reasonably liberal construction that would also take into consideration manifest changes or developments in the climate of opinion which have occurred since the Convention was concluded. But this is a different matter, and quite different from the subservience to policy that seems to have been advocated in recent argument before the Court, in which the speaker terminated his remarks by stating: "I conclude by saying that law is always the instrument of policy". [7] Even allowing for the fact that this remark is here being quoted out of the immediate context[8], such a conclusion is dangerous unless carefully qualified, - for if taken literally and generally, it would seem to justify the excesses of courts of law in the carrying out of the policies of some of the worst tyrannies in history. In my view the integrity of the law requires that the courts should apply it neither as the instrument, nor as the contriver, of policy, but in accordance with their own professional standards and canons.

11. I now turn from these general questions of approach, concerning the interpretation of the Convention as a whole, to that of the interpretation to be given to the particular provisions material in the present case - principally Articles 11 and 14 (art. 11, art. 14).

II.

Article 11 (art. 11)

12. The relevant part of this provision reads:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

I am in general agreement with what the judgment says about Article 11 (art. 11), except that I share the minority view in the Commission as regards the phrase "for the protection of his interests", namely that this is redundant. I would put it this way that doubtless this phrase plays a useful semantic part in indicating pro maiore certo what is the main object of the preceding phrase, to which it is directly attached, viz., "the right to form and to join

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[7] CDH (75) 65, p. 75.

[8] This context was "So this is not a matter of proof that one interpretation is demonstrably the right one, but I ... believe ... that the wider interpretation ... gives a more effective use of the Convention, and particularly Article 11 (art. 11). If I may say so with respect, the choice is perhaps also [sc. as well as a case of interpretation] a matter of judicial policy; but I conclude by saying that law is always the instrument of policy".

trade unions" (for the protection of, etc.) - but that it is in no way necessary in order to import this notion of protection of interests into that of the right to form and join trade unions since, according to the normal concept of a trade union, this right can, in that context, have little purpose other than the protection of the members' interests - or, more accurately, must at least comprise that purpose amongst, possibly, others. Indeed there is even a certain danger in the express reference in Article 11 (art. 11) to the protection of interests, and to that alone, for it could well suggest that this is the only purpose of a trade union, or at least the only trade union activity that the Convention purports to protect, - which was probably not the intention. Strictly, the phrase under discussion has a limiting effect and, if interpreted literally, would involve that the Convention conferred a right to form and join a trade union if it was for the protection of the members' interests, but not otherwise.

13. It seems to me however, that since a trade union that did not have the capacity to protect its members' industrial or professional interests would serve little or no useful purpose and would be difficult to reconcile with the normal idea of a trade union, it must really be regarded as inherent in the freedom to form and join a union, that the union should, when formed, have this capacity. If this is correct the phrase, "for the protection of his interests", while it may make certainty more certain, does not strictly add anything of substance that would not already be there. In thinking this, I do not overlook what was said on behalf of the Commission during the oral hearing in the present case as recorded in the last paragraph on p. 73 of the final record.[9] But persuasive though these considerations may be in themselves, the case of a trade union formed for the protection of its members' interests seems to me, at least in the present context, to be so very much the usual one as to render other possibilities unreal.

14. Be these things as they may, the notion of trade union formation for the protection of its members' interests implies (and here I agree with the Court's judgment) some definite minimum right of activity for the union so formed; - and moreover a right of institutional activity, qua union - for if it still remained the case that only individual action was open to members, the whole point of association in a trade union context, which is precisely corporate action, would be lost.

15. In considering what the notion of trade union activity comprises for purposes of Article 11 (art. 11), it is perhaps more important, or will at any rate be more fruitful, to enquire what that notion does not include, as much as what it does. Without going into detail, I believe the distinction to be made, on the basis of a straightforward interpretation of Article 11 (art. 11), is that which can broadly be drawn between, on the one hand, the rights and freedoms of the individual in forming a union and, following on that

[9] CDH (75) 31.

formation, the activities of the union itself, - and, on the other hand, the obligations of employers, whether in the public or private domain, and of the State in its capacity as such in relation to those individual and union rights, freedoms and activities. In my opinion, such obligations do not in principle extend beyond the obvious "counterpart" obligations to allow or permit and not interfere with, impede or prevent the exercise by individuals and unions of those rights, freedoms and normal activities. (Even here there is an important qualification to be made which I shall mention in a moment.) What the obligations of employers, whether in the public or private sector, or of the State as such, do not, on the basis and wording of Article 11 (art. 11) include, are such things as consultation[10] with unions, negotiation with them, the conclusion of agreements, etc., - still less the granting to the unions or their members of any specific economic or industrial terms. Whether there is a duty of another kind for the employers to do one or more of these things, is another matter, but it is not a legal duty deriving from either the language of Article 11 (art. 11) or from any reasonable inference to be drawn from that language.

16. It follows from this that I must disagree entirely with the view expressed at the end of paragraph 69 of the report of the Commission in the present case, to the effect that the words "freedom of association" in Article 11 (art. 11) may legitimately be extended to cover State responsibility in the sphere of labour/management relations - i.e., of relations between labour and management. This might perhaps be so in certain very limited particular instances; but as a general statement of principle it is far too sweeping. Even the "counterpart" obligation of the employer and of the State, not to prevent or impede normal trade union activity, which I have already mentioned, must be subject to at least one important qualification, - namely that it cannot extend to imposing any duty on the employer or the State to remain passive in the face of strike or other industrial action by the union or any of its members whether acting individually or together. If there is on the one side a right to engage in strike action and its possible accompaniments, such as picketing etc., (as to which I make no pronouncement), then this must be balanced on the other by a right of lock-out, prevention of "sit-ins", withdrawal of certain financial benefits, etc. The one not only implies, but entails, the other. This is the principle of "equality of arms" which is but another facet of the right of self-defence within the limits of the law - that right which is graphically illustrated through the irony of the saying, "Cet animal est méchant, quand on l'attaque il se défend!" Moreover, the principle of action within the law must also operate both ways. If employers and the State as such, must conform to

[10] It should perhaps be made clear here that the so-called right of consultation in question in the present case is not the right of the union to approach the employers of the State, but not right (if any) of the union to be consulted as a matter of obligation on the initiative of the employer or the State as such.

this, so also must trade unions. Article 11 (art. 11), whatever it may or may not comprise, cannot validate extra-legal activities, assuming always that the law permits or does not prevent normal trade union activity in the furtherance of industrial interests so long as this is peaceful, non-violent and non-coercitive (apart of course from the natural and inherent pressures resulting or inseparable from the very fact of strike action and its legitimate concomitants).

17. Even if some of these observations are only obiter dicta in the actual context of the present case, they serve to re-inforce my conclusion that the refusal of the Belgian Government to recognise the National Union of Belgian Police as one of the organisations most representative of the staff of the provinces and communes for purposes of consultation did not infringe Article 11 (art. 11) of the Convention, - indeed I doubt whether that Article as such has any true application to this type of complaint.

III.

Article 14 (art. 14)

18. The relevant part of this provision reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour ..." etc.

I find it difficult to agree with this part of the Court's judgment, or even to see how the Court manages to arrive at it. In my opinion, so soon as it is established (as the earlier part of the judgment does) that Article 11 (art. 11) does not embody any right for trade unions to be consulted, or any obligation for the authorities to consult them, Article 14 (art. 14) can have no possible sphere of application. This is because, according to the plain language of that Article (art. 14), it is only the "enjoyment of the rights and freedoms set forth in this Convention" - [my italics] - that is to be "secured without discrimination". (Here, and before going further, I would interject that, in what follows, I shall, generally speaking, take no separate account of the notion of a "freedom" which, in the context, I regard as being merely another way of describing a right, or a way of describing another kind of right - since the notion of freedom to be consulted has no real juridical content - (and see further footnote 15 below)). To resume, if - as the Court finds – the right to form and join trade unions for the protection of the members' interests does not comprise any right for trade unions to be consulted by the authorities, then a right of consultation is not one of "the rights and freedoms set forth in this Convention", and the issue of discrimination becomes irrelevant. No question of the discriminatory or non-discriminatory application or enjoyment of a right can arise unless that right itself exists in the first place, to be conceded whether discriminatorily or not. Otherwise Article 14 (art. 14) has nothing to bite upon. Where no

right at all exists, but only a certain voluntary practice (of consultation), the practice may be exercised discriminatorily, but this cannot be a breach of Article 14 (art. 14), which only enjoins non-discrimination in the enjoyment of "rights and freedoms", not of mere voluntary or discretionary, and non-binding practices.

19. The view (to the contrary) expressed in paragraph 44 of the Court's judgment seems to me not only not to answer these points but to ignore them completely, or at least "by-pass" without coming to grips with them, although of course they were fully made known to the Court. I draw attention in particular to the following aspects of the Court's view:

(i) In the first sub-paragraph of paragraph 44 of the judgment it is stated (second sentence) that "although Article 14 (art. 14) has no independent existence[11], it is complementary to the other normative provisions" of the Convention. The words I have italicised in this sentence, though not incorrect, are elliptical and slide round the essential requirement of Article 14 (art. 14) that the "other normative provisions" concerned should consist of "rights and freedoms set forth in this Convention", which the right to consultation is not - nor even implied - as the Court has found. It is also of course correct to say that Article 14 (art. 14) complements these other provisions, but (a) it does so only in the manner which I indicate in paragraphs 23 and 24 below, and (b) it can only complement them if they exist as independent rights and freedoms - which is not here the case.

(ii) The third sentence of the first sub-paragraph of paragraph 44 of the judgment starts as follows: "A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question ..." But the Court has just found in the earlier part of its judgment that a right to consultation is not enshrined in Article 11 (art. 11). This fact therefore, and the Court's disregard of it, vitiates the whole reasoning and effect of this sentence, the further words of which I give in footnote 12 below[12].

(iii) The final sentence of the first sub-paragraph 44 of the judgment adds nothing really, for whatever may be the truth about Article 14 (art. 14), it must be the same whether it stands on its own or is considered to be separately integrated in each individual Article of the Convention. But I discuss this further in paragraph 20 below.

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[11] This is of course correct in substance but not correctly stated. As a provision Article 14 (art. 14) does have an independent existence for the purpose stated in paragraphs 23 and 24 below. What does not, is the obligation not to discriminate, which is tied to and dependent on the existence of a right or freedom set forth in some other Article of the Convention.

[12] "... may therefore infringe this Article when read in conjunction with Article 14 (art. 14) for the reason that it is of a discriminatory nature."

(iv) The argument contained in the second sub-paragraph 44 of the judgment which I also reproduce textually below[13] equally fails, and for the same basic reason. The "right embodied in the Convention", the "right of this kind" - i.e. so embodied - which the Court "has noted at paragraph 39" as being "enunciated" in Article 11 (art. 11) turns out to be a right for a trade union to "be heard". But even if Article 11 (art. 11) did enunciate such a right - (in fact, it is at most implied) - it would not be the right under discussion in the present case. As indicated in footnote 10 above, the right to consultation as it has arisen in these proceedings, and in the form which it takes in the National Union of Belgian Police complaint, is quite a different thing from a right to be heard - (i.e., if the union asks to be): it is a right to be consulted on the initiative of the employer or the State, even if it has not asked to be heard. This is a vastly different thing. The Belgian Government is not refusing to hear the applicant union: it is failing to consult it in the way it does certain other unions. Whether or not the right to be heard is enshrined by implication in Article 11 (art. 11), the right to be consulted in the above sense of that term is not - as indeed the Court has found.

(v) It would seem therefore that all the considerations set out in paragraph 44 of the judgment must fail, or amount at best to half-truths that avoid the essential issue that has to be met, but is not met.

20. Paragraph 44 of the Court's judgment is evidently founded on, or derived from, the view expressed in the Belgian "Linguistics" case, to which it refers, and some of the language of which it recalls. Granted that it may be difficult to depart from conclusions arrived at in a case that has acquired so much prestige as that one. Nevertheless, the Court, like all international tribunals, and unlike some national ones, is not bound by precedent; and if good reasons arise for doubting whether a particular view previously expressed was correct, the Court should not hesitate to review the matter. In my opinion the view expressed in the "Linguistics" case was seriously incorrect; but before commenting upon it; I will set out the essential passage concerned, which is referred to, but not quoted, in paragraph 44 of the Court's judgment. In this passage the Court, as it was constituted at the date of the "Linguistics" case (merits), and speaking of "the guarantee laid down in Article 14 (art. 14) of the Convention", said (paragraph 9 on pp. 33 and 34 of the judgment)[14]:

> "While it is true that this guarantee has no independent existence in the sense that under the terms of Article 14 (art. 14) it relates solely to 'rights and freedoms set forth in the Convention', a measure which in itself is in conformity with the requirements of

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[13] "These considerations apply in particular where a right embodied in the Convention and the corresponding obligation on the part of the State are not defined precisely and consequently the State has a wide choice of the means for making the exercise of the right possible and effective. As the Court has noted above at paragraph 39, Article 11 para. 1 (art. 11-1) enunciates a right of this kind."

[14] Judgment of 23 July 1968, Series A no. 6.

> the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 (art. 14) for the reason that it is of a discriminatory nature."

The Court then gave as an example the case of a State which was under no obligation to set up "a particular kind of educational establishment" but held that, if nevertheless, the State in fact did so, it could not "in laying down entrance requirements" apply discriminatory criteria. It then continued:

> "To recall a further example ... Article 6 (art. 6) of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6 (art. 6). However, it would violate that Article, read in conjunction with Article 14 (art. 14+6), were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of [legal] actions.
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> In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14 (art. 14). It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms."

The view thus expressed is, in my opinion, not only wrong but manifestly wrong and, moreover, self-contradictory. The case of a system of appellate courts is indeed precisely the one I would myself have selected in order to demonstrate how, and in what way, Article 14 (art. 14) cannot be applicable. Moreover the view (correct in itself) that Article 14 (art. 14) should be read as integrally incorporated in each Article of the Convention, "laying down rights and freedoms" - i.e., in which these are "set forth", can only emphasise that they must be set forth there before the non-discrimination obligation can come into play. Yet in one and the same breath the Court says that there is no obligation for States under Article 6 (art. 6) of the Convention to establish such a system - which means that the individual has no right to require it to be established[15], which in turn means that such right is not, within the terms of Article 14 (art. 14), a right "set forth in this Convention" which again means that it is not a right in respect of the enjoyment of which non-discrimination is prescribed by Article 14 (art. 14): there is no right to be enjoyed (as of right) and hence no prohibition of discrimination if it is voluntarily accorded by the State.

21. It will be seen, therefore, that in the "Linguistics" case the Court simply contradicted itself when, on the one hand, it postulated a case of non-violation of Article 6 (art. 6) because that provision involved no obligation (and hence no right) as regards setting up a system of appeals, and then, on the other hand went on to hold that there could nevertheless be

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[15] As I mentioned earlier the notion of a "freedom" is virtually meaningless in this context. Anyone is free to call for anything he pleases, but this is not a juridically significant situation. It is particularly lacking in sense to talk of a freedom to call for the setting up of a system of appellate tribunals.

a breach of Article 14 (art. 14) even though - ex hypothesi on the basis of the first leg of the Court's finding - the discrimination involved did not relate to any right or freedom set forth in the Convention - as Article 14 (art. 14) requires.

22. It should not be necessary to labour such an elementary point, - but it may all the same be useful if I try to put it in another way. The passage from the "Linguistic" case which I have been discussing speaks repeatedly of a violation of some Article of the Convention (Article 6, Article 11, etc.) "in conjunction" with Article 14 (art. 14+6, art. 14+11). If this is so, there must be a link - but what is that link? If the matter in respect of which discrimination is alleged is not one in regard to which some Article of the Convention provides a right or freedom, there is no basis for any link with Article 14 (art. 14). There can in such a case be no violation of some other Article "in conjunction with" Article 14 (art. 14), for the other Article concerned has been found not to comprise the right or freedom concerned, while, as the Court correctly found in the "Linguistics" case, the "guarantee" contemplated by Article 14 (art. 14) "has no independent existence" inasmuch as "it relates solely to 'rights and freedoms set forth in the Convention'". How then could the Court hold that there had been a violation of a given Article "in conjunction with" Article 14 (art. 14)? The addition of two negatives cannot make a positive. There can be no cumulation where there is nothing under either Article, taken by itself, to cumulate. One cannot cumulate rights or freedoms which, under Article 6, Article 11 (art. 6, art. 11), etc., are not provided for, and which under Article 14 (art. 14), are not independently provided for, but are such as arise solely in respect of rights or freedoms that some other Article does provide for. In such a case the necessary link is absent, because there is no fundament in either Article to which it can attach. It is not sufficient to show that Article 11 (art. 11) is an Article that deals in principle or in a general way with trade union activity, or that the subject-matter of a given dispute lies within the field of trade union rights or interests. This is what the Court is relying on in the present case: but it is not enough. To suffice it is necessary to show that the particular right in dispute - in this case the right to consultation - is a right conferred by Article 11 (art. 11) as part of that activity. That is what the Court has found not to be the case. Hence consultation is not one of the matters to which Article 14 (art. 14) relates.

23. This analysis can and must be carried further. It is really an error to speak of a violation of Article 6, Article 11 (art. 6, art. 11), etc. at all, in the context of Article 14 (art. 14), for the whole point of the latter Article is that it operates even where there is no violation of the other Article concerned, provided that this other Article does confer the right or freedom in the application of which there is discrimination. That is the real purpose of Article 14 (art. 14). There would usually be no need to invoke that Article (art. 14) if the other Article concerned was itself being violated, irrespective

of any discrimination. In that event the discrimination would only add to the offence - it would not create it. Article 14 (art. 14) does not require the violation of a right or freedom for its operation but merely its existence under another Article of the Convention; and what it is intended to catch is the case where a right or freedom required by some other Article is being afforded, but in a discriminatory manner.

24. The considerations just mentioned equally supply the answer to those who argue that if the view which I take were correct, Article 14 (art. 14) would serve no useful purpose and would add nothing to such a provision as Article 6 (art. 6) or Article 11 (art. 11). In fact, it of course adds a great deal. Supposing, contrary to the view correctly taken by the Court in the present case, Article 11 (art. 11) did create a right for trade unions to be consulted by the Government, then what Article 14 (art. 14) would add to that would be that it would not suffice simply to afford this right and to honour this obligation. It would also, and additionally, have to be done in a non-discriminatory manner. Otherwise, although there might be no infringement of Article 11 (art. 11), there would be a breach of Article 14 (art. 14). That is what Article 14 (art. 14) does, though only if the basic right under Article 11 (art. 11) already exists. In consequence, given that indispensable condition (but not otherwise), Article 14 (art. 14) has a quite definite and important sphere of application and is not in any way rendered a dead letter by the view I take. Without it, discrimination would be permissible so long as the right itself was not in principle withheld.

25. To conclude - apart from the separate point considered in my final paragraph below - it comes to this, that what the Court is really doing here (and the same is true for the "Linguistics" case) is to interpret and apply Article 14 (art. 14) as if the words "set forth in this Convention" did not figure in it at all, and as if the opening phrase read "The enjoyment of [all] rights and freedoms shall be secured ..." etc. But this would be (contrary to what was correctly held in the "Linguistics" case and to the Court's own statement in the second sentence of the first paragraph of paragraph 44 of the judgment) to set up that Article (art. 14) as an independent autonomous provision under which all discrimination in the general field of human rights would be prohibited. Such a process may have its attractions, and it may be tempting to follow it. Yet a natural and creditable distaste for discrimination in any form cannot justify a conclusion for which no sufficient legal warrant exists, or can exist. The Court is not a court of ethics but a court of law.

26. Lest I should overlook it, there is one more category of argument that has been advanced in favour of the view taken in the Judgment of the Court - an argument of a wider order, founded on general principles rather than on the actual language of the Convention. General principles of law, it may be said, can, where relevant, properly be applied in the interpretation and application of a treaty provision, provided that the terms of that provision do not clearly exclude them. Accordingly, the doctrine suggested

was that although there may be no obligation to do a particular thing at all, yet if it is done, it must be done in the same manner, and to the same extent, for all concerned, without penalty or favour. But whether or not any doctrine of that kind has gained currency in other contexts or for certain purposes, it cannot be regarded as established in such a way as to override the clear language of the Convention, which confines the obligation not to discriminate to cases where the right or freedom concerned is one of those "set forth in the Convention". In short, the Convention does exclude the application of this doctrine. Let us also not forget the relevance of one of the oldest parables of our civilisation - that of the labourers in the vineyard. When those who had "borne the heat and burden of the day" complained of being discriminated against because they were paid no more than was paid to those engaged towards the end of the day, the Lord of the Vineyard replied (St. Matthew, cap. 20, vv. 13-15) "Friend, I do thee no wrong ... Take that thine is, and go thy way ... Is it not lawful for me to do what I will with mine own?" Ethically, this might not be the last word; but even ethics - let alone law can be stretched too far. If I choose to help my neighbour tidy up his garden, does this mean that, either in law or ethics, I must do the same for all the other residents of the street? Voluntary processes, such as trade union consultation, cannot be the subject of valid charges of discrimination contrary to law unless some law makes them so. In the present case the applicable law is the law of or deriving from the Convention, - and the Convention neither makes consultation obligatory nor non-consultation a breach of any of its Articles. How then can the consultation of some unions but not others, even if that constituted discrimination, be in any circumstances a breach of a right prescribed by the Convention - since no right of consultation is prescribed by it at all?