

APPLICATION No. 7050/75

by

Pat ARROWSMITH

against

UNITED KINGDOM

- I. Report of the European Commission of Human Rights
adopted on 12 October 1978 (Article 31 of the Convention) page 1
- II. Resolution DH (79) 4 of the Committee of Ministers adopted
on 12 June 1979 (Article 32 of the Convention) page 68

This publication contains the report of the European Commission of Human Rights drawn up in accordance with Article 31 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the application (No. 7050/75) lodged with the Commission by Miss Pat Arrowsmith against United Kingdom.

This report was transmitted to the Committee of Ministers on 5 December 1978.

As the case was not referred to the European Court of Human Rights, it was for the Committee of Ministers to decide, under the provisions of Article 32, paragraph 1, of the Convention "whether there has been a violation of the Convention".

The decision of the Committee of Ministers was taken by Resolution DH (79) 4 of 12 June 1979, the text of which is reproduced at page 68 of the present publication.

The Committee of Ministers also authorised publication of the Commission's report on this case.

I. REPORT OF THE COMMISSION

TABLE OF CONTENTS

	<u>Pages</u>
I. <u>INTRODUCTION</u> (paras. 1 - 8)	1
The substance of the application (para. 2)	1
Proceedings before the Commission (paras. 3 - 6) ..	1
The present Report (paras. 7 - 8)	3
II. <u>ESTABLISHMENT OF THE FACTS</u> (paras. 9 - 21)	5
The factual basis of the applicant's complaint (paras. 10 - 17)	5
The situation in Northern Ireland in 1973 and 1974 (para. 18)	11
The law relating to offences of subverting the forces and the importance of the Incitement to Disaffection Act 1934 (paras. 19 - 21)	12
III. <u>SUBMISSIONS OF THE PARTIES</u> (paras. 22 - 58)	14
AS TO THE FACTS (paras. 22 - 29)	14
<u>The applicant</u> (paras. 22 - 24)	14
As regards the 1934 Act (para. 22)	14
As regards the impact of the leaflet (para. 23) ..	14
As regards prosecution of others under the 1934 Act (para. 24)	14
<u>The respondent Government</u> (paras. 25 - 29)	15
As regards the 1934 Act (para. 25)	15
As regards the impact of the leaflet (para. 26) ..	15
As regards prosecution of others under the 1934 Act (para. 27)	15

As regards the consideration of the Director of Public Prosecutions in respect of the Colchester and the Warminster Incidents (paras. 28 - 29)	16
LEGAL ARGUMENTS ADVANCED BY THE PARTIES	
(paras. 30 - 58)	16
<u>The applicant</u> (paras. 30 - 39)	16
As to Art. 5 of the Convention (para. 30)	16
As to Art. 9 of the Convention (para. 31)	17
As to Art. 10 (1) of the Convention (para. 32)	18
As to paras. (2) of Arts. 9 and 10 of the Convention (paras. 33 - 38)	18
Was the restriction prescribed by law, which is is itself consistent with the purposes of paras. (2) of Arts. 9 and 10? (para. 33)	18
The particular aim of the prosecution in the applicant's case (paras. 34 - 35)	18
- In the interests of public safety (Arts. 9 and 10), public order (Art. 9) and the protection of the rights of others (para. 34) ...	18
- In the interests of national security, territorial integrity and for the prevention of disorder or crime (Art. 10) (para. 35) ...	19
Necessary in a democratic society (paras. 36 - 38)	20
As to Art. 14 read in conjunction with Arts. 9 and 10 of the Convention (para. 39)	21
<u>The respondent Government</u> (paras. 40 - 58)	22
As to Art. 5 of the Convention (para. 40)	22
As to Art. 9 (1) of the Convention (paras. 41 - 45)	22
As to Art. 10 (1) of the Convention (para. 46) ...	24

As to paras. (2) of Arts. 9 and 10 of the Convention (paras. 47 - 57)	24
Was the restriction prescribed by law which is itself consistent with the purposes of paras. (2) of Arts. 9 and 10? (paras. 48 - 49) ..	25
The particular aim of the prosecution in the applicant's case (paras. 50 - 53)	25
- In the interests of public safety (Arts. 9 and 10), public order (Art. 9) and the protection of the rights of others (Arts. 9 and 10) (para. 50)	25
- In the interests of national security, territorial integrity and for the prevention of disorder and crime (Art. 10 (2)) (paras. 51 - 53)	26
Necessary in a democratic society (para. 54) ...	27
- The necessity of the 1934 Act (para. 55)	27
- The necessity of the applicant's prosecution and conviction (paras. 56 - 57)	28
As to Art. 14 read in conjunction with Arts. 9 and 10 of the Convention (para. 58)	28
IV. <u>POINTS AT ISSUE</u> (paras. 59 - 62)	30
Under Art. 5 of the Convention (para. 59)	30
Under Art. 9 of the Convention (para. 60)	30
Under Art. 10 (2) of the Convention (para. 61) ...	30
Under Art. 14 read in conjunction with Art. 9 and/or Art. 10 of the Convention (para. 62)	30

V.	<u>OPINION OF THE COMMISSION</u> (paras. 63 - 104)	31
1)	As to Art. 5 of the Convention (paras. 63 - 66)	31
	Conclusion (para. 66)	32
2)	As to Art. 9 of the Convention (paras. 67 - 76)	32
	Conclusion (para. 76)	34
3)	As to Art. 10 of the Convention (paras. 77 - 100) ..	35
	(a) Was the restriction and penalty "prescribed by law"? (paras. 79 - 83)	35
	(b) Was the restriction and penalty in pursuance of one or more of the purposes of Art. 10 (2) of the Convention? (paras. 84 - 94)	36
	i. The aim of the 1934 Act (paras. 84 - 86) ..	36
	ii. The particular measures taken against the applicant (paras. 87 - 94)	37
	(c) Was the interference and penalty necessary in a democratic society? (paras. 95 - 99)	38
	Conclusion (para. 100)	39
4)	As to Art. 14 read together with Art. 9 and/or Art. 10 of the Convention (paras. 101 - 104)	40
	Separate Opinion, in part dissenting, of M. Opsahl ...	41
	Dissenting Opinion of M. Klecker	45
	APPENDIX I - History of proceedings	50
	APPENDIX II - Decision on Admissibility of the application	54
	APPENDIX III - Friendly Settlement - (separate document)	

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the application

2. The applicant, Miss Pat Arrowsmith, is a citizen of the United Kingdom, born in 1930 and living in London. She is represented by Mr N.S. Rodley, legal adviser of Amnesty International, and Mr H. Levenson, acting on behalf of the National Council for Civil Liberties in London.

On 20 May 1974 the applicant was convicted under Sections 1 and 2 of the Incitement to Disaffection Act 1934 (1) at the Central Criminal Court, London, mainly on the ground that she had distributed leaflets to troops stationed at an army camp endeavouring to seduce them from their duty or allegiance in relation to service in Northern Ireland. She was sentenced to 18 months' imprisonment. The conviction was confirmed by the Court of Appeal on 4 December 1974. However, the Court of Appeal granted leave to appeal against sentence and reduced the term of imprisonment so as to allow for the applicant's immediate release. By then, she had been under detention since 14 March 1974.

The applicant submits that Section 1 of the 1934 Act is so vague that it threatens the right to liberty and security of person as protected by Art. 5 of the Convention.

She also considers that her conviction and sentence interfered with her right to manifest her pacifist belief as guaranteed by Art. 9 (1) of the Convention and her right to freedom of expression as guaranteed by Art. 10 (1) of the Convention. This interference was not justified under paras. 2 of the said Articles. Furthermore she alleges a violation of Art. 14 in connection with Arts. 9 and 10 of the Convention contending that the Incitement to Disaffection Act of necessity discriminates against persons holding pacifist opinions.

Proceedings before the Commission

3. The application was introduced with the Commission on 2 June 1975 and registered on 5 June 1975.

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(1) Hereinafter also referred to as the 1934 Act.

On 7 October 1976 the Commission decided to give notice of the application to the respondent Government for observations on admissibility. The respondent Government were consequently invited to submit their observations before 7 December 1976. The observations were received on that date and the applicant was invited to submit her reply before 5 January 1977. At her request an extension was granted until 28 January 1977 and her observations in reply were received on 24 January 1977. This reply was communicated to the respondent Government which stated in a letter of 15 February 1977 that they did not, unless so invited by the Commission, wish to submit further written or oral observations on admissibility.

4. On 16 May 1977, after having considered the parties' written observations, the Commission found that the applicant's complaints raised questions of law and fact, in particular under Art. 10 of the Convention, which were also of a general interest for the application of the Convention whose determination should depend upon an examination on the merits. The Commission consequently decided to declare the application admissible (1).

5. The parties were then invited to submit before 30 August 1977 their observations in writing on the merits of the issues raised in the application. The applicant's observations were received on 26 August 1977. The time-limit for the submission of the respondent Government's observations was, at the Government's request, extended until 30 September 1977. They were asked to submit within the same time-limit any comments which they would wish to make with regard to the applicant's observations on the merits. The respondent Government's observations were sent to the Commission on 27 September 1977 and the applicant was invited to reply before 8 November 1977. Her observations in reply were submitted on 14 November 1977.

The Commission examined the parties' submissions at its 130th session in December 1977 and considered it necessary to hold an oral hearing on the merits of the application. This hearing took place on 4 May 1978.

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(1) See Decision on Admissibility, Appendix II.

6. At the oral hearing the applicant was represented by MM. Rodley and Levenson. The applicant also attended the hearing.

The respondent Government were represented by their Agent, Mr. D.H. Anderson, Foreign and Commonwealth Office, who was assisted at the oral hearing by MM. N. Bratza, Counsel, J. Nursaw, J.R. O'Meara, both from the Home Office, Legal Adviser's Branch, and Miss K. O'Neill, Principal, Home Office.

The present Report

7. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present(1):

MM. C.A. Nørgaard, Acting President (Rules 7 and 9
of the Rules of Procedure)

J.E.S. Fawcett
F. Ermacora
B. Daver
T. Opsahl
C.H.F. Polak
J.A. Frowein
G. Jörundsson
R.J. Dupuy
G. Tenekides
S. Trechsel
B.J. Kiernan.

The text of the Report was adopted by the Commission on 12 October 1978 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

A schedule setting out the history of the proceedings before the Commission and the Commission's decision on the admissibility are attached hereto as Appendices I and II.

8. A friendly settlement of the case has not been reached (2) and the purpose of the Commission in the present Report, as provided in para. (1) of Art. 31, is accordingly to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

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- (1) Mr Klecker was not present when the final votes were taken but the Commission decided, under Rule 52 (3) of its Rules of Procedure, that he should be entitled to express his separate opinion in the Report.
- (2) An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document - see Appendix III,

The full text of the oral and written pleadings of the parties together with further documents handed in as exhibits are held in the archives of the Commission and are available to the Committee of Ministers if required.

11. ESTABLISHMENT OF THE FACTS

9. The facts relating to the present case are generally not in dispute between the parties.

The factual basis of the applicant's complaint

10. The applicant is a convinced pacifist. She has campaigned in support of her views and in this connection she was also active in an organisation called the British Withdrawal from Ireland Campaign. She helped with the drafting of a leaflet which was published by this organisation and was intended to be given to soldiers.

11. On 22 September 1973 the applicant, and other persons, were found by the police distributing the leaflet in question at an Army Centre at Warminster in Wiltshire. The Army centre contained, inter alia, soldiers of battalions which would shortly be posted to Northern Ireland.

12. The text of the leaflet is as follows:

(text reproduced on pp. 6-8)

"SOME INFORMATION FOR BRITISH SOLDIERS

"I Kevin Cadwallader came to Sweden for asylum because of Northern Ireland. I do not think that what is happening there is very good. As I see it, there must be a simpler way of ending the fight without more people being killed. So I have left rather than fight in something I think is wrong."

(BRITISH EX-SOLDIER NOW IN SWEDEN)

"I'm not against being a soldier. I would be willing to fight to defend this country against an invader - I'd be willing to fight for a cause I could believe in. But what is happening in Ireland is all wrong. Some of my friends have been killed there. I keep asking myself - what did they die for?"

(BRITISH EX-SOLDIER IN ENGLAND)

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We are aware that there are British soldiers who are leaving the army, or who want to, because of British policy in Northern Ireland. We are glad about this and hope many more will do so. We have therefore compiled this fact-sheet giving information about various methods of quitting the British armed forces, hoping it may prove useful.

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GOING ABSENT WITHOUT LEAVE

1. SWEDEN - Special arrangements have been made to welcome British soldiers who go A.W.O.L. to Sweden. At least 12 have already done so.

Legal Advice Obtainable From: (a) Hans Göran Franck, Kungsgatan 24, Stockholm (tel. 200550 or 200600); (b) Bengt Söderström - same address as Franck (office tel. 102502, home tel. 332013); (c) Svenska Flytingradet, Drottningsgatan 16, Stockholm (Tues. 6-8 pm, tel. 210732).

Social Help Obtainable From: Desmond Carragher, c/o KFUK/KFUM, Birger Jarlsgatan 33 (2 tr), Stockholm (tel. 206729).

N.B. To be considered for asylum in Sweden, a soldier must have been or be about to be, posted to Northern Ireland. He should bring his I.D. card and enter via Stockholm. After 10 days (to establish residence) he should go to the police accompanied by a friend and register for POLITICAL asylum. After registering, which takes a couple of hours, he can go to the Swedish social bureau who will (a) get him a place to stay; (b) give him money to live on; (c) help him to enrol in Swedish classes. This help is available immediately after registering. There is no need to wait for the final decision about staying before obtaining these benefits.

2. EIRE - Eire has proved to be a dangerous destination in some cases. A.W.O.L. soldiers are advised NOT to go there.

3. BRITAIN - Some A.W.O.L. soldiers are having difficulties over employment (no insurance cards) and accommodation, and have to keep moving in order to avoid arrest. Those considering going A.W.O.L. in Britain should therefore plan ahead very carefully.

4. OTHER COUNTRIES - Other countries are not yet, as far as we know, offering sanctuary. However, as condemnation of the British Government's actions in Northern Ireland becomes more widespread, people in other countries may wish to help men who avoid taking part.

(Soldiers who intend to go A.W.O.L. overseas may like to compare their situation with that of US servicemen who opposed the Vietnam war. An interesting book on this subject is "They Love it but Leave it" by D. Prasad - obtainable from Houseman's Bookshop, 5 Caledonian Road, London N.1. - price 30p).

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CONSCIENTIOUS OBJECTION

A serviceman is entitled to apply for a discharge on the grounds of conscientious objection if, since enlisting, he has developed a moral or religious objection to taking part in any war. Objections on purely political grounds to specific conflicts (eg that in Northern Ireland) are not usually treated sympathetically.

Those who intend to apply for a discharge on conscientious grounds, or who wish to know more about this possibility, are advised to contact the CENTRAL BOARD FOR CONSCIENTIOUS OBJECTORS CONTINUING COMMITTEE, 6 Endsleigh St., London W.C.1. This body can give personal advice on how to proceed, and offer support throughout what can be a difficult and lengthy process.

DISCHARGE ON OTHER GROUNDS

If a serviceman has served 3 years (in some cases 4), and has not been notified that he is about to be sent overseas, he may be able to buy himself out. He should ask permission to do this. Permission may be granted, delayed or withheld at the discretion of the Ministry of Defence. The price varies between £20 and £150 for boy-soldiers, and between £150 and £250 for adults. A soldier under 18 can choose to leave within 6 months of enlisting on payment of £20, or, if he enlisted when under 17 1/2, without paying anything.

The basic principle governing discharge on COMPASSIONATE grounds is that of being needed at home - the family being unable to manage on their own.

In the near future, it is hoped to open a new Servicemen's Advisory Bureau in London to deal with enquiries about all LEGAL ways of leaving the forces. Telephone 01-387-5501 for details about this service. Meanwhile THE NATIONAL COUNCIL FOR CIVIL LIBERTIES (186 Kings Cross Road, London W.C.1., tel. 01-278-4575) may be able to give advice.

N.B. The army may discharge a soldier on health or sexual grounds.

OPEN REFUSAL TO BE POSTED TO NORTHERN IRELAND

A soldier who publicly stated that he refused to serve in Northern Ireland, whatever the consequences, would be taking a courageous stand. He would be setting an example to other soldiers: strengthening their resolve to resist the Government's disastrous policy. Better still, if a group of soldiers made this announcement simultaneously it would make a great impact on public opinion, both inside and outside the army. Such an act could lead to Court Martial and imprisonment. But soldiers who believe, as we do, that it is wrong for British troops to be in Northern Ireland are asked to consider whether it is better to be killed for a cause you do not believe in or to be imprisoned for refusing to take part in the conflict.

All soldiers who intend to refuse to be posted to Northern Ireland are asked to inform the BRITISH WITHDRAWAL FROM NORTHERN IRELAND CAMPAIGN, so that the brave actions can receive as much publicity and have as much effect as possible.

WE WHO ARE DISTRIBUTING THIS FACT-SHEET TO YOU HOPE THAT, BY ONE MEANS OR ANOTHER, YOU WILL AVOID TAKING PART IN THE KILLING IN NORTHERN IRELAND.

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Published by: The British Withdrawal from Northern Ireland Campaign,
3 Caledonian Road, London N.1."

13. When the group was asked by the police to desist from distributing the leaflets, the applicant's colleagues heeded this warning. The applicant, however, referred to a case at Colchester, another Army Centre, where she had previously distributed the same leaflets, and said the Director of Public Prosecutions had then ruled that the leaflet was in order.

With this reasoning she went on distributing the leaflet and was arrested for conduct likely to cause a breach of the peace. She was released on bail and re-arrested on 14 March 1974.

14. Charges were preferred against her under the Incitement to Disaffection Act. When brought before the justices in the Warminster area the applicant learned that the Director of Public Prosecutions was willing to consent to summary trial. This was important in relation to sentence, because the 1934 Act provides, in Section 3 (1), as follows:

"A person guilty of an offence under this Act shall be liable, on conviction on indictment to imprisonment for a term not exceeding two years or to a fine not exceeding two hundred pounds, or on summary conviction to imprisonment for a term not exceeding four months or to a fine not exceeding twenty pounds or (whether on conviction on indictment or on summary conviction) to both such imprisonment and fine."

The applicant elected to be tried by a jury.

15. On 20 May 1974 the applicant was convicted under Sections 1 and 2 of the Incitement to Disaffection Act 1934 (1) at the Central Criminal Court, London. She was sentenced to 18 months' imprisonment.

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(1) Section 1:

(1) If any person maliciously and advisedly endeavours to seduce any member of Her Majesty's forces from his duty or allegiance to Her Majesty, he shall be guilty of an offence under this Act,

Section 2:

(2) If any person, with intent to commit or to aid, abet counsel or procure the commission of an offence under Section 1 of this Act, has in his possession or under his control any documents of such a nature that the dissemination of copies thereof among members of Her Majesty's forces would constitute such an offence he shall be guilty of an offence under this Act.

16. The conviction was confirmed by the Court of Appeal (1) on 4 December 1974. The Court stated inter alia:

"This leaflet is the clearest incitement to mutiny and to desertion. As such, it is a most mischievous document. It is not only mischievous but it is wicked. This court is not concerned in any way with the political background against which this leaflet was distributed. What it is concerned with is the likely effects on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding. It is particularly concerned about young soldiers who either come from Ireland or who have family connections with Ireland; there are probably a large number of them in the British army. These young soldiers are encouraged to desert on learning of a posting to Northern Ireland and to mutiny. If they mutiny, they are liable to be sentenced by court-martial to a very long term of imprisonment, and if they desert, they must expect to get a sentence of at least 12 months' detention. For mature women like this appellant to go round military establishments distributing leaflets of this kind amounts to a bad case of seducing soldiers from both their duty and allegiance."

The Court also dealt with the question as to whether the applicant was entitled to rely on the defence of lawful excuse, inter alia in view of the fact that following the distribution of leaflets at Colchester no indictment was brought against her under the 1934 Act.

In fact after the Colchester incident the Director of Public Prosecutions had refused to consent to proceedings against the applicant under the 1934 Act (2) and the applicant's then solicitor had been so informed without indications of the reasons for this refusal.

The Court of Appeal stated that the words "lawful excuse" did not appear in Section 1 of the 1934 Act and that it was difficult to conceive how anyone could have a lawful excuse to incite soldiers to desert or to mutiny.

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(1) Decision published in "The All England Law Reports 1975", pp. 463 - 471.

(2) Section 3 (2) of the 1934 Act provides:

"No prosecution in England under this Act shall take place without the consent of the Director of Public Prosecutions."

The Court admitted though that a mistake as to the law might be relevant in relation to sentence. In this respect it stated:

"What effect ought this inaction (1) have on sentence? It is difficult to believe that this well-educated and intelligent appellant did not appreciate what she was doing. She must have known that she was inciting mutiny and desertion. The story which she put forward at the trial, that she was merely giving information to those in the services who were already disaffected, was an insult to the intelligence of the jury who were trying her..... Nevertheless, as a result of the Director of Public Prosecutions' decision, she may have thought that she could continue, with immunity, doing what she had done."

The Court emphasised that had there not been the complication arising from the Director of Public Prosecution's decision, the 18 months' prison sentence would in its opinion have been justified, but in the particular circumstances it considered it appropriate to quash the sentence and substitute it by one which allowed for the applicant's immediate release.

17. The applicant's companions who distributed leaflets with her at Warminster but had stopped doing so at the request of the police were not prosecuted.

In 1975 thirteen persons were prosecuted together in a trial involving a number of alleged offences under the 1934 Act. Only one charge, against one Mrs W., related to a leaflet of the kind here in question. The jury acquitted all defendants of all charges under the 1934 Act.

The situation in Northern Ireland in 1973 and 1974

18. During the period in question the situation which prevailed in Northern Ireland was of utmost gravity. The army, who were deployed in large numbers in the province, were regularly, almost daily, under attack from the IRA. The casualty rate, both civilian and military casualties, was still alarmingly large. From 1 February 1973 until the end of that year there were a total of 233 deaths. 940 explosions were counted during the same period.

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(1) The Court referred to the refusal of the Director of Public Prosecutions to consent to an indictment against the applicant after the Colchester incident.

The law relating to offences of subverting the forces and
the importance of the Incitement to Disaffection Act 1934

19. There are a number of offences in the United Kingdom created by statute which protect the armed forces and the police from attempts to subvert their allegiance or persuade them into breaches of duty such as the Incitement to Mutiny Act 1797, the Incitement to Disaffection Act 1934, the Police Act 1964 and the Aliens Restriction (Amendment) Act 1919. In addition, the armed forces' Acts (Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957), create a number of offences of this nature relating to military matters which apply to persons generally and are punishable by the civil courts.

20. Under the Incitement to Mutiny Act 1797 it is, inter alia, punishable:

"maliciously and advisedly (to) endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their duty and allegiance to His Majesty".

There have been no prosecutions under this Act for many years.

21. When the Bill concerning the Incitement to Disaffection Act 1934 was submitted to Parliament there seems to have been some indication at the time that many leaflets likely to cause disaffection among the forces had been printed and distributed but the Government of the day asserted that the Act was not a panic measure but merely a means of bringing persons to trial for endeavouring to seduce the forces without having to rely on the Incitement to Mutiny Act 1797, which necessitated trial on indictment in every case with a maximum penalty of life imprisonment (1).

The Bill aroused controversy which mainly centred upon:

- (1) the words "duty or allegiance" used in Section 1 instead of "duty and allegiance" used in the 1797 Act, and
- (2) the powers of search and seizure.

It was stressed in debate by those opposed to the measure that the use of the word "or" rather than "and" in Section 1 considerably widened the scope of the proscribed conduct, and indeed created an entirely new offence. It was pointed out that a wife who persuaded her soldier husband to overstay his leave by a day or so could not be said to have endeavoured to seduce him from his duty and allegiance

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(1) See The Law Commission, Working Paper No 72, p. 51, paras. 82, 83.

to the Sovereign, and would not, therefore, have been guilty of an offence under the 1797 Act, although, so it was argued, she might well be guilty of an offence under the 1934 Act, for she would have endeavoured to seduce him from his duty. It was contended by the Government that the offence created was no wider than that contained in the 1797 Act.

The 1934 Act has been little used since its introduction and between 1956 and 1974 there were, indeed, only four prosecutions, two in 1971, one in 1973 and one in 1974; all were concerned with the possession or distribution of leaflets designed to seduce soldiers from their duty or allegiance to the Queen in relation to service in Northern Ireland (1).

The 1934 Act has recently been under consideration by the Law Commission, a statutory body established "for the purpose of promoting the reform of the law" (2). In its Working Paper No 72 the Law Commission states that it does not seek views on the wider issue of whether there is need to retain the 1934 Act. Referring to the dispute as to whether the Act is compatible with Art. 10 (1) of the European Convention on Human Rights the Law Commission states in para. 93 of its Working Paper (3):

"Subject to the provisions of the Convention, the extent to which freedom of speech and freedom of action need to be curtailed in the interests of national security is essentially a matter for Parliament. We note that since 1817 - the year the Incitement to Mutiny Act 1797 was revived after its lapse in 1805 - there has been on the statute book the very serious offence of maliciously and advisedly endeavouring to seduce a member of the forces from his duty and allegiance. Further, in 1934 after a very full debate the Incitement to Disaffection Act was enacted. These facts may be taken as some indication of Parliament's opinion as to the need for such legislation and we do not now seek views on the principle of whether such legislation is required in the interests of national security or public safety for the prevention of disorder or crime."

The Law Commission only suggests that if the Incitement to Disaffection Act is to be retained, to replace the words "maliciously and advisedly" in Section 1 by words more in accord with modern usage (4).

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- (1) See Law Commission, *op. cit.* p. 52, para. 84.
 - (2) Section 1 (1) of the Law Commission's Act 1965.
 - (3) p. 58.
 - (4) *ibid.*

III. SUBMISSIONS OF THE PARTIES

AS TO THE FACTS

The Applicant

As regards the 1934 Act

22. The applicant has submitted a study of the background to and operation of the 1934 Act by T. Young, entitled "Incitement to Disaffection", published in 1976 in London by Cobden Trust. Referring to this study she points out that the 1934 Act has only been invoked in support of the role of the armed forces in maintaining internal order, not in respect of defending the realm against external threat. Separate legislation was invoked in the context of World War II and the Korean war. She alleges that it is apparent from the history preceding adoption of the Act that it was aimed at fortifying the internal role of the armed forces in the context of industrial strife.

As regards the impact of the leaflet

23. The applicant submits that at her trial her defence had sought to illicit from the prosecution witnesses what impact the leaflet she distributed had made on their minds. She refers to the Short Transcript of the case (1) from which it follows that the judge did not admit such questions and explained to the jury that this had nothing to do with the case.

As regards prosecution of others under the 1934 Act

24. The applicant alleges that one Mrs. W., who was acquitted in 1975 on charges under the 1934 Act, had distributed exactly the same leaflet as herself.

She also alleges that at Warminster her companions desisted from distributing leaflets but they immediately went on to another army camp where they distributed the same leaflet and were arrested but no prosecutions were launched against them.

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(1) Volume 2, p. 6.

The respondent Government

As regards the 1934 Act

25. The respondent Government admit that until 1972 the 1934 Act had not been invoked for many years. In the Government's view, the explanation for this would appear to be that offences under the Act had hardly ever been committed until opposition to the policy in Northern Ireland led certain people to act in a way which brought them into conflict with the law. The Northern Ireland situation presented the only major security problems since World War II. During that war various special war-time powers were available in consequence of which resort to the 1934 Act had not been necessary.

As regards the impact of the leaflet

26. The Government point out that certain of the courses referred to in the leaflet as being open to a soldier were not merely breaches of military rules or regulations. They were offences under the general law of the land, punishable with terms of imprisonment. Desertion was an offence under the Army Act of 1955 which is punishable with a term of imprisonment from two years to an unlimited period, depending on the circumstances. Going absent without leave was similarly an offence punishable under the Army Act with up to two years' imprisonment. Mutiny was an offence under the Army Act, punishable with imprisonment for an unlimited term of years. Disobedience to the lawful order, as, for instance, a lawful order posting a soldier to Northern Ireland, was likewise an offence punishable by up to two years' imprisonment. The respondent Government further submit that the circulation of the pamphlets would have created a threat to the peace-keeping role of the armed forces in Northern Ireland.

As regards prosecution of others under the 1934 Act

27. The leaflet which had been distributed by one Mrs. W., who was acquitted in 1975 of charges under the 1934 Act, was a watered-down version of the leaflet in respect of which the applicant was convicted. Mrs. W.'s trial involved thirteen other defendants and a number of alleged offences under the 1934 Act and only one charge against Mrs. W. related to the leaflet. The jury acquitted all defendants of all charges under the 1934 Act.

Since the end of 1971 six prosecutions involving nineteen people have all related to acts committed in the course of campaigning against Government policy in Northern Ireland and this was also the case in the even fewer instances where the Director of Public Prosecutions had considered alleged offences and had decided not to prosecute.

As regards the consideration of the Director of Public Prosecutions in respect of the Colchester and the Warminster incidents

28. The respondent Government point out that the necessity of the Director of Public Prosecutions' consent to prosecution under the 1934 Act involved the highly important question of whether the public interest required such a prosecution.

Consequently, before giving his consent to the prosecution in the present case, the Director of Public Prosecutions discussed all aspects of the case with both the Attorney General and with the Treasury Counsel. Among the factors which influenced the decision to prosecute were

1. the vital role of the army in peace-keeping in Northern Ireland ;
2. the nature and scale of the threat to the effective performance of that role posed by a campaign to persuade soldiers unlawfully to refuse to serve in Northern Ireland; and
3. the potentially aggravating effect of the applicant's clear determination to continue distributing the leaflet.

29. If the Director of Public Prosecutions refused his consent to prosecution after the Colchester incident, it was undoubtedly his hope that the warning which the applicant had received on that first occasion was sufficient deterrent to prevent her from carrying on this campaign. When this was repeated at Warminster - not only repeated but repeated despite the fact that the applicant was told to stop - it became that much more serious because it became apparent to the Director of Public Prosecutions that this was no longer an isolated incidence but a campaign which was going to continue unless steps were taken to prevent it.

LEGAL ARGUMENTS ADVANCED BY THE PARTIES

The Applicant

As to Art. 5 of the Convention

30. The applicant submits that the scope and ambit of the 1934 Act are much wider than that of the Incitement to Mutiny Act of 1794. The 1934 Act is worded so vaguely and has been

interpreted so broadly that it is impossible for a citizen to know when he or she is or is not violating the Act. The vagueness could lead to the same acts being legal or illegal depending on which jury happened to try the case, as was demonstrated by the case of Mrs. W., who was acquitted in 1975. The uncertainty thereby created in itself violated Art. 5 of the Convention. In particular, Art. 5 (2) was difficult to implement if a legal provision was vague and ambiguous.

In the applicant's view there was a general tendency of Governments to deal with political threats by way of legislation which is deliberately vague and ambiguous so as to allow them maximum leeway in handling political opposition.

In relation to the respondent Government's submission that the Director of Public Prosecutions had to determine whether or not his consent to prosecution under the 1934 Act was in the "public interest" the applicant submits that the use of the concept of "public interest" was in effect and in practice a way of a Government taking political rather than legal decisions in its prosecution policy, taking into account that no satisfactory definition or arrangement of what that concept means has been given by the respondent Government.

As to Art. 9(1) of the Convention

31. The applicant states that her belief in pacifism was not an abstract hope or wish that violence would cease to be used in this world. Rather, her pacifism was integrally and inseparably bound up with practical action. Her belief of necessity entailed engaging in the very political action for which she was arrested and found guilty. This action was necessary to affirm and propagate the conviction which she held.

It was irrelevant that the leaflet contained nothing about pacifism per se, because there was no reason that a person could not spread his or her beliefs by the use of teachings which are consistent with and implementing that belief, rather than dealing with that belief per se.

It was also irrelevant that the leaflet contained the statement "I would be willing to fight for a cause I believe in". Obviously that statement in no way purported to be an expression of her philosophy but was nothing more than a citation showing that her beliefs on the Northern Ireland question command widespread sympathy even among those who do not adhere to pacifist principles en bloc.

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The applicant admits that she opposes the political role of the army in Northern Ireland, but in her opinion to pursue one's political objectives through non-violent means falls within the modern concept of pacifism ie "the commitment, in both theory and practice, to the philosophy of securing one's political or other objectives without resort to the threat or use of force against another human being under any circumstances, even in response to the threat or use of force".

In this context she also points out, referring to p. 8 of the Short Transcript of her trial, that evidence was given at her trial by Miss Bernadette Devlin proving that her call to lay down arms was also directed to the other side, i.e. the IRA.

Insofar as Art. 9 (1) of the Convention enumerates manners of manifesting a belief, namely by worship, teaching, practice or observance, the applicant submits that this enumeration is not exhaustive but in any event fully covers the action here in question.

She concludes that the observance of her creed demanded that she practise it precisely as she did, by distributing the leaflets.

As to Art. 10(1) of the Convention

32. The respondent Government having conceded an interference with the applicant's right to freedom of expression, the applicant has not submitted any particular argument in this respect.

As to paras. (2) of Arts. 9 and 10 of the Convention

Was the restriction prescribed by law, which is itself consistent with the purposes of paras.(2) of Arts. 9 and 10?

33. The applicant admits that her punishment was prescribed by law but contends that this law, i.e. the 1934 Act, was itself incompatible with the Convention.(1).

The particular aim of the prosecution in the applicant's case

In the interest of public safety (Arts. 9 and 10), public order (Art. 9) and the protection of the rights of others (Arts. 9, 10)

34. The applicant submits that her case was distinguishable from Application No. 6084/73(2) because she did not counsel measures so extreme as those advocated in the previous case (such as disobedience to orders

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(1) See above, p. 17.

(2) This case likewise concerns a conviction under the 1934 Act. The documents there in question contained a money offer to British soldiers if they joined the IRA and an invitation to soldiers to turn their guns on their officers.

to fire even though this could be necessary in self-defence or the control of violence). She consequently denies that public safety, public order or the rights of others were in any way endangered by her action. In her opinion the respondent Government have offered no evidence or proof to the contrary. She points out that the trial judge and the Court of Appeal had stressed that the impact of the leaflet was irrelevant to the application of the 1934 Act.

In this context she also submits that it is relevant who was attempting to seduce soldiers from their duty.- whether it was civilians or other soldiers. A soldier who counselled his fellows to refuse to serve in Northern Ireland would have a far greater impact than would have a civilian/stranger. In any case, a civilian was entitled to maximum protection under the Convention, protection to which a soldier might not be entitled.

Referring to the Application Ireland v. the United Kingdom, the applicant submits that it has been established that soldiers in Northern Ireland have been ordered to commit acts which are in violation of international law. She says she was motivated to prevent such violations of law and her action therefore purported to protect the rights and freedoms of others, including the freedom to receive ideas and information.

In the interests of national security, territorial
integrity and for the prevention of disorder or
crime (Art. 10)

35. In the applicant's opinion the leaflet did not have the effect, or even the purpose, of threatening either of the concepts enumerated above.

The concept of "national security" was aimed, according to the applicant, at an external threat, not at internal disobedience. In any event, the kind of matters covered by it, be it external or internal, would relate to things like military secrets and espionage-type activities. In her case there were no military secrets disclosed, no military action was jeopardised, no lives or property were endangered, no advantage was given to any enemy of the realm.

"Territorial integrity" was not concerned, because, first of all, it was not even clear that the United Kingdom was fighting to preserve its territorial integrity in Northern Ireland. It was fighting to preserve, apparently, the will of the majority in Northern Ireland. But in any event, "territorial integrity" did not mean national unity.

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Referring to Art. 2(4) of the United Nations Charter which provides "that all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of a State", the applicant submits that the concept of "territorial integrity" related to international peace and security.

Finally, a non-violent action such as that committed by her could not possibly necessitate any measures for the "prevention of disorder or crime".

Necessary in a democratic society

36. The applicant invites the Commission to give the narrowest interpretation to the concept of "necessity" since the fundamental freedoms in Arts. 9 and 10 of the Convention are the cornerstones of a democratic society.

A guidance could be, in her opinion, the definition of the concept of necessity in the case of self-defence as stated by the then United States Secretary of State in the Caroline Case (1841):

"It will be for the Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation."

Also, the Clear and Present Danger doctrine as developed by the United States Supreme Court provides guidance for the interpretation of the term "necessary" in para. (2) of Art. 9 or 10 of the Convention.

According to this doctrine, interference with freedom of expression was permissible only if the expression in question tended in fact to incite or produce imminent lawless action or was so closely brigaded with action as to be indistinguishable from it (*Brandenburg v. Ohio*, 395 US 444 (1969)). There had to be a connection between the words and possible direct consequences. But the 1934 Act made no such provisions, none of these considerations were relevant under the Act. Indeed they had to be excluded. They were not even relevant to the question of the exercise of the discretion of the Director of Public Prosecutions.

The Government ought to be able, so the applicant argues, to tell the Commission this is what would have happened if she had not been stopped and convicted, but in fact the Government were unable to do so.

37. Therefore, the respondent Government could not even rely on the "margin of appreciation" concept which they invoke, because any margin of appreciation came after an examination of the facts. The facts, however, were not even lawfully within the contemplation of the authorities when

they prosecuted and convicted her. The Director of Public Prosecutions did not direct his mind to those criteria that are enunciated in paras. 2 of Arts. 9 and 10. Also, the courts were unable to pronounce - and indeed prevented her from using such evidence as would enable them to pronounce - on whether her acts were in reality such as to take them outside the protection of the Convention. In this context, the applicant again points out that her case was distinguishable from Application No. 6084/73 which also concerned a conviction under the 1934 Act, by virtue of the nature of the document and also by virtue of the context of the act in question. Contrary to the facts in the previous application she was not distributing her document in Northern Ireland, where there was a notified emergency, but in the United Kingdom where there was not. Nor did she distribute it to soldiers on active military service. Finally, unlike the documents referred to in Application No. 6084/73, her leaflet preferred no personal advantage to the recipient soldiers such that they might have been enticed, for personal gain, to follow any of the courses of action suggested by the document.

38. Also the fact that her companions at Warminster had not been prosecuted against and that one Mrs. W., who had distributed the same leaflet, had been acquitted of charges under the 1934 Act showed that the conviction was not necessary for the purposes mentioned in paras. (2) of Art. 9 and 10 of the Convention.

The applicant also submits in this context that an army of unthinking people would be contrary to the national interests. No society's interests would be preserved by isolating soldiers from information and ideas. In her opinion the Incitement to Disaffection Act, and her conviction under this Act, were designed to keep soldiers of limited political understanding.

As to Art. 14 read in conjunction with Arts. 9 and 10 of
the Convention

39. The applicant maintains that, in the enjoyment of rights guaranteed by Arts. 9 and 10 of the Convention, the 1934 Act of necessity discriminated on the grounds of political opinion such as pacifism.

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The respondent GovernmentAs to Art. 5 of the Convention

40. The respondent Government consider that the applicant's deprivation of liberty, in connection with her conviction under the 1934 Act, was justified under paras. (1) (a) and (c) of Art. 5.

This Article is, in their submission, not designed to ensure that penal laws are drafted with such clarity that an individual citizen is able, without recourse to legal assistance, and in the absence of traditional interpretation, subjectively to predict the likely outcome of proceedings brought under the Statute. Still less was it an Article designed to ensure uniformity in the result of prosecutions brought under a particular Statute.

It is admitted that an issue might arise under Art. 5(2) of the Convention if an offence was so obscure that a person could not be informed in comprehensive terms of the reason why he was being arrested, or of the nature of the charge brought against him, and thus was incapable of adequately challenging the legality of the arrest, or of adequately contesting the charge. This was, however, not the case as regards the conviction complained of.

The applicant may have been doubtful as to the outcome of the prosecution, or as to whether her conduct infringed the provisions of the Incitement to Disaffection Act. But this fact alone did not give rise to any issue under Art. 5 of the Convention.

Even if it were assumed that the Convention did require a degree of precision of language in penal statutes, this requirement was met by the 1934 Act.

As to Art. 9(1) of the Convention

41. The respondent Government, considering the matter in the light of the applicant's definition of pacifism, (1) submit that Art. 9 requires a distinction to be drawn between the protection of a belief and the incidence or implementation of that belief. In other words, Art. 9 is concerned with the fundamental

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(1) See above para. 31 on p. 18.

convictions which guide a person's conduct and not with the conduct itself, except to the extent required to affirm and propagate the convictions themselves.

The applicant was free and remained free, under United Kingdom law, to express her pacifist convictions in such terms and by such means as she thought fit. Her prosecution and conviction was not for manifesting a philosophy of non-violence by teaching or observance, but for the offence of endeavouring to seduce soldiers to act in breach of their duties and in breach of the general law.

Pacifism was concerned with the philosophy of non-violence and not with any particular political or other objective.

42. In this context the Government consider that the word "belief" in Art. 9(1) is of more limited scope and application than the words "opinions" or "ideas" which appear in Art. 10 (1) of the Convention. In their view, the more limited construction to be placed on the word "belief" is confirmed by the context in which this word is used in Art. 9 (1). It is further confirmed by a juxtaposition of the words "religion" and "conscience", which convey not merely the holding of views or opinions but the holding of spiritual or philosophical faith and, further, by the use of the words "worship, teaching, practice and observance", which similarly convey not merely the expression of manifestation of general opinions but the more formal adherence to and the expression of spiritual, philosophical articles of faith.

The word "belief" connotes and requires the holding and expression of spiritual or philosophical convictions which, while not necessarily organised in the same sense of a religion, nevertheless have an identifiable formal content. Thus, while conscientious objection or pacifism might constitute beliefs for the purposes of Art. 9(1) of the Convention, an "opinion" or view that British policy in Northern Ireland is wrong, or that the British Army should be withdrawn from the province, is not such a "belief" although the expression of such a view may be protected under Art. 10 of the Convention.

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43. Furthermore the words "worship, teaching, practice and observance" in Art. 9(1) were intended to be exhaustive of the way in which the religion or belief might be manifested. A correct interpretation of Art. 9(1) does not allow for other possible forms of manifestation of belief.

What is protected by the relevant part of Art. 9(1) is a manifestation in one of the ways enumerated in that provision. Thus general conduct or behaviour which is merely consistent with a religion or belief, or which flows from the belief or even which might serve to further the religion or belief, is not within the protection of Art. 9 (1).

44. Also, there has to exist some objectively recognisable link between the belief and the expression of it, whether by way of teaching, practice or observance.

It is not enough merely to assert a connection between a person's conduct and the belief he or she professed to manifest. Nor is it enough to assert that in the applicant's view her conduct was dictated by a moral imperative of the belief held, if objectively judged there is no necessary or sufficient relationship between the belief held and the manifestation relied on.

The applicant's approach was entirely subjective and gave no effect to the objective character of para. (1) of Art. 9 which plainly required a link between the conduct and the belief expressed, which might be objectively recognised. That link could only be sought in the pamphlet itself. The remarkable feature of the pamphlet was, however, that there was nothing in it which would convey to the readers any link between its contents and the applicant's pacifist belief. It said nothing about pacifism at all.

45. The Government conclude that there was no interference by the United Kingdom authorities with the manifestation of any belief of the applicant for the purposes of para. (1) of Art. 9.

As to Art. 10(1) of the Convention

46. The respondent Government accept that there was an interference with the applicant's right under para. (1) of Art. 10.

As to paras. (2) of Arts. 9 and 10 of the Convention

47. On the assumption that contrary to their contention there was an interference with the applicant's freedom to manifest her belief (Art. 9(1)), the respondent Government argue that such

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interference was justified under para. (2) of Art. 9 as well as the interference with the applicant's right under Art. 10(1) of the Convention was justified under para. (2) of that provision.

Was the restriction prescribed by a law which is itself consistent with the purposes of para. (2) of Art. 9 or Art. 10?

48. In the Government's view there can be no question that the offence with which the applicant was charged and of which she was convicted was prescribed by law, namely the Incitement to Dissaffection Act 1934.

Equally there can be no doubt that the general aim of the 1934 Act is consistent with the purposes enumerated in paras. 2 of Arts. 9 and 10, namely the interests of public safety (9(2) and 10(2)), the protection of public order (9(2)) and the protection of the rights and freedoms of others (9(2) and 10(2)).

49. One feature of the protection of public safety and public order is the maintenance of a national military force which is both loyal and disciplined. It is a basic requirement of the effective functioning of the armed forces that their members should not be seduced from their duty or allegiance. It was this effective functioning of a disciplined armed force that the 1934 Act was designed to achieve. The 1934 Act was designed to serve the further purpose in Convention terms of the protection of the rights and freedoms of others. In the narrow sense, the Act was plainly designed to protect the members of the military forces themselves whose lives and security depend on the discipline and loyalty engendered in their fellow soldiers. But in the broader sense the Act was also designed to protect the interests of the civilian public in being able to call on a disciplined force both in the defence of the nation and as a body which can perform other essential services in aid of the civil power.

The particular aim of the prosecution in the applicant's case

In the interests of public safety (Arts. 9 and 10), public order (Art. 9) and the protection of the rights of others (Arts. 9 and 10)

50. Referring to the Commission's decision on the admissibility of Application No. 6084/73 the respondent Government argue that the object of the prosecution and conviction in the present case, namely to ensure against the unlawful seduction from the duties of members of the armed forces, was in the interests of public safety, for the protection of public order and the rights of others.

The respondent Government state that the considerations, which were taken into account by the Director of Public Prosecutions in deciding to commence the prosecution, were in particular the vital role of the army in peace-keeping in Northern Ireland at the time and the threat to that role which was posed by a campaign designed to persuade soldiers to refuse to serve in Northern Ireland.

In the interests of national security, territorial integrity and for the prevention of disorder and crime (Art. 10(2))

51. The respondent Government generally point out that the provisions of Art. 10 (2) correspond very broadly to those of Art. 9(2). In particular, the purposes for which the exercise of the freedom of expression may be restricted include the protection of public safety and the rights of others (1). To that extent, therefore, the justification under Art. 10(2) is similar to that under Art. 9(2), although the greater scope of the freedom of expression, which is recognised by the reference in Art. 10(2) to the duties and obligations which the exercise of the freedom carries with it, requires a correspondingly greater scope to be given to the qualifications in that paragraph.

According to the respondent Government the object of the prosecution and conviction of the applicant may be justified under "national security" as well as "territorial integrity" and "prevention of disorder and crime".

52. The concept of "national security" cannot be confined - as the applicant contended - to the protection of military secrets nor can para. 2 of Art. 10 be so narrowly interpreted that only external threats but not threats from within the nation can be invoked in connection with the concept of "territorial integrity". It is self-evident that a major source of the emergency in Northern Ireland during the period with which this application is concerned has been the violent activities of the IRA, a clandestine organisation committed to overthrowing by force the lawful Government of Northern Ireland and terminating the union of Great Britain and Northern Ireland. These activities constituted a threat to national security in Northern Ireland and to the territorial integrity of the State and the deployment of troops in Northern Ireland has, in large measure, been for the purpose of putting an end to these activities. The reference to "territorial integrity" did not appear in the Convention in a context which restricts its scope and the fact that the same expression appears in the UN Charter was irrelevant for its interpretation in the present context.

53. As regards the concept of "prevention of disorder or crime" the respondent Government refer to the jurisprudence of the European Court of Human Rights (case of Engel and others) according to which the concept of order, for the purposes of Art. 10(2), covers the order that must prevail within the confines of a specific social group. The respondent Government conclude that a restriction on

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(1) See above para. 50.

freedom of expression can have a legitimate purpose insofar as it is, as in the present case, specifically directed at maintaining military discipline within the armed forces.

Necessary in a democratic society

54. In this respect the respondent Government submit that the function of the Convention organs is not identical to that of the United States Supreme Court. For this reason the clear and present danger doctrine as developed by the United States Supreme Court can not be applied in the present case.

Referring to the judgment of the European Court of Human Rights in the Handyside Case (para. 48) the respondent Government argue that the word "necessary" as employed in paras.(2) of Arts. 9 and 10 is not synonymous with, or as strict as, the words "indispensable" or "absolutely necessary" or "strictly necessary" which also appear in the Convention. It also emerges from the said judgment that it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in the context of para.(2) of Art. 9 or Art. 10 and for the Convention organs to review the decision of the national authorities in the exercise of their power of appreciation. A restriction imposed by a State is inconsistent with the Convention only where it must be considered as unreasonable even having regard to its perception of that danger.

The necessity of the 1934 Act

55. As regards the necessity of the 1934 Act itself the respondent Government submit that a comparative study of the law of the legislation in the member States of the Council of Europe shows that there is a general recognition by the national legislators of the need to protect the armed forces, even in peace-time, from attempts to incite or encourage them to act in breach of their duty or of their allegiance. Legislation comparable to the 1934 Act is therefore common to a number of member States, in particular Greece, the Netherlands, the Republic of Ireland, Turkey, the Federal Republic of Germany, Malta, Cyprus, Luxembourg, France and Norway. The comparative survey indicates a common recognition of the continuing necessity in the national interest for maintaining armed forces which are both loyal and disciplined and a common recognition of the particular vulnerability of members of the armed forces to incitement.

That need, which was recognised by the United Kingdom legislation at the time of the enactment of the 1934 Act, became in the first half of the 1970s the more pressing, with the advent of the most widespread and vicious terrorist campaign ever witnessed in the United Kingdom.

The Parliament of the United Kingdom may in the future years conclude that such provisions are unnecessary or that some variation in the provisions is desirable. But whatever the position might be in the future, the legislator of the United Kingdom cannot be said to have exceeded the margin of appreciation conferred on them by the Convention in deeming it necessary in the national interest and for the purposes enumerated in paras.(2) of Arts. 9 and 10 to maintain the 1934 Act either in 1973 or to the present day.

The necessity of the applicant's prosecution and conviction

56. The question of necessity of the applicant's prosecution and conviction has to be viewed in relation to the obligation of the United Kingdom to maintain the fundamental rights of all its citizens, particularly the right to life and physical integrity.

The applicant was conducting a persistent and concerted campaign directed specifically at soldiers destined to service in Northern Ireland at a time when the security situation in the province was to her knowledge most critical, a campaign encouraging soldiers to act unlawfully and in disobedience to orders. Even if the direct effect of the dissemination of the document in question were seriously in doubt, the significance of allowing it to continue unchecked and the encouragement it would give to the dissemination of further material of the same or of a more damaging kind had also to be borne in mind.

In the circumstances the strict control exercised over the dissemination of the leaflets was, as in the case of Application No. 6084/73, necessary and amply justifiable either under para. (2) of Art. 9 or para. (2) of Art. 10 .

57. As regards the fact that the applicant's companions at Warminster were not prosecuted the Government submit that the exercise, in their case, of a proper and lenient discretion based on their abandonment of their unlawful activity cannot be a good ground for contending that the applicant should not have been prosecuted when she refused to abandon it.

As regards the acquittal of Mrs. W. the facts of her case were distinguishable from that of the present case and in any event the acquittal of one defendant does not prove that the conviction of another was contrary to the Convention.

As to Art. 14 read in conjunction with Arts. 9 and 10 of the Convention

58. In the respondent Government's view there was no interference with the applicant's rights under Art. 9 in this case, and to that extent her complaint under Art. 14 was incompatible with the provisions of that Article.

With regard to Art. 10 in conjunction with Art. 14 the Government first observe that the 1934 Act does not distinguish between persons on the grounds of their political opinions.

They further submit that the applicant was prosecuted and convicted because of the distribution of the leaflet. She has produced no evidence to show that the prosecution was brought against her because of her pacifist or other opinions or that other persons with different opinions would not have been prosecuted in the same circumstances.

IV. POINTS AT ISSUE

The general points at issue are as follows:

59. Under Art. 5 of the Convention

- Whether or not there has been an interference with the applicant's right to liberty and security by reason of the existence and the application to her of the Incitement to Disaffection Act 1934, and more particularly, whether or not her arrest and detention on remand was in accordance with para. (1)(c) and her detention after trial was in accordance with para. (1)(a).

60. Under Art. 9 of the Convention

- Whether or not the distribution of the leaflets concerned in this case can be regarded as an exercise of the applicant's right to freedom of thought, conscience and religion as being the manifestation of a belief and if so, whether the applicant's prosecution and conviction under the Incitement to Disaffection Act 1934 for having distributed the leaflets in question was necessary in a democratic society in the interests of public safety, for the protection of public order and the rights of others.

61. Under Art. 10 (2) of the Convention

- Whether or not the interference with the applicant's right to freedom of expression was necessary in a democratic society in the interests of national security, territorial integrity or public safety and/or for the prevention of disorder or crime.

62. Under Art. 14 read in conjunction with Art. 9 and/or Art. 10 of the Convention

- Whether or not the applicant's prosecution and conviction constituted a discrimination with regard to the enjoyment of the applicant's right to manifest a belief (Art. 9 (1)) and/or her right to freedom of expression (Art. 10 (1)) on the ground of political or other opinion.

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V. OPINION OF THE COMMISSION

1) As to Art. 5 of the Convention

63. The applicant considers that the jeopardy flowing from the "perniciously vague wording" of the Incitement to Disaffection Act 1934 constitutes an interference with her "right to liberty and security of person" as protected by Art. 5 (1) of the Convention.

Art. 5 (1) provides:

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

(a) the lawful detention of a person after conviction by a competent court;

.....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

....."

64. The Commission observes generally that it is not competent to examine in the abstract the compatibility of a statute with the provisions of the Convention (1), but that it can only consider whether the application of the statute in the case complained of involves a violation of the Convention. "Personal liberty" in Art. 5 means primarily freedom from arrest and detention. The right to security of person comprises the guarantee that individuals will be arrested and detained only for the reasons and according to the procedure prescribed by law. This is a guarantee against arbitrariness in the matter of arrest and detention. The applicant was arrested on the basis of legal provisions. The Commission does not find that the law in question is so vague as to allow an arbitrary arrest or detention of people. The act which is made an offence by the law of 1934 consists in endeavouring to seduce any member of the armed forces

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(1) European Court of Human Rights, Case of Klass and others, Judgment of 6 September 1978, para. 33.

from his duty or allegiance. The act must be done maliciously and advisedly. This shows - as the interpretation by the courts confirmed - that the offence is circumscribed and restricted by the traditional requirement of penal statutes of bad intent. Therefore, the arrest and detention on the basis of the law does not violate Art. 5 as far as it guarantees the security of person.

The Commission further observes that an alleged uncertainty of the law may also give rise to issues under Art. 7, or under those Convention rights which may be subject to limitations which are "prescribed by law" as e.g. the right to freedom of expression (see below paras. 79 - 83).

65. In the present case the Commission can only examine under Art. 5 para. (1) whether the applicant's arrest and detention constituted an interference with her right to liberty and security of person which was not justified under any of the sub-paragraphs of this provision.

As it is not contested that the applicant's arrests were effected for the purpose of bringing her before the competent legal authority on reasonable suspicion of having committed an offence, her arrests and detention before the trial were justified under Art. 5 (1)(c). As it is further not contested that the applicant was convicted by a competent court in accordance with a procedure prescribed by law, it follows that her detention after conviction was justified under Art. 5 (1)(a) of the Convention.

Conclusion

66. The Commission is therefore unanimously of the opinion that the present case does not disclose a breach of Art. 5 of the Convention.

2) As to Art. 9 of the Convention

67. Art. 9 of the Convention reads as follows:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

68. The applicant is undisputedly a convinced pacifist. The respondent Government have accepted her definition of pacifism as being "The commitment, in both theory and practice, to the philosophy of securing one's political or other objectives without resort to the threat or use of force against another human being under any circumstances, even in response to the threat of or use of force".

69. The Commission is of the opinion that pacifism as a philosophy and, in particular, as defined above, falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief ("conviction") protected by Art. 9 (1). It remains to be determined whether or not the distribution by the applicant of the leaflets here in question was also protected by Art. 9 (1) as being the manifestation of her pacifist belief.

70. Art. 9 (1) enumerates possible forms of the manifestation of a religion or a belief, namely, worship, teaching, practice and observance ("par le culte, l'enseignement, les pratiques et l'accomplissement des rites"), and the applicant submits that by distributing the leaflets she "practised" her belief.

71. The Commission considers that the term "practice" as employed in Art. 9 (1) does not cover each act which is motivated or influenced by a religion or a belief.

It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Art. 9 (1), even when they are motivated or influenced by it.

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72. The leaflet here in question starts with the citation of the statements of two ex-soldiers one of whom says: "I'm not against being a soldier. I would be willing to fight to defend this country against an invader - I'd be willing to fight for a cause I can believe in. But what is happening in Ireland is all wrong." Although this is an individual opinion of a person who is not necessarily linked to the organisation which edited the leaflet its citation nevertheless indicates that the authors consider it recommendable. It can therefore not be found that the leaflet conveys the idea that one should under no circumstances, even not in response to the threat of or the use of force, secure one's political or other objectives by violent means. It only follows from the contents of the leaflet that its authors were opposed to British policy in Northern Ireland.

73. This view is not only expressed in the statement of the ex-soldier but also by the authors of the leaflet who comment the citation as follows: "We are aware that there are British soldiers who are leaving the army, or who want to, because of British policy in Northern Ireland. We are glad about this and hope many more will do so." And under the heading: "Open refusal to be posted to Northern Ireland" the following passages: "A soldier who publicly stated that he refused to serve in Northern Ireland would be setting an example to other soldiers: strengthening their resolve to resist the Government's disastrous policy". Further: "But soldiers who believe, as we do, that it is wrong for British troops to be in Northern Ireland are asked to consider whether it is better to be killed for a cause you do not believe in or to be imprisoned for refusing to take part in the conflict."

74. The leaflets were not addressed and distributed to the public in general but to specific soldiers who might shortly be posted to Northern Ireland. The soldiers were, according to the contents of the leaflet, given the advice to go absent without leave, or openly to refuse to be posted to Northern Ireland. This advice was not clearly given in order to further pacifist ideas.

75. The Commission finds that the leaflets did not express pacifist views. The Commission considers, therefore, that the applicant, by distributing the leaflets, did not manifest her belief in the sense of Art. 9 (1). It follows that her conviction and sentence for the distribution of these leaflets did not in any way interfere with the exercise of her rights under this provision.

Conclusion

76. The Commission is therefore unanimously of the opinion that Art. 9 (1) of the Convention has not been violated.

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3) As to Art. 10 of the Convention

77. Art. 10 of the Convention provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

78. It is undisputed that the applicant's arrest, prosecution and punishment under the Incitement to Disaffection Act 1934 interfered with her right to freedom of expression. Therefore the only question to be determined is whether in the circumstances of the present case this interference was justified under para. (2) of Art. 10. The Commission consequently must examine (a) whether the interference was prescribed by law; (b) whether it was made for one or more of the purposes listed in para. (2); and (c) whether the interference was necessary in a democratic society.

(a) Was the restriction and penalty "prescribed by law"?

79. In order to be so justified, the interference complained of must in the first place have been "prescribed by law". The basis in law for the applicant's conviction and sentence was uncontestedly the Incitement to Disaffection Act 1934.

80. With regard to the application of the Act in her case, the applicant complains of an uncertainty resulting from the allegedly vague wording of the Act, in particular the terms "maliciously and advisedly" and "to seduce".

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81. The Commission has previously examined the alleged uncertainty of provisions of criminal law under Art. 7 of the Convention which enshrines inter alia the principle of nullum crimen sine lege.

The Commission refers in this respect to its decision on the admissibility of Application No 5493/72, Handyside v. the United Kingdom (1) where it found that the requirement of certainty is satisfied when it is possible to determine from the relevant statutory provision what act or omission is subject to criminal liability, even if such determination derives from the courts' interpretation of the provision concerned.

82. The uncertainty of provisions of the law may, as suggested in the present case, also create doubts as to whether a restriction within the meaning of Art. 10 (2) is "prescribed by law" (2). However, the Commission has already found that the 1934 Act is not so vague as to exclude any predictability as to which act might give rise to prosecution under it (3). From the wording of the statute it is quite clear that acts which are intended to persuade soldiers illegally to leave their duty will be an offence if the subjective requirements are fulfilled. The applicant was convicted for acts of that sort.

83. The Commission consequently concludes that the interference complained of was "prescribed by law" within the meaning of para. (2) of Art. 10.

(b) Was the restriction and penalty in pursuance of one or more of the purposes of Art. 10 (2) of the Convention?

i) The aim of the 1934 Act

84. According to the respondent Government the Incitement to Disaffection Act 1934 serves the protection of national security, the prevention of disorder and the protection of the rights of others and thus it serves purposes which are under Art. 10 (2) justifying restrictions of the right to freedom of expression.

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- (1) Collection of Decisions 45, pp. 23 et seq. at pp. 48, 49.
(2) Cf. the Commission's Report in the matter Times Newspapers Ltd and others v. the United Kingdom, paras. 200 - 205.
(3) S. above para. 64.

85. The Commission accepts that desertion of soldiers can, even in peace-time, create a threat to "national security" in that it tends to weaken the army's role as an instrument destined in a democratic society to protect it from internal or external threats.

The concept of "order" as envisaged by Art. 10 (2) covers, according to the Judgment of the European Court of Human Rights in the Case of Engel and others (para. 98), "the order that must prevail within the confines of a specific social group for example when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole". The Commission accepts that the maintenance of "order" within the armed forces requires strict measures to prevent desertion.

86. It follows that the aims pursued by the 1934 Act are consonant with Art. 10 (2) of the Convention.

ii) The particular measure taken against the applicant

87. Next the Commission has to examine whether the application of the 1934 Act in the present case was also in pursuance of legitimate purposes under that provision.

88. In this context it is important to note that prosecution under the Act depends on the consent of the Director of Public Prosecutions. Thus the British legislature itself expressly recognised that not every violation of the Act necessarily requires measures to be taken against the offender.

89. The applicant submits that her prosecution was unjustified for the purposes enumerated in Art. 10 (2) because the leaflet which she distributed only contained the expression of political opinion and information for soldiers who had a right to receive such information.

90. The Commission recognises that freedom of expression constitutes one of the essential foundations of a democratic society. It finds, however, that the applicant by distributing the leaflets here in question went further than simply to express a political opinion.

91. While it is true that the leaflet contained factual information and political argumentation it also contained sentences or paragraphs which, as pointed out by the competent British courts, were to be understood, or could have been interpreted by soldiers, as an encouragement or incitement to disaffection. The leaflet mentioned as possible courses to be taken by soldiers "going absent

without leave" or "open refusal to be posted to Northern Ireland". At the end of the text of the leaflet the hope is expressed that "by one means or the other, you will avoid taking part in the killing in Northern Ireland" and thereby soldiers were urged to go absent without leave or to refuse openly to be posted to Northern Ireland although, as is also pointed out, "such an act could lead to Court martial and imprisonment".

92. It is important to draw the line between the expression of political opinions as to the situation in Northern Ireland including the use of the army on the one hand and this case on the other. The applicant was not convicted for statements showing her discontent with British policy in Northern Ireland. She was convicted because in the leaflets distributed she encouraged individual soldiers to disaffection indicating specific means of assistance.

93. As regards the justification of prosecution in the applicant's case, the Commission observes that both the Director of Public Prosecutions and the Courts dealing with the case attached particular importance to the facts that the leaflet was aimed at and distributed to soldiers who might shortly be posted to Northern Ireland and that the applicant herself had behaved in a way which made it clear that she would go on distributing the leaflets unless strict measures were taken to stop her.

94. In all these circumstances, the Commission considers that the applicant's prosecution, conviction and sentence under the 1934 Act served an aim which was consistent with Art. 10 (2) of the Convention, namely the protection of national security and the prevention of disorder within the army.

(c) Was the interference and penalty necessary in a democratic society?

95. It remains to be examined whether the applicant's prosecution and conviction, and the sentence imposed on her, were "necessary" in order to secure this aim.

The applicant has suggested that the "clear and present danger doctrine", as developed by the United States Supreme Court, be applied.

The notion "necessary" implies a "pressing social need" which may include the clear and present danger test and must be assessed in the light of the circumstances of a given case (1).

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(1) Cf. European Court of Human Rights, Handyside Case, Judgment of 7 December 1976, p. 17, para. 48.

96. As regards the decision to prosecute the applicant, the Commission notes that the Director of Public Prosecutions took into account, when deciding to consent to prosecution, the difficult situation in Northern Ireland and the possible effect of the campaign, which the applicant supported by distributing the leaflets, if this campaign was not stopped.

97. The Commission accepts that, in view of the applicant's manifest intention to continue her action unless stopped by prohibitive measures, the decision to prosecute her was necessary for the protection of national security and the prevention of disorder in the army.

98. It is true that the competent British authorities did not prosecute or convict some other persons who also distributed leaflets such as the applicant.

However, the Commission notes in this respect that the applicant continued to distribute the leaflet despite warnings, while her companions at Warminster desisted from doing so and were not being prosecuted. These cases were consequently less serious than the applicant's case. The acquittal in a further case (concerning Mrs W. and others) concerned, according to the Government's undisputed statements, a watered down version of the leaflet and does not prove that the applicant's conviction was not a response to a real necessity.

99. Having in mind that one of the principles characterising a "democratic society", according to the European Court of Human Rights, is that every "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued" (1), the Commission must finally consider the question of the severity of the sentence. It is of the opinion that the sentence which the applicant finally received and served (seven months' imprisonment), although admittedly severe, was not in the circumstances so clearly out of proportion to the legitimate aims pursued that this severity in itself could render unjustifiable such an interference which the Commission otherwise has held justified.

Conclusion

100. The Commission is therefore of the opinion by eleven votes against one that the restriction imposed on the applicant's right to freedom of expression was justified under Art. 10 (2) of the Convention.

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(1) Handyside Case, Judgment of 7 December 1976, para. 49.

- 4) As to Art. 14 read together with Art. 9 and/or 10 of the Convention

101. Art. 14 provides:

"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."

102. The Commission has found that there has been no interference with the applicant's right to manifest her belief (Art. 9). It considers that no question of discrimination arises in this respect.

103. Given that the arrest, prosecution and conviction of the applicant interfered with her right to freedom of expression, the Commission finds that they were motivated, not by her holding particular political opinions, including pacifist views, but by the fact that her action in distributing the leaflets constituted the offence of incitement to disaffection.

Further, the Commission considers that the difference of treatment of the applicant and of persons engaged in distribution of the leaflets, described in para. 98 above, was based on factual grounds and so objectively justified.

The applicant has not suggested that a similar action, if carried out by other persons who were motivated by other reasons, would not entail the same consequences.

Conclusion

104. The Commission is therefore of the opinion by eleven votes and one abstention that the present case does not disclose a breach of Art. 14 in conjunction with either Art. 9 or 10 of the Convention.

Secretary to the Commission Acting President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

Separate Opinion, in part dissenting, of Mr. Opsahl

1. For the reasons set out in the report the acts for which the applicant was convicted and sentenced could not be considered exclusively as a manifestation of her pacifist beliefs. I have therefore voted for the conclusion that these acts were not as such protected by Art. 9. But I find this question very doubtful, as I shall explain, and might have dissented on this point were it not for the fact that in the present case the acts concerned were in any event protected by, and perhaps can be more adequately considered under, Art. 10, as being essentially part of the exercise of freedom of expression, opinion and information. The nature and essence of this case is in my opinion best understood when it is examined under this provision, and the conditions for interference are not substantially different. In my view there has been a breach of Art. 10.

Article 9

2. I agree with the Commission when it assumes (above, para. 71) that in deciding the scope of Art. 9 a distinction may be drawn between manifestation and motivation. Otherwise one could claim protection under Art. 9 for any act shown to be motivated by the belief. But it is not clear, and this case has not clarified, where this line should be drawn. On the one hand, ordinary crimes such as violence or theft certainly cannot be protected as manifestations of a belief even if it is shown that they were motivated or inspired by it, as it is sometimes argued. On the other hand, one cannot in my opinion generally exclude from Art. 9 all acts which are declared unlawful according to the law of the land if they do not necessarily manifest a belief, provided they are clearly motivated by it. On the contrary, as Art. 9(2) shows in setting out a series of further conditions for an interference to be justified, an act cannot be interfered with merely because it has been declared unlawful. I consider that Art. 9 must, in principle, be applicable to a great many acts which are not, on their face, necessarily manifesting the underlying or motivating belief, if that is what they genuinely do. This is important where such acts cannot readily be seen as protected by other provisions of the Convention. Such is the case as regards e.g. religious or conscientious objection to civil or professional duties.

3. The opinion of the Commission seems to imply that Art. 9 is inapplicable mainly because one might have done what the applicant did without sharing her belief in pacifism. In this respect it relies heavily on the language used in the leaflets, concluding that because

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this was not particularly of a pacifist nature, the possession and distribution of them was not a manifestation of this belief and therefore falls outside the scope of Art. 9 (above, paras. 72-75). I find this approach too narrow. There is on the facts of this case no possible doubt concerning the connection between the applicant's belief and the acts for which she was punished. If it does not emerge completely from the text of the leaflet, it is clear enough from her other actions and activities. This context does not seem to have been seriously disputed by the prosecution and the courts, and seems indeed to have been accepted by the Government and the Commission in the present proceedings. The fact that the campaign and the leaflets also appealed to those other than pacifists does not create any contradiction, in my opinion, between her belief on the one hand and her participation in the campaign and the language of the leaflets on the other. Her acts were not only consistent with her belief, but genuinely and objectively expressed it when seen in their context. In my view, everyone is entitled to have their acts examined under the Convention in the context of their individual circumstances. It follows that the protection of Art. 9 may have to be denied to one person but granted to another for the same acts, whether it is for distribution of the same leaflets, or for other alleged manifestations of a belief as, for instance, in different cases of alleged conscientious objection. And this, in fact, is the line taken by laws on the latter subject when they require an examination of the nature and seriousness of the objectors' motives. Moreover, the line should not be drawn too narrowly so that only certain, perhaps the more traditional, types of manifestation are protected, irrespective of the genuineness of the motivation.

Article 10

4. In one important respect the situation under Art. 10 is different from that under Art. 9, and also from many other situations where Art. 10 is invoked, namely as regards its "mixed" or "pure" character. While the offence has been held by the Commission to be sufficiently "mixed" to bring it outside the protection of Art. 9, it had no extraneous elements in relation to Art. 10. The applicant was not, for instance, charged with any breach of the peace, unlawful entry, violence or any other such unlawful act which may constitute at the same time an expression of opinion, and for which therefore protection is frequently claimed.

5. Moreover, it appears that all the opinions expressed or referred to in the leaflets for which she was punished, and all the information contained in it, could as such be expressed to anyone

and also lawfully imparted to the soldiers. What constituted the offence, was the more or less explicit "incitement", consisting, as the courts held, in an attempt to influence the soldiers to act in breach of their duty and allegiance by avoiding, lawfully or unlawfully, to go to Northern Ireland.

6. The aim of influencing others who are themselves responsible for their actions is an essential and legitimate aspect of the exercise of freedom of expression and opinion, in political and other matters. If others are in fact led to accept such beliefs, opinions or ideas or make use of information which has been imparted to them with a view to influencing them, they do so mainly on their own responsibility. Whether the matter is seen under Art. 9 or 10 or both, the justification and need for punishing those who merely try to influence others by an otherwise "pure" exercise of these rights, must be examined in this perspective.

7. On the facts of the present case I consider its nature and essence to be that a political offence was seen as a potential threat to public policy, but that the applicant did not in the circumstances actually endanger national security or undermine order in the army, which are the justifications accepted by the Commission, or at most she did so only very indirectly. No link has been shown to the Commission between her own specific acts and actual dangers to these interests. In fact, under the law applied to her by the domestic courts, the prosecution was not required to show any such link, while she on the other hand was not allowed to show that no such dangers actually existed.

8. The time and space available do not allow me to go into many details, but I attach some importance to the fact that the Act of 1934 was originally passed and applied in circumstances which could be seen as a threat to political freedom, and that it had not been applied for many years when some prosecutions were again brought under it during the emergency in Northern Ireland. I find it significant that the Commission was much more specific and careful in its opinion when it accepted the interference with certain other leaflets aimed at soldiers who were actually on duty in Northern Ireland during the emergency. Their suppression was seen as "necessary in the interests of public safety when the present state of the public emergency in Northern Ireland is taken into account, insofar as the letter urges disobedience to orders to fire even though these could be necessary in self-defence or the control of violence". (Application No. 6084/73, X. v. United Kingdom, Decisions and Reports 3, p. 62 at p. 65.) In the present case the Commission has not attempted to link the need for punishment to the situation in similarly direct and narrow terms, and there was no incitement to disobey orders under actual service in Northern Ireland.

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9. The relevant justifications under the Convention offered in this case, and in part accepted by the Commission, seem to have been adduced in retrospect, during the present proceedings. Whatever one may think of the doctrine of the "margin of appreciation" for the national authorities in the application of restrictions under the Convention - a doctrine which the opinion of the Commission avoids mentioning - it seems to me that it may only be invoked where it is shown that the national authorities have in fact undertaken, at the relevant time, such an appreciation, at least in substance. I have not become convinced that they did so when they decided to prosecute the applicant, and some of the language of the courts seems to suggest the contrary.

10. In addition the Commission has not explicitly accepted the punishment as also being necessary to prevent crime, namely such offences as desertion or disobedience to placement in Northern Ireland. But this was, in fact, what the case before the domestic courts was all about. This was the only actual - but still rather remote - threatening effect of her acts, and this was the only incitement she was held guilty of. In my view the Commission should be very reluctant to accept punishment for incitement to commit such or similar political offences as "necessary in a democratic society".

11. Finally, I consider that the interference by way of long imprisonment, even as it was reduced upon appeal, was out of proportion to the legitimate aim pursued, as required by the European Court of Human Rights in the Handyside case (above, para. 99). It is, to my knowledge, quite unusual in a democratic country in our time to punish anyone in this way for non-violent political offences such as those committed by the applicant, and I cannot reconcile it with the requirement of necessity in the present case. It leaves me with the unfortunate impression that in this case, because of the serious and violent conflict in Northern Ireland, the authorities over-reacted.

12. That tolerance for the views of dissidents which we expect of other countries should not be abandoned in Western Europe even in times of crisis. Although the applicant's action remotely threatened public policy, this is not in my opinion a sufficient justification for interference under the system of the European Convention whose claim to credibility it is very important to preserve in the world-wide debate on human rights.

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Dissenting opinion of M. Klecker(1)

1. I cannot share the Commission's approach to its examination of both the Art. 9 and Art. 10 questions presented in this application. In my opinion both provisions have been breached in relation to the facts of the present case.

2. In relation to Art. 9, if it is accepted that practical action is an important part of the philosophy of pacifism, it seems difficult not to admit that Pat Arrowsmith was prosecuted for her pacifist belief since the distribution of the leaflet was not merely an extension of her belief but an integral part of it. In this respect I must disagree with the Commission's examination of Art. 9 finding it too narrow, firstly, because it reaches its conclusion by leaving aside a number of facts relevant to this case and, secondly, because its analysis of the contents of the leaflet is over-selective in its choice of the decisive elements.

3. In determining whether the applicant's distribution of the leaflet constitutes the manifestation of a belief in practice, it is necessary to consider not only the contents of the leaflet, but other factual elements connected to the present case which validate the authenticity of the applicant's pacifist views.

4. Describing the factual basis of the applicant's complaint, the Commission states in its report (para. 6):

"The applicant is a convinced pacifist. She has campaigned in support of her views and in this connection she was also active in an organisation called the British Withdrawal from Ireland Campaign. She helped with the drafting of a leaflet which was published by this organisation and was intended to be given to soldiers" .

It is thus not in dispute that the distribution of the leaflet in question represented action in pursuance of her views.

5. However in determining the nature and content of those views it is essential to take into account the evidence given by Miss Bernadette Devlin on the applicant's behalf (which is not disputed) that appears in the Short Transcript of the applicant's trial. From this, it appears that she had been with Pat Arrowsmith in Northern Ireland during discussions with both wings of the I.R.A. and that Pat Arrowsmith was saying to the people of these organisations that they ought to lay down their arms and campaign through peaceful demonstration, and that she impressed upon them that they should abandon the I.R.A. and work through peaceful organisations.

(1) Cf. page 3, footnote (1).

6. If, on the one hand, the leaflet shows that the applicant opposes the political role of the army in Northern Ireland, her appeal to both wings of the I.R.A. to lay down their arms, on the other hand, reveals the aim of that opposition, namely to have the fighting stopped and the problems solved through peaceful negotiations. There could not be a clearer example of pacifist action than these appeals to both parties to stop fighting.

7. The Commission's approach to this question is based on an examination of the leaflet in question and a determination that in effect it was not the manifestation of a pacifist belief but the manifestation of "political" opposition to the use of the British army in Northern Ireland. I agree with the view that not every act which is motivated by a belief is protected under Art. 9. Clearly there has to be a strong element of harmony between the motivation and the act under scrutiny. However I cannot accept the approach used by the Commission to arrive at its conclusion. It isolates several unrepresentative paragraphs and extrapolates from them a conclusion which is the product of false emphasis. It seems to me to be an elementary proposition that in assessing whether the leaflet is a manifestation of a pacifist belief it should be read as a whole and not only in part. If such a test is observed several observations can be made concerning its contents.

(a) The basic purpose of the leaflet is clearly stated: "We who are distributing this fact-sheet to you hope that, by one means or another, you will avoid taking part in the killing in Northern Ireland". (see p. 8 of Report).

(b) The means chosen by the authors (of whom the applicant was one) was to inform soldiers as to the practical steps they could take if they wanted to go absent without leave; if they objected on grounds of conscience; if they sought legal ways of leaving the service or if they openly refused to be posted to Northern Ireland (see pp. 5-8 of Report). The leaflet was referred to as a "fact-sheet" giving information about various methods of quitting the British armed forces (see p.6 of Report).

(c) The fact-sheet contained a quotation from a soldier who was not expressing pacifist sentiments stricto sensu ("I'd be willing to fight for a cause I could believe in", p. 6 of Report).

(d) The pamphlet could be considered as a passive form of encouragement or advocacy of the idea that soldiers should leave the army either by going absent without leave or refusing to serve in Northern Ireland. It is passive encouragement in the sense that at no point does it openly advocate in strong terms that soldiers should desert or disobey orders. Encouragement is expressed in the following terms:

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"We are glad about this /soldiers leaving the army because of policy in Northern Ireland/ and hope many more will do so."

"A soldier who publicly stated that he refused to serve in Northern Ireland ... would be taking a courageous stand."

"Soldiers who believe, as we do, that it is wrong for British troops to be in Northern Ireland are asked to consider whether it is better to be killed for a cause you do not believe in or to be imprisoned for refusing to take part in the conflict."

"We who are distributing this fact-sheet to you hope that, by one means or another, you will avoid taking part in the killing in Northern Ireland."

(See pp. 6-8 of the Report)

(e) The tone of the pamphlet is moderate throughout. Its most striking characteristic is that it conveys factual information of the sort to be found in many leaflets offering advice. Its language is neither threatening nor abusive nor insulting.

8. If the leaflet, taking into consideration the known pacifist beliefs of the applicant and the facts referred to above, is analysed in this way, it leads to the conclusion that both its content and its distribution represents the manifestation of a pacifist belief within the meaning of Art. 9(1).

I would emphasise the following factors in this context:

(a) The pamphlet is not meant to be a tract about pacifism as a philosophy and, therefore, the absence of statements about pacifism should not be decisive. It is against British policy in Northern Ireland and the use of the army there. This is perfectly consistent with a pacifist belief. In essence, it is a call to British soldiers to lay down their arms in relation to Northern Ireland.

(b) The hallmarks in the leaflet itself of a pacifist motivation are firstly its moderate and factual tone and secondly the fact that it is addressed to individual soldiers. In this respect it is instructive to compare the text of this pamphlet with that in Application No. 6084/73 (3 Decisions and Reports, p. 62).

(c) The "non-pacifist" quotation from a soldier is not given sufficient prominence to pollute the basic character of the rest of the text. Is it not, in any event, legitimate to use non-pacifist views in this way to further a pacifist end?

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I am, therefore, of the opinion that the prosecution, conviction and sentence of the applicant for the distribution of the pamphlet constitutes an interference with her right to manifest her belief in practice.

9. Since I also consider there to have been an interference with her right to freedom of expression, particularly as it concerns her right to impart information and ideas, the remaining issues of justification under both Art. 9 and Art. 10 converge (1). The issue is thus whether such an interference with the applicant's rights can be justified as being necessary in a democratic society.

The question which is raised here concerns the nature and scope of the threat to national security and to the other heads of national interest referred to. In this regard it is notable that the trial judge was not concerned with this factual question, but rather with the narrower question of whether the leaflet could be regarded as an "incitement". It does appear, however, that the Director of Public Prosecutions considered the nature of the threat posed to the army's peace-keeping role in Northern Ireland by the applicant's persistence in distributing her leaflets and concluded that it justified prosecution. But this alone cannot be enough. It must be supported by evidence of the threat posed which goes beyond mere official belief. Ideas which shock and disturb official values may create sincerely perceived but unwarranted fears of imminent danger arising unless restrictive measures are applied. I cannot consider that, in the present case, such evidence has been produced that would convince an ordinary person that national security would be endangered or crime engendered by Pat Arrowsmith and her small band of supporters distributing moderately pitched leaflets to soldiers about to be sent to Northern Ireland. Regrettably this was not the issue that was considered by the trial jury.

Nor can I consider, on the basis of the facts presented by the Government, that an institution as solidly rooted in discipline as the army would be seriously undermined in respect of its Northern Ireland operations by leafleteers of this sort, any more than it would by the regular and acceptable features in the mass-media critical of the army role in Northern Ireland.

10. In reaching this conclusion I am influenced by the importance attached by the Court in the Handyside Case to the value of freedom of expression in a democratic society (see decision of 29 April 1976, Series A, No. 24, p. 23). It can be derived from the Court's

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(1) This examination of the issues sets to one side the possibility that the test of "justification" in respect of freedom of expression might be more rigorous than in respect of freedom of thought, conscience and religion.

"broadminded" approach that ordinary individuals are entitled to try to influence soldiers, even young soldiers bound for Northern Ireland, who, as active participants in the democratic system, should not be considered as blocked off from the marketplace of ideas, even where those ideas touch on the ethics of their professional role.

11. The Government argues that public safety and order can only be secured by loyal and disciplined armed forces, and that the peace-keeping role of the army can only be accomplished if members of the army obey orders. It is difficult to see why this argument should be opposable to Pat Arrowsmith. She has submitted that she does not challenge the presence of troops in Northern Ireland per se under the Convention. She raises the question of the conduct of troops posted there. Her position is that soldiers in Northern Ireland have been ordered to commit acts which are in violation of international law. Such a position, concerning at least some soldiers posted in Northern Ireland, is equally sustained by the Court in its decision on the case of Ireland v. the United Kingdom. Is it "necessary" to restrict a person who tries to prevent violations of law?

12. I further consider that at a time in our history, when so many are prepared to either advocate the use of violence to achieve political ends or adopt violent means themselves, a large measure of protection should be afforded to those who seek to express their voice of disapproval in moderate non-violent terms. It must be clear that there are alternatives to violence in a society that claims to be democratic. If freedom of expression and freedom to manifest beliefs in practice are to be worthwhile values then ideas which are provocative and anti-establishment must be given a wide berth unless a case is made out that a real threat is posed. This is not the case here. It might have been had the campaign been more widespread or where there were signs that army morale was being affected or if the leaflets carried threats. However, these factors are not present. In essence this application concerns an ineffectual troop of leafleteers.

13. Art. 10(2) makes it clear that freedom of expression carries with it duties and responsibilities. I find that these have been respected in the moderate and factual tone used in the leaflets. It is true that the leaflet encouraged soldiers to commit crimes in the sense that if they were persuaded by the leaflet to desert or to disobey orders they would be guilty of criminal offences. However, in addition to the point that in the present case this was an unlikely event, I would agree with Mr. Opsahl that the aim of influencing others who are themselves responsible for their actions is a legitimate feature of the exercise of freedom of expression and that those who are persuaded to accept the views expressed must carry their own burden of responsibility.